

District of Columbia Special Education Hearing Officer Training

***The training outlines provided by Art Cernosia, Esq. are current up through September 2007 and August 2007, respectively. Mr. Cernosia makes no guarantee regarding the accuracy of the information included in these outlines after the dates of production.

IDEA Due Process Hearing Issues

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I. Introduction

The Individuals With Disabilities Education Improvement Act of 2004 (IDEA 2004), along with the 2006 IDEA Regulations, has added numerous requirements to the due process hearing system. This outline is intended to highlight those changes, along with judicial and administrative interpretations.

In addition, hearing officers are bound by promulgated regulations of the District of Columbia (Chapter 30), terms of the Blackman v. District of Columbia Consent Decree and the District's Due Process Hearing Standard Operating Procedures (SOP) which are required by the Consent Decree.

II. Due Process Hearing Requests

A. IDEA Statute (Section 615 (b)(7)) and IDEA Regulations (34 CFR 300.507 508)

The IDEA requires that State Education Agencies or Local Education Agencies develop:

1. Procedures that require either party, or the attorney representing a party, to provide due process complaint notice... (which shall remain confidential) –
 - a. to the other party ... and forward a copy of such notice to the State educational agency; and
 - b. that shall include—
 - (1) the name of the child, the address of the residence of the child (or available contact information in the case

of a homeless child), and the name of the school the child is attending;

- (2) in the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child and the name of the school the child is attending;
 - (3) a description of the nature of the problem of the child relating to such proposed or refused initiation or change, including facts relating to such problem; and
 - (4) a proposed resolution of the problem to the extent known and available to the party at the time.
2. A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements.
 3. Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice.

III. Sufficiency Challenges

- A. IDEA Statute (Section 615 (c)(2)) and IDEA Regulation (34 CFR 300.508 (d))
 1. Due Process Complaint Notice
 - a. COMPLAINT – The due process complaint notice required shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements.
 - b. TIMING – The party providing a hearing officer notification challenging the sufficiency of the complaint shall provide the notification within 15 days of receiving the complaint.
Note: The SOP requires the filing of a sufficiency challenge with the Student Hearing Office or the assigned Hearing

Officer (if the Hearing Officer has been assigned) and to the other party. (SOP, Section 303 A.)

- c. DETERMINATION – Within five days of receipt of the notification challenging the sufficiency of the complaint, the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements . . . , and shall immediately notify the parties in writing of such determination.

2006 IDEA Regulations

- The Comments to the Regulations clarify that there is no requirement that the party who alleges that a complaint notice is insufficient state in writing the basis for the allegation.

B. Judicial/Administrative Decisions-Sufficiency Issues

1. Based on an objection challenging the sufficiency of the due process hearing complaint, the hearing officer concluded that the parents' complaint met all of the IDEA's statutory requirements. The parents' complaint described the neurological deficits affecting their child's abilities and outlined the lack of appropriate services. The complaint included some facts to support each issue. In addition, the parents were requesting 11 specific changes be made to their child's IEP (Independent School District No. 719, Prior Lake Public Schools, 106 LRP 1882 (SEA MN (2005))).
2. The parents filed a complaint for a due process hearing. The description of the problems, the facts and proposed resolution section of the complaint simply made reference to "see attached letter".

The school district filed a Motion for a More Definite Statement contending that the letter contains a laundry list of problems over the last five years and requests a monetary resolution. The school district argued that it is impossible to determine the student's problems in the dispute and/or the resolution.

The ALJ noted that the school district did not file a Motion to Dismiss based on insufficiency, but a Motion for a More Definite Statement. The ALJ granted the school district's motion stating that

the IDEA required the complaint to be sufficiently specific allowing the school district to respond to the identified problems.

The parents were allowed the opportunity to file an Amended Due Process Complaint within 10 business days or the matter would be dismissed (Howard County Public Schools, 105 LRP 57809 (SEA MD (2005))).

3. The Court rejected the school district's allegation that the due process complaint was insufficient. The IDEA does not require that all of the facts relating to the parent's dissatisfaction must be spelled out much less that every legal theory must be set forth in "painstaking detail". As the United States Supreme Court noted in the Weast decision, the IDEA's due process hearing requirements imposes "minimal pleading standards" on the parties (Escambia County Board of Education v. Benton, 44 IDELR 272 (S.D. AL (2005))).
4. The parents sent a letter to the school district requesting that changes be made to their child's IEP within 10 days. If the school did not comply, the letter stated that it should be treated as a request for a due process hearing.

The ALJ, based on an objection challenging the sufficiency of the complaint, dismissed the complaint since it did not describe the problems supported by the facts. The ALJ noted "a school district may not be put into the position of having to guess what the problems might be".

In addition, the ALJ observed that the parents did not send their due process complaint (the letter) to the State Education Agency as required by the IDEA (Independent School District No. 719 Prior Lake-Savage Public Schools, 106 LRP 1875 (SEA MN (2005))).

5. The ALJ found that the parents' due process complaint was legally sufficient after an objection was filed by the school district. Although the parent's pro se complaint may have been "less artfully drafted than a lawyer written due process request," all of the required complaint components were addressed.

However, the ALJ did grant the school district's Motion for Summary Judgment since the student, who was living with foster parents in another school district, was not legally entitled, under

state law, to be placed in the school district where the parent resided which was the only relief the parent was requesting (Board of Education for Charles County, 105 LRP 57755 (SEA MD (2005))).

6. The ALJ held that three of the five issues raised in the due process complaint were insufficient in that they either lacked a sufficient statement of the nature of the problem and/or a lack of stated facts related to the alleged problems. In addition, the entire due process complaint was insufficient in that it failed to specify resolutions for any of the five enumerated issues.

The ALJ held that that parent may file an amended due process complaint only with the written consent of the district or petition the ALJ for permission to amend the complaint (In the Matter of C.O. and the Portland Public School District, LRP (SEA OR (2005))).

C. Judicial Decisions—Jurisdiction/Party Status

1. The United States Supreme Court held that parents of students with disabilities are granted independent enforceable rights under the IDEA. These rights are not limited to certain procedural and reimbursement related matters but also encompass the entitlement to a FAPE for the parent’s child and the substantive decisions to be made.

Since parents enjoy rights under the IDEA, they are entitled to prosecute IDEA cases on their own behalf. In light of the Court’s holding, the Court found it need not address whether the IDEA entitled parents to litigate their child’s claims pro se (Winkelman v. Parma City School District, 127 S.Ct. 1994, 47 IDELR 281 (United States Supreme Court (2007))).

2. The noncustodial parent initiated legal action under the IDEA and the Family Educational Rights and Privacy Act (FERPA) regarding an IEE and access to education records. The Court held that the IDEA and FERPA leave intact the state’s authority to determine under state law who may make educational decisions.

The Court affirmed the dismissal of the IDEA claim regarding the IEE and the FERPA claim. The Court overturned the dismissal of the IDEA records claim and remanded the matter for further proceedings (Taylor v. Vermont Department of Education, 313 F3d

768, 38 IDELR 32 (United States Court of Appeals, 2nd Circuit (2002)).

3. The hearing officer and District Court erred when dismissing the IDEA due process hearing initiated by the noncustodial parent solely on account of the divorce. The Court remanded the matter to determine the precise nature of the noncustodial parent's claims and to evaluate their status under the divorce decree (Navin v. Park Ridge School District 64, 270 F. 3d 1147, 35 IDELR 239 (United States Court of Appeals, 7th Circuit (2001))).

On remand, the Court held that the noncustodial parent, under the divorce decree, does not have the right to a due process hearing contesting the IEP. The Court did find that the noncustodial parent may pursue a hearing on various IDEA procedural violations such as failure to provide access to records and notice of meetings (Navin v. Park Ridge School District, 36 IDELR 235 (N.D. Ill. (2002))).

4. Determinations of whether particular issues are within the jurisdiction of an IDEA hearing or whether a party has been properly named in any hearing request are the exclusive province of the impartial due process hearing officer (OSEP Letter to Wilde, (October 3, 1990)).
5. A Hearing Officer has jurisdiction to hear due process claims involving a student who was expelled from school prior to a determination of his eligibility for special education services (Hacienda LaPuente Unified School District v. Honig, 976 F.2d. 487, 19 IDELR 150, (U.S. Court of Appeals, 9th Circuit (1992)).
6. The district does have standing to initiate a due process hearing regarding its decision not to place the student in a private school. This is true even when the parents unilaterally withdraw their child from the public school (Yates v. Charles County Board of Education, 212 F. Supp. 2d 470 (U.S. District Ct. MD (2002))).
7. A parent may request a due process hearing on an issue which has previously been the subject of a state's administrative complaint investigation. A claim for compensatory education for alleged denial of FAPE does not become moot when the family moves out of the school district's boundaries. Therefore, the parents have a right to a due process hearing against their former school district (Lewis v. Cass Intermediate School District et al. v. M.K. 40 IDELR 8 (W.D. Michigan (2003))).

8. Hearing Officer has jurisdiction to hear due process claims involving a student who was expelled from school prior to a determination of his eligibility for special education services (Hacienda LaPuente Unified School District v. Honig, 976 F.2d. 487, 19 IDELR 150, (U.S. Court of Appeals, 9th Circuit (1992))).
9. The Court, in overturning the Hearing Officer and District Court, held that an IDEA Hearing Officer has jurisdiction to hear safety concerns (such as training and availability of substitutes, potential dangers in the classroom environment, etc.) that could interfere with a student's right to receive FAPE. The broad language of the IDEA that due process issues could be brought with respect to "any matter" related to FAPE suggests that Congress did not intend to exclude from consideration these issues which may impact the student's services (Lillbask v. State of Connecticut Department of Education, 397 F.3d 77, 42 IDELR 230 (United States Court of Appeals, 2nd Circuit (2005))).
10. The Court found that the parent's claim for injunctive and declaratory relief became moot when the family moved and enrolled their student in another school district. Therefore, the parent's appeal of the U.S. District Court's decision in favor of the school district was vacated (Brown v. Bartholomew Consolidated School Corporation, 442 F.3d 588, 45 IDELR 147 (United States Court of Appeals, 7th Circuit (2006))).
11. The school district denied the parent's request for a due process hearing since the district was misled regarding their legal residency status. The school district pursued residency issues in a separate state court action.

The Court of Appeals upheld the dismissal of the parent's IDEA claims that they were denied due process. The Court found that the parents failed to allege any connection between the denial of the due process hearing and any substantive harm to the students (D.L. v. Unified School District #497, 392 F.3d 1223, 42 IDELR 139 (U.S. Court of Appeals, 10th Circuit (2004))).

12. The Comments to the IDEA 2006 regulations clarify that a parent or student may not file a due process hearing request based on the failure

of a particular SEA or LEA employee to be highly qualified (Federal Register, Page 46561).

IV. Timelines—Statute of Limitation

A. IDEA Statute (Section 615 (b)(6)(B) and (f)(3)(C) and (D)) and IDEA Regulation (34 CFR 300.507 (a)(2)).

1. **TIMELINE FOR REQUESTING HEARING** – A parent or agency shall request an impartial due process hearing within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.
2. **EXCEPTIONS TO THE TIMELINE** – The timeline described in ... shall not apply to a parent if the parent was prevented from requesting the hearing due to –
 - a. specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
 - b. the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.

B. Judicial Decisions

1. The Court held that the school was not required under the IDEA to affirmatively explain to parents the revisions in the procedural safeguard statement pertaining to the statute of limitations requirement. By providing the parents with a written copy of the revised procedural safeguards, the parents received notice as required by the IDEA. Therefore, the Court affirmed the dismissal of the due process hearing request as being untimely (Natalie M. v. Department of Education, State of Hawaii, 2007 Westlaw 1186835 (D. Hawaii (2007))).

V. Response to a Due Process Request

A. IDEA Statute (Section 615 (c)(2)(B)) and IDEA Regulation (34 CFR 300.508 (e) and (f))

1. RESPONSE TO COMPLAINT –

a. LOCAL EDUCATIONAL AGENCY RESPONSE –

- (1) **IN GENERAL** – If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include –
 - (a) an explanation of why the agency proposed or refused to take the action raised in the complaint;
 - (b) a description of other options that the IEP Team considered and the reasons why those options were rejected;
 - (c) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and
 - (d) a description of the factors that are relevant to the agency's proposal or refusal.
- (2) **SUFFICIENCY** – A response filed by a local educational agency... shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.
- (3) **OTHER PARTY RESPONSE** – Except the circumstance when the LEA must send the parents prior written notice as described in subsection (1) above, the non-complaining party shall, within 10 days of receiving

the complaint, send to the complainant a response that specifically addresses the issues raised in the complaint.

2006 IDEA Regulations

- The Comments to the Regulations state that the IDEA does not establish consequences for the failure to respond to a due process hearing complaint notice. However, if either party fails to respond to or to file the requisite notices it could increase the likelihood that the resolution meeting will not be successful in resolving the dispute and that a more costly and time-consuming due process hearing will occur.
Note: The SOP states that hearing officers may take the failure to file a response into consideration in determining how to proceed on a case by case basis, considering the equities of the circumstances. (SOP, Section 303 D)

B. Judicial/Administrative Decisions

1. The Court ordered the school district to immediately place and fund a student's placement in a private school. In so doing, the Court held that the parents were not required to exhaust their administrative remedies in a due process hearing since the process was inadequate.

The Court's conclusion was based on the school district's failure to schedule a resolution session in a timely manner and failure to respond to the parent's request for the due process hearing as required by the IDEA (Massey v. District of Columbia, 400 F. Supp 2d 66, 44 IDELR 163 (D. D.C. (2005))).

VI. Amendments to the Due Process Request

- A. IDEA Statute (Section 615 (c)(2)(E)) and IDEA Regulation (34 CFR 300.508 (d)(3)).
 1. SUBJECT MATTER OF HEARING – 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 notice filed ... unless the other party agrees otherwise

2. **AMENDED COMPLAINT NOTICE –**

a. **IN GENERAL –** A party may amend its due process complaint notice only if –

- (1) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a resolution meeting; or
- (2) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

b. **APPLICABLE TIMELINE –** The applicable timeline for a due process hearing under this part shall recommence at the time the party files an amended notice, including the timeline applying to resolution sessions.

2006 IDEA Regulations

- The Comments state that a hearing officer has the discretion whether to allow the non-complaining party to raise issues that were not raised in the due process hearing complaint.

VII. Resolution Sessions

A. IDEA Statute (Section 615 (f)(1)(B)) and IDEA Regulation (34 CFR 300.510)

1. **RESOLUTION SESSION –**

a. **PRELIMINARY MEETING –** Prior to the opportunity for an impartial due process hearing ... the local educational agency shall convene a meeting with the parents and the relevant

member or members of the IEP Team who have specific knowledge of the facts identified in the complaint –

- (1) within 15 days of receiving notice of the parents' complaint;
 - (2) which shall include a representative of the agency who has decision making authority on behalf of such agency;
 - (3) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and
 - (4) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint, unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process.
- b. **HEARING** – If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this part shall commence.
- c. **WRITTEN SETTLEMENT AGREEMENT** – In the case that a resolution is reached to resolve the complaint at a resolution meeting, the parties shall execute a legally binding agreement that is–
- (1) signed by both the parent and a representative of the agency who has the authority to bind such agency; and
 - (2) enforceable in any State court of competent jurisdiction or in a district court of the United States.
- d. **REVIEW PERIOD** – If the parties execute an agreement resulting from the resolution session, a party may void such agreement within 3 business days of the agreement's execution.

2006 IDEA Regulations

- The 45 day due process hearing timeline starts after either: both parties waive, in writing, the resolution meeting; the 30 day resolution period has expired with no resolution reached; the mediation/resolution starts but the parties agree, in writing, that no agreement is possible before the expiration of the 30 day period; or the parties agree to continue to mediation after the 30 day period but one party withdraws from the mediation process (300.510 (c)).
Note: Under the terms of the Blackman Consent Decree, if there has been a mutual waiver of the resolution session, the parties will jointly contact the Student Hearing Office which shall arrange a “specially set” due process hearing. A specially set due process hearing will be an expedited hearing to be set on the next available date upon notice from the parties. The hearing officer shall issue a hearing officer determination within 10 days of the hearing or 75 days of the complaint, whichever is earlier.
- The IDEA 2006 regulations do not require a resolution session when the public agency files a due process complaint. Since the resolution process is not required, the 45 day timeline for issuing a due process hearing decision begins the day after the agency’s due process complaint is received by the other party and the SEA. However, if the parties elect to use mediation, the 30 day resolution period is still applicable (Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children With Disabilities, Questions D-1 and D-3 (OSERS (2007))).
- Except where the parties have jointly waived the resolution process or to use mediation, the failure of the parents to participate in the resolution meeting will delay the timelines for the resolution process and the due process hearing until the meeting is held (300.510 (b)(3)).

- If the LEA has been unable to obtain the parents' participation in the resolution meeting after reasonable efforts have been made and documented, the LEA at the conclusion of the 30 day period may request that the hearing officer dismiss the due process complaint (300.510 (b)(4)).
- If the LEA fails to hold the resolution meeting within 15 days or fails to participate, the parent may seek the intervention of the hearing officer to begin the due process hearing timeline (300.510 (b)(5)).
- There is nothing to prohibit a State from using other enforcement mechanisms to seek enforcement of a resolution agreement provided it is not mandatory and does not delay or deny the right to seek enforcement from a Court (300.537).
- The Comments provide that the parties may agree to enter into a confidentiality agreement as part of the resolution process. A State could not require a confidentiality agreement (Page 46696).
- A State may adopt procedures that include a requirement that an LEA or SEA, as appropriate, advise the parent in writing that the timeline for starting the resolution process will not begin until the parent provides both the LEA **and** SEA with a copy of the due process complaint (emphasis added) Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children With Disabilities, Question C-1 (OSERS (2007)).

B. Judicial/Administrative Decisions

1. The Court refused to grant the parent's request for injunctive relief allowing them to bypass the resolution session prior to the due process hearing due to the alleged failure to hold a timely resolution session.

A resolution session was scheduled 15 days after the due process hearing complaint was received. The parent then withdrew the

complaint before the resolution session was held. Subsequently, the parent renewed her request for a due process hearing. The school district scheduled another resolution session.

The parent contended that the resolution session was not scheduled in a timely manner excusing the requirement that the resolution process take place for 30 days before the due process hearing process begins.

The Court noted that the parent's position "defies common sense" since the resolution process is mandatory under the IDEA unless mediation is requested or both parties to the due process proceeding waive the right to go to a resolution session (Spencer v. District of Columbia School District, 45 IDELR 11 (Dist. Ct. DC (2006))).

2. The Court overturned the administrative complaint decision of the State Education Agency when it held that a school attorney's involvement in finalizing the draft of the resolution agreement, while in the school building where the resolution session took place, was not a violation of the IDEA. Although the IDEA prohibits the school attorney from being included in the resolution session when the parent's attorney is not present, the attorney in this matter was not physically or functionally present (Mr. and Mrs. S. v. Rochester Community Schools, 46 IDELR 187 (Dist. Ct. W.D. Michigan (2006))).
3. The Court ordered the school district to immediately place and fund a student's placement in a private school. In so doing, the Court held that the parents were not required to exhaust their administrative remedies in a due process hearing since the process was inadequate.

The Court's conclusion was based on the school district's failure to schedule a resolution session in a timely manner and failure to respond to the parent's request for the due process hearing as required by the IDEA (Massey v. District of Columbia, 400 F. Supp 2d 66, 44 IDELR 163 (D. D.C. (2005))).

4. A hearing officer refused to grant the parent's motion to exclude a special education administrator, who also was an attorney, from a resolution session since she was not acting as the attorney for the school district (Melrose Public Schools 46 IDELR 119 (SEA MA (2006))).

VIII. Hearing Officer Competencies

- A. IDEA Statute (Section 615 (f)(3)(A)) and IDEA Regulation (34 CFR 300.511 (c))
1. PERSON CONDUCTING HEARING – A hearing officer conducting a hearing shall, at a minimum –
 - a. not be –
 - (1) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or
 - (2) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;
 - b. possess knowledge of, and the ability to understand, the provisions of this title, Federal and State regulations pertaining to this title, and legal interpretations of this title by Federal and State courts;
 - c. possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
 - d. possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

Note: The SOP applies the American Bar Association’s Code of Judicial Conduct to every Hearing Officer, prohibits *ex parte* communication about substantive matters, and sets procedures for seeking the disqualification of a Hearing Officer. (SOP, Sections 600.2.600.3 and 600.4)

B. Judicial Decisions

1. Although the IDEA does not describe standards relevant to hearing officer impartiality, a Court found that the applicable standard is analogous to one involving disqualification of federal judges. Only if a judge's decision to sit “cannot be defended as a rational conclusion

supported by reasonable reading of the record” will the Court insist upon disqualification (Manchester School District v. Christopher B., 19 IDELR 143 (D NH 1992)).

2. Where a Hearing Office held *ex parte* conversations with defense witnesses prior to the Due Process Hearing, impartiality of the Hearing was tainted and the decision of the Hearing Officer must be annulled (Hollenbeck v. Board of Education of Rochelle Township, 441 IDELR 281 (ND IL 1988)).
3. Hearing Officer’s telephone conversation with director of private residential school prior to rendering a decision in a pending hearing constituted *ex parte* communication which violated the Due Process rights of the student with a disability and parents (Murphy v. the Commonwealth of Pennsylvania, 460 A.2d. 398, IDELR 554:527 (PA 1983)).
4. The appearance of impropriety resulted from the Hearing Officer having lunch with a party to a due process hearing. The Court therefore ordered a new hearing to take place (Wells v. DeNorth, (Colorado Court of Appeals). (Unpublished decision)
5. In refusing the District’s motion for discovery regarding alleged hearing officer bias, the Court held that the mere fact that the hearing officer has a child with a disability did not disqualify her. Also, the alleged *ex parte* conversation about her own child appears to have been only passing social conversation (although the Court stated that even social conversation must be chosen with care because of the opportunity for misunderstanding) (Falmouth School Committee v. Mr. and Mrs. B., 32 IDELR 256 (D. Maine (2000)).
6. The parents initiated a lawsuit against the State Department of Education, State Superintendent, and the Due Process Hearing Officer alleging, in part, that their IDEA due process hearing rights were violated. The parent’s claim was based on the refusal of the hearing officer to recuse himself as requested by both parties due to his health problems and the subsequent failure of the SEA to remove him.

The Court held that there was no evidence to conclude that the hearing officer was disqualified due to bias, prejudice or conflict of interest (A.D. v. Clay Community Schools, Indiana Department of Education et. al., 43 IDELR 192 (S.D. IN (2005))).

7. In a challenge to the impartiality of the hearing officer, the parents alleged that since the hearing officer teaches a workshop on special education law for school administrators, he has a professional interest that presents a conflict of interest. The Court held that this fact alone does not rebut the presumption of impartiality. However, the Court refused to dismiss the complaint since the parents can still establish facts that could prove that the hearing officer was actually biased (H.H. v. Indiana Board of Special Education Appeals, et al., 47 IDELR 250 (N.D. IN (2007))).

IX. Burden of Proof

A. IDEA Statute

The IDEA is silent regarding the burden of proof in a special education due process hearing.

Note: In DC, the burden of proof in special education due process hearings shall be on the party seeking relief. (Chapter 30, Section 3030.3)

B. United States Supreme Court

1. The Court held that the burden of persuasion in a due process hearing is on the party challenging the IEP. The Court noted that the decision is only addressing the burden of persuasion not the burden of production in a due process case.

Note: The Court commented that this decision does not address those states that have a state law which places the burden of proof on the school district in a due process hearing (Weast v. Schaffer, 126 S. Ct. 528, 44 IDELR 150 (United States Supreme Court (2005))).

C. Judicial Decisions

1. Although the State Supreme Court had previously ruled that a school district has the burden of proof in an IDEA due process hearing, the Court held that the Weast decision is now applicable. Therefore, the

burden of proof is on the parents in this case since the appeal in this matter was pending when Weast was issued.

The Court also concluded that the Weast holding applies not only to issues of FAPE, but to any challenge to the IEP including LRE issues (L.E. v. Ramsey Board of Education, 44 IDELR 269 (United States Court of Appeals, 3rd Circuit (2006))).

X. Pre-Hearing Conferences

- A. One of the main responsibilities of a hearing officer is to maintain control over the hearing process and see that it operates in an efficient and effective manner.

The purpose of the pre-hearing conference is to clarify procedural matters and to specify the issues that will be heard. The hearing officer should not offer advice to either party. The pre-hearing conference must be held in the presence of the parties/representatives concerned. Discussion with either party separately could result in an *ex parte* relationship which would taint the impartiality of the process.

In conducting a pre-hearing conference, the hearing officer may want to have a verbatim recording of the proceedings. In the absence of a verbatim recording, the hearing officer should keep extensive, complete, and accurate notes in order to provide a record and to avoid any misunderstandings.

Note: The SOP allows the Hearing Officer to order a pre-hearing conference or either party may request a conference. (SOP, Section 304 A). A motion for a pre-hearing conference, unless by consent, shall be filed with the Student Hearing Office and served on opposing parties no more than 10 calendar days after the Notice of Hearing is issued by the Student Hearing Office. All motions should include a proposed order. Consent motions shall be filed at least 20 days before the hearing date and include a proposed order. Also, the SOP requires that action taken at the pre-hearing conference shall be on the record. (SOP, Section 304 A(3)).

Immediately after the pre-hearing conference, the hearing officer should make the conference a matter of record by writing all parties concerned. The written record, which should be in a form of a Pre-Hearing Order and should contain: (1) a specific statement of the issues to be resolved at the

hearing, (2) the time, place, and other physical arrangements for the hearing, and (3) clarification on any procedural points that may have been disclosed.

Note: The Order must be sent to the parties within 3 business days after the pre-hearing conference or at least 7 business days prior to the hearing, whichever is earlier. A copy shall also be sent to the Student Hearing Office. (SOP, Section 304 A(1))

B. Pre-Hearing Conference Checklist

1. If party(ies) are unrepresented, clarify their intent to proceed with or without representation.

The IDEA gives both the parent and the local education agency the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities. The hearing officer should ensure that the local education agency has carried out its legal requirement of informing the parent of any free or low cost legal or other relevant services available.

2. Set expectations for the parties and their representatives for their conduct throughout the proceedings.

Special education hearings oftentimes become very emotional and can be adversarial. It is extremely important for the Hearing Officer to clearly set out the expectations of conduct for the parties. Parties/representatives should be warned that rude or discourteous behavior will not be tolerated.

Note: The SOP states that the hearing officer has the responsibility for maintaining the integrity and orderly conduct of the hearing process, ensuring the rights of all parties are protected and maintaining an atmosphere conducive to impartiality and fairness at all times. (SOP, Section 206).

3. Encourage parties to explore mediation or other settlement options.

Mediation is an available option for parties to resolve their differences. It must be voluntary and cannot be used to delay/deny the right to go to a hearing. Hearing Officers should raise the

mediation option and encourage parties to pursue mediation if they have not already done so. Hearing Officers, however, should not turn the pre-hearing conference into a mediation session or discuss the terms of settlement.

4. Clarify the issue(s) identified by the moving party and the relief they are seeking through the hearing process.

It is critical that the Hearing Officer and both parties have a clear understanding of the specific issues(s) and the relief sought from the hearing process. Even if the receiving party has not filed a sufficiency challenge, the Hearing Officer has the authority to require specification of the issues and relief.

The Hearing Officer ultimately needs to confirm the issues presented for hearing. In one judicial case, the Court found that the parents' due process rights were not violated when the hearing officer formulated the hearing issues in words different from the words the parents used in their request (Ford v. Long Beach Unified School District, 291 F.3d 1086, 37 IDELR 1 (United States Court of Appeals, 9th Circuit 2002)).

5. Confirm your jurisdiction to hear the issues and grant the relief sought.

Based on the issue(s) identified and the relief sought, you may question whether you have the legal jurisdiction to hear the case. Not every concern a party has automatically becomes a special education hearing issue under the IDEA. Should you question your jurisdiction over a particular issue, raise your concern with both parties and give them an opportunity to provide you with legal authority to support/negate your jurisdiction. Should you conclude you have no jurisdiction, you have the authority to dismiss the matter.

6. Review the procedural safeguards applicable to the hearing process.
 - a. Do the parents want the hearing open or closed?
 - b. Do the parents choose to have their child present at the hearing?

- c. Do the parents desire a written or electronic record of the hearing and decision?

The IDEA specifically gives the parents the sole right to decide whether the hearing will be open or closed to the public, whether the child who is the subject of the hearing will be present at the hearing, and the form of the hearing record.

If the hearing will be closed, you must decide who in addition to the attorney/advocate will be allowed to remain in the hearing. Typically, the parent and a school district representative are allowed to remain in the hearing room.

7. Review the Hearing Procedures

- a. Estimate the number of days each party will need to present their case.
- b. Set the hearing date(s), time and place.

The IDEA regulations require that there be a written or electronic verbatim record of the hearing, pursuant to the parents' choice, which will be made available to the parties. Therefore, either a court reporter or tape recording device must be arranged for. If a tape recorder will be used, external microphones should be provided in order that the witness', hearing officer's and party's statements will be clearly audible. The hearing must be conducted at a time and place that is reasonably convenient to the parents and child.

Note: If the hearing date and time is not set in the pre-hearing conference, the parties shall notify the Student Hearing Office which will schedule the matter for hearing. All hearing will be scheduled for two hours unless a party otherwise requests. If the SHO has good cause to believe the request is unreasonable, the matter will be referred to the Chief Hearing Officer who shall convene a pre-hearing conference within three business days. (SOP, Section 400.1 D). The Hearing Officer is responsible for making an electronic record of the hearing. (SOP, Section 800.1 (5))

8. Review Evidentiary Issues

- a. Identify the last day for exchange of exhibits and list of witnesses to comply with the 5 Day Rule.

The IDEA allows a Hearing Officer to bar a party from introducing as evidence evaluations completed and recommendations based on the evaluations which have not been disclosed at least 5 business days prior to the hearing.

The IDEA regulations also give either party to the hearing the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 days before the hearing.

The 5 Day Rule requires that any documents to be introduced as exhibits at the hearing and names of witnesses to be called and the summary of their testimony be disclosed to the other party. It is recommended that the Hearing Officer also receive the proposed exhibits and witness lists at this time.

- b. Consider ordering the parties to submit a list of joint exhibits.

In order to facilitate the introduction of exhibits, consider ordering the parties (especially if both are represented) to meet and submit joint exhibits. This can serve two purposes: (1) since many, if not most, of the documents will be submitted by both parties (i.e., IEPs, evaluation reports), it is much easier to refer to the same document in the same manner. Example, the latest IEP will be Joint Exhibit #5 instead of Parents Exhibit #7 and District Exhibit D. Secondly, it requires the parties to sit down and work with one another which at times has led to resolution of the issues. The parties may also stipulate to the admission of the joint exhibits which leads to a more efficient hearing.

- c. Discuss the burden of proof.
- d. Discuss the fact that the Rules of Evidence will not be strictly applied, although there is an expectation to avoid redundant and irrelevant testimony.
- e. Address any request to compel the attendance of witnesses.

Either party has the right to compel the attendance of witnesses.

Although the federal regulations give the hearing officer the authority to compel the attendance of witnesses, the Hearing Officer does not have the authority to enforce the subpoena of witnesses. However, the legal counsel for the party exercising this right may go through the courts to enforce the subpoena of a witness.

9. Other Motions/Requests

Note: Pre-Hearing Motions need to be submitted in writing to the Hearing Officer with a copy to the Student Hearing Office. The motion shall also be faxed or mailed to the other party. A certificate of service must be attached. All motions must be filed no later than the 5 day deadline for disclosing evidence. The Hearing Officer has the discretion to deny untimely motions unless good cause is shown by the party for the late filing. A party wishing to respond shall do within three business days from the time the motion is filed. (SOP, Section 401)

a. Extension of the 45 Day Time Frame

The IDEA regulations require that the Hearing Officer assigned to a case issue a written hearing decision and send it to the parties within 45 calendar days of the expiration of the 30 day resolution period with the exceptions noted in the outline.

The regulations do permit the Hearing Officer to extend the 45 day time line. The Hearing Officer may grant specific extension of time at the request of either or both parties. The regulations do not permit the Hearing Officer to extend the 45 day time frame on his/her own initiative.

Since the Department of Education is given the legal responsibility to ensure that this requirement is adhered to, the Hearing Officer's determination whether to grant or deny the request for an extension should be sent to the parties and the Department of Education.

b. Motion to Dismiss

Hearing Officers are authorized to determine whether the issues raised are within the jurisdiction of an IDEA hearing (OSEP Policy letter, October 1990). If a party files a Motion to Dismiss, a hearing officer after giving both parties the opportunity for oral/written argument may dismiss the proceeding based on lack of jurisdiction.

c. Motion for Recusal

Although the IDEA does not describe the applicable standard in such a situation, courts have found the standard is analogous to one involving the disqualification of federal judges. Only if a decision to sit cannot be defended as a rational conclusion supported by a reasonable reading of the record will the court insist upon disqualification (Manchester School District v. Christopher B., 19 IDELR 143 (D.N.H. 1992)).

d. Clarification of “stay put”

The student who is the subject of the hearing must remain in his/her present educational placement during the pendency of the hearing process unless the school district and parents agree otherwise.

e. Access to Records

Parents are given the right to inspect and review the education records of their child prior to the hearing.

XI. Due Process Hearing Rights

A. IDEA Statute (Section 615 (h) and (f)(2)) and IDEA Regulation (34 CFR 300.512)

1. Hearing Rights

Any party to a hearing shall be accorded:

- a. the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
- b. the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;
- c. the right to a written, or, at the option of the parents, electronic verbatim record of such hearing;
- d. the right to written, or, at the option of the parents, electronic findings of fact and decisions which shall be made available to the public consistent with confidentiality requirements.
- e. Not less than five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

A hearing officer may bar any party that fails to comply with the 5 day disclosure from introducing relevant evaluation or recommendation at the hearing without the consent of the other party.

Note: In DC, the attorney submitting the due process hearing request must disclose any financial interest of any participant in a non public provider or service. (Chapter 30, Section 3029.5) In addition, the Hearing Officer is given both the general authority to take any actions necessary to ensure the integrity of the hearing and complete the hearing in an efficient and expeditious manner. The SOP also outlines the specific authority of the hearing officer including the right to ask questions of counsel and witnesses; order an impartial assessment of the student and restrict the number of witnesses and length of testimony while ensuring the parties are not prohibited from introducing relevant material and competent evidence. (SOP, Section 600.1)

2006 IDEA Regulations

- Parents must be given the right to have the child who is the subject of the hearing present, open the

hearing to the public and have the record of the hearing and the findings of fact and decisions provided at no cost. (300.512 (c))

- Each hearing must be conducted at a time and place that is reasonably convenient to the parents and the child involved. (300.515 (d))
- The Department, in the Comments, stated that they are considering the issue of non-attorney representation in a due process hearing and anticipate publishing a notice of proposed rule making seeking public comment on the issue. (Page 46699)

B. Judicial Decisions

1. The Court held that a parent's expert has the right under the IDEA to observe a placement which was proposed by the school district which was the subject of a due process hearing. In so doing, the Court overturned the hearing officer's decision which was based on a state law allowing such observation only as part of a parent's Independent Educational Evaluation of the child (Benjamin G. v. Special Education Hearing Office, 44 IDELR 7 (Cal. Ct. of Appeals (2005))).
2. The School District has the right to review any written information an expert witness uses prior to or during her testimony to refresh her recollection. The expert has waived any protection provided by privileged communication. The plaintiffs should not be able to use the privilege as "both a sword and a shield" (I.D. v. Westmoreland School District, 788 F.Supp. 632, 17 IDELR 417 (D. NH 1991)).
3. When a party to a hearing has been unsuccessful in meeting the Five-Day Rule for Disclosure, the Hearing Officer may grant the party's request for a continuance in order to provide the opposing party with an opportunity to review the evidence or testimony which was not properly disclosed or may deny the request for a continuance and simply prohibit the introduction of the evidence (OSEP Policy Letter, 18 IDELR 739 (1991)).

4. A school district utilized a videotape of the student's behavior as an exhibit in a due process hearing. The taping was done without the consent of the student or parents. The Court held videotaping in public areas does not violate the constitutional right of privacy or FERPA (MR v. Lincolnwood Board of Education, District 74, 843 F.Supp. 1236, 20 IDELR 1324 (N.D. Ill. 1994)). (Affirmed Rheinstrom v. Lincolnwood, 23 IDELR 1171 (U.S. Ct. of Appeals, 7th Circuit (1995))).
5. The decision whether to allow parents to admit testimony by telephone at a due process hearing falls within the hearing officer's discretion. If a party objects to that decision, the party can seek review of that determination through an administrative appeal, or, if applicable, a civil action (Letter to Anonymous, 23 IDELR 1073 (OSEP (1995))).
6. In overturning the hearing officer's decision, the Court held that the plain meaning of the statutory language of the IDEA affording the right to "...confront, cross-examine and compel the attendance of witnesses...." in a due process hearing precluded the use of telephone testimony of out-of-state witnesses absent the agreement of the parties (Walled Lake Consolidated Schools v. Jones, 24 IDELR 738 (E.D. Michigan (1996))).
7. In overturning the decision of the hearing officer, the Court found that too much reliance was given to the experts who testified. The experts did not observe the student or his program nor did they speak with his teachers and other service providers. The Court found that there was inadequate consideration given to the opinions of those who worked with the student throughout the year. Their opinions are entitled to great weight (Faulders v. Henrico County School Board, 190 F. Supp.2d 849, 36 IDELR 183 (E.D. VA (2002))).
8. The Hearing Officer taped the due process hearing but failed to re-engage the tape recorder after changing the tape, resulting in a loss of a record of a witness' cross-examination. In addition, there were approximately 100 instances in which the Hearing Officer's comments were unintelligible.

The Court held that the failure to provide a full transcript or

recording of the hearing did not result in a denial of FAPE since the evidence was insufficient that the procedural violation affected the student's substantive rights under the IDEA. (Kingsmore v. District of Columbia, 466 F.3d 118, 46 IDELR 152 (United States Court of Appeals, District of Columbia Circuit (2006))).

XII. Hearing Officer Decisions—Procedural Issues

A. IDEA Statute (Section 615 (f)(3)(E)) and IDEA Regulation (34 CFR 300.513 (a))

1. DECISION OF HEARING OFFICER –

- a. **IN GENERAL** – Subject to subsequent subsection, a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.
- b. **PROCEDURAL ISSUES** – In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—
 - (1) impeded the child's right to a free appropriate public education;
 - (2) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
 - (3) caused a deprivation of educational benefits.
- c. **RULE OF CONSTRUCTION** – Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

- d. RULE OF CONSTRUCTION – Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

B. Judicial/Administrative Decisions

1. The parents claimed that the student was harmed by the alleged failure of the school to complete the evaluation in a timely manner. The Court held that IDEA procedural violations raise a viable claim only if the procedural violations affect the student's substantive rights under the IDEA (Lesesne v. District of Columbia, 447 F.3d 828, 45 IDELR 208 (United States Court of Appeals, District of Columbia (2006))).
2. The Court found that the IEP offered a 17-year-old who has Aspergers Syndrome provided a FAPE. The Court found that the procedural errors (lack of some goals and objectives, failure to notify parents of progress through regular report cards) did not result in a loss of educational opportunity (Adam J. v. Keller Independent School District, 39 IDELR 1 (United States Court of Appeals, 5th Circuit (2003))).
3. The school district called an IEP meeting to propose a change in placement for a student who is autistic. A regular classroom teacher was invited but did not attend the meeting. The IEP Team changed the student's placement from a regular kindergarten class to a special education class. The Court overturned the IEP Team decision holding that the lack of a regular class teacher at the meeting, standing alone, is a structural defect prejudicing the right of the student to a FAPE. Therefore, since the procedural deficiency resulted in a denial FAPE, there was no need to analyze whether the IEP would have provided educational benefit to the student (M.L. v. Federal Way School District, 394 F.3d 634 (U.S. Court of Appeals, 9th Circuit (2005))).
4. The District's failure to provide the parents with their procedural safeguards, in itself, amounted to denial of FAPE. It is irrelevant whether the IEP provided educational benefit when the parents were not informed of their right to challenge the IEP (Jaynes v. Newport News School Board, 35 IDELR 1 (U.S. Court of Appeals, 4th Circuit

(2001)). NOTE: This is an unpublished decision which may limit its use as precedent

5. The Court concluded that the IEP developed for a student with autism denied FAPE since the school had an “unofficial policy” not to provide ABA regardless of any evidence the parents provided concerning the individual needs of the student. Therefore, the parents were not afforded a meaningful opportunity to participate in the development of the IEP (Deal v. Hamilton County Board of Education, 392 F.3d 840, 42 IDELR 109 (U.S. Court of Appeals, 6th Circuit (2004)). Review denied by the United States Supreme Court.
6. The school district violated the IDEA when it unilaterally amended the IEP by removing the student’s participation in the state’s alternate assessment program. In addition, the parents were not provided prior written notice of the change. The Court, in affirming the hearing officer, found that these procedural violations were more than harmless errors. In addition, the Court found that the student was entitled to occupational therapy and a certified sign language interpreter (County School Board of York County v. A.L., 46 IDELR 94 (United States Court of Appeals, 4th Circuit (2006)).

XIII. Hearing Timelines

A. IDEA Regulation (34 CFR 300.515)

1. The public agency must ensure that not later than 45 days after the expiration of the 30 day resolution period unless an exception exists as noted below in the 2006 Regulations, a final decision is reached in the hearing and a copy of the decision is mailed to each of the parties.
2. A hearing officer may grant specific extensions of time beyond the 45 day period at the request of either party.
Note: In DC, the hearing officer may grant an extension for good cause. (Chapter 30, Section 3030.2) There is a rebuttable presumption that good cause does not exist for a continuance sought by DCPS due to: unavailability of witnesses/counsel; hearing officer unavailability; decision to allot a different amount of time from the parent request; failure to secure adequate physical space; Student

Hearing Office's failure to transmit notices/documents in a timely manner; later arrival of the hearing officer or DCPS attorney; or failure to provide the necessary recording equipment. The hearing officer shall issue a written decision.

All continuances shall be limited to 10 days and no more than 1 continuance per side shall be granted unless granted by the Chief Hearing Officer due to exceptional circumstances. Failure to notice and conduct a resolution session shall not constitute an exceptional circumstance. (SOP, Section 402).

2006 IDEA Regulations

- The 45 day due process hearing timeline starts after either: both parties waive, in writing, the resolution meeting, the 30 day resolution period has expired with no resolution reached, the mediation/resolution starts but the parties agree, in writing, that no agreement is possible before the expiration of the 30 day period or the parties agree to continue to mediation after the 30 day period but one party withdraws from the mediation process. (300.510 (c))
- The IDEA 200 regulations do not require a resolution session when the public agency files a due process complaint. Since the resolution process is not required, the 45 day timeline for issuing a due process hearing decision begins the day after the agency's due process complaint is received by the other party and the SEA. However, if the parties elect to use mediation, the 30 day resolution period is still applicable. Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children With Disabilities, Questions D-1 and D-3 (OSERS (2007)).

B. Case Law

1. The parent's attorney asked the Court to set aside the hearing decision since it was untimely. There were several extensions of the hearing process based on requests from both the parents and school district. The Hearing Officer requested an additional 10 day

extension due to the volume of the record and complexity of the case. The school district then moved for the additional 10 day extension. The Court found no need to set the decision aside as being untimely. Given the several extensions requested by the parents' attorney, the Court observed, "It is disingenuous for Plaintiff's counsel to argue those 10 days significantly affected her client's rights" (Grant v. Independent School District 11, 43 IDELR 220 (D. MN (2005))).

2. The parents of a student with a disability were awarded reimbursement for their unilateral private placement and compensatory education based on an unreasonable delay of the due process hearing. The hearing was significantly delayed due to repeated requests for continuances by the district and extensions initiated by the hearing officer (Blackman v. District of Columbia, 44 IDELR 156 (Dist. Ct. DC (2005))).
3. A violation of the time limits for a due process hearing is a basis for a Section 1983 cause of action. However, a party seeking relief would need to show how, in fact, they were injured by the delay of the issuance of a hearing decision (Brantley v. Independent School District No. 625, 936 F. Supp. 649, 24 IDELR 696, (D. MN (1996))).
4. Parents' claim that a hearing officer failed to render his decision within 45 days of the hearing failed, as that right was waived. The parents requested four continuances of the hearing and did not oppose many of the district's continuance requests and the parents' attorney sent a letter to the hearing officer indicating that he was waiving the 45-day requirement (Andress v. Cleveland Independent School District, 64 F.3d 176, 22 IDELR 1134, (United States Court of Appeals (1995))).

XIV. Stay Put

A. IDEA Statute (Section 615(j)) and IDEA Regulation (34 CFR 300.518)

1. During the pendency of any proceeding, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then current educational placement of the child, or, if applying for the initial admission to a public school, shall, with the

consent of the parents, be placed in the public school program until all such proceedings have been completed.

2006 IDEA Regulations

- If the hearing complaint involves an application for initial services under Part B of the IDEA (ages 3-21) from a child who is transitioning from Part C of the IDEA (ages Birth-3) and the child is no longer eligible for Part C services because the child has turned 3, the public agency under Part B is not required to provide the Part C services that the child had been receiving. If the child is eligible for Part B services and the parent consents to the initial provision of special education services, then the public agency must provide those services not in dispute. (300.518 (c))
- If the hearing officer (or a State Review Officer in a state with an administrative appeal level) agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of stay put. (300.518 (d))

B. Cases

1. The Court found that the receiving high school district was obligated to fund the private school "stay put" placement in a due process dispute originated against the former elementary school district (Casey K. v. St. Anne Community High School District, 400 F.3d 508, 43 IDELR 1 (United States Court of Appeals, 7th Circuit (2005))).
2. The Court found that the school district complied with the IDEA, even though it did not hold an annual IEP meeting, since the "stay put" provisions were invoked due to the parents request for a due process hearing (C.P. v. Leon County School Board, 46 IDELR 182 (United States Court of Appeals, 11th Circuit (2006))).
3. The Court held that the SRO decision, which overturned the ALJ decision, was the stay put placement. In so holding, the Court found that North Carolina follows a "modified two tiered system" of hearing

in which the state conducts both the due process hearing and the appeal. Wittenberg v. Winston-Salem/Forsyth County Board of Education, 46 IDELR 132 (Dist Ct. MD NC (2006)).

4. The district did not violate stay put by discontinuing hippo therapy during the pendency of a hearing. The Court found that the district continued to provide OT pursuant to the IEP goals and therefore did not change the basic element of his program (Erickson v. Albuquerque School District, 31 IDELR 156, (United States Court of Appeals, 10th Circuit (1999))).
5. A student who was over the age of 21 could not invoke the protections of the stay-put. The district's refusal to implement an IEP developed in another state did not violate stay put (Michael C. by Stephen C. v. Radnor Township School District, 31 IDELR 184 (United States Court of Appeals, 3rd Circuit (2000))).
6. A student who was over the age of 21 could not invoke the protections of the stay-put provision. The IDEA's provisions were limited to minors with the exception of the judge-created remedial exception of compensatory education; thus, the statute's age limitations were presumptively carried over into the stay-put provision which was silent on that subject (Board of Education of Oak Park & River Forest High School District 200 v. Illinois State Board of Education, 79 F.3d 654, 23 IDELR 1118, (United States Court of Appeals, 7th Circuit (1996))).
7. A dispute arose regarding the funding for a student's residential placement. A due process hearing was requested. The student was expelled from his residential placement and placed in another residential facility by his parents. The Court held that the residential facility secured by his parents was the "stay put" placement since the district did not offer any suggestions as how the education placement could be maintained pending resolution of the dispute (Board of Education of Community High School District No. 218 v. Illinois State Board of Education, 24 IDELR 1028, (United States Court of Appeals, 7th Circuit (1996))).
8. A due process hearing was requested when the student was in a temporary placement agreed to by the parents and school district. The parents later withdrew their consent for the temporary placement. The

Court held it was the stay put placement in spite of the parents withdrawing their approval (Clyde K. V. Puyallup School District, 21 IDELR 664, (United States Court of Appeals, 9th Circuit (1994))).

9. The parents and school district agreed through a private settlement to fund the education of a child with a disability at a private school. During the following school year, the parents initiated a due process hearing. The “stay put” placement was not the private school since it was not an IEP Team placement decision (Peter G. v. Chicago Public School District, 36 IDELR 237 (N.D. Ill. (2002))). But see Lauren W. v. Radnor township School District, 37 IDELR 248 (E.D. PA (2002))).
10. When the stay put placement becomes functionally unavailable due to no fault of the school district, the parents may either agree to an alternative placement with the District or seek a preliminary injunction from a Court. A Court has the equitable authority to order a change in the stay put placement upon a proper showing by the moving party (Wagner v. Montgomery County Board of Education, 335 F.3d 297, 39 IDELR 122 (United States Court of Appeals, 4th Circuit (2003))).
11. When a student moves from one school district to another school district in the same state and requests a due process hearing, under stay put the new school district must implement the former school district’s IEP to the extent possible. Stay Put does not require the new district to develop a new program (Ms. S. v. Vashon Island School District, 337 F.3d 1115, 39 IDELR 154 (United States Court of Appeals, 9th Circuit (2003))).

XV. Expedited Hearings

- A. IDEA Statute (Section (k)(3) and (4) and IDEA Regulation (34 CFR 300.532 and 533)
 1. Parents may challenge manifestation determination or any decision regarding placement with a right to have an expedited due process hearing. The expedited hearing shall occur within 20 school days of the request and shall result in a determination within 10 school days after the hearing.

2. “Stay Put” is the IAES pending the hearing officer’s decision or the expiration of disciplinary removal, whichever occurs first, unless otherwise agreed upon.
3. “Stay Put” exception for dangerousness
 - a. Expedited hearing applying dangerousness standard.
4. A school district may seek a hearing officer order placing a student in an IAES for up to 45 school days if:
 - a. It is determined that maintaining the current placement for the student is substantially likely to result in injury to the student or to others.

2006 IDEA Regulations

- In the event an expedited hearing is requested, a resolution meeting must occur within seven days of the hearing request with a 15 day period of resolution unless the parties have mutually waived the resolution process. (300.532 (c)(3))
- States may establish different state imposed procedural rules for expedited hearings. (300.532 (c)(4)
- The Comments explain that, in an expedited due process hearing, there is no procedure for challenging the sufficiency of the request for the expedited due process hearing. (Page 46725)

XVI. Miscellaneous Due Process Hearing Issues

A. Hearing Officer Authority—Compensatory Education

1. Under the terms of the Consent Decree in the matter of Blackman v. District of Columbia, compensatory education services includes: (a) assistive technology devices; (b) assistive technology services; (c) equipment; (d) related services; (e) supplementary aids and services; (f) educational instruction; (g) extension of IDEA eligibility beyond age 21; and (h) any services, devices, products and/or equipment that

can help a student participate in further education, participate in the general curriculum, obtain employment, and/or live independently.

2. The student was awarded 810 hours of compensatory education by the due process hearing officer which was one hour for every day that he was not provided a FAPE.

On appeal, the Court both rejected the hearing officer's award and the parents' argument that compensatory education should be calculated on the presumption that one hour without FAPE entitles the student to one hour of compensatory services. The Court held that compensatory education is an equitable remedy which must rely on fact specific, individually based considerations (Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (United States Court of Appeals, DC Circuit (2005))).

3. In rejecting a "lump sum" award of compensatory education which the Court described as a "cookie cutter" approach, the Court held that the award of compensatory education must be reasonably calculated to provide the educational benefits that would have likely accrued from the special education services the student should have been provided in the first place. The inquiry must be "qualitative, fact intensive and, above all, tailored to the unique needs of the disabled student" (Branham v. District of Columbia, 427 F.3d 7, 44 IDELR 149 (United States Court of Appeals, DC Circuit (2005))).
4. The Court affirmed the Hearing Officer's conclusion that two of the three IEPs in dispute did not provide the student a FAPE. The Court then affirmed the award of compensatory education which was additional services for the student's teachers addressing the implementation of the IEP's self-help goals. In so doing, the Court noted that the award of compensatory education is a form of equitable relief and the IDEA does not require services be awarded directly to the student (Park v. Anaheim Union School District, 444 F.3d 1149, 45 IDELR 178 (United States Court of Appeals, 9th Circuit (2006))).
5. The Court affirmed the Administrative Hearing Officer's decision finding that a student with autism was denied a FAPE for the last three years. The Hearing Officer correctly determined that the award of reimbursement and compensatory education was limited to the events during the two year statute of limitation period. Further, the Court

found that the Administrative Hearing Officer had the authority to award compensatory education services, which was discussed at the pre-hearing conference, even though the parents' did not specifically ask for the relief in the due process hearing request (Hawaii Department of Education v. E.B., 45 IDELR 249 (District Court Hawaii (2006))).

6. The Court held that a hearing officer may not delegate his/her authority to award specific compensatory education services to the IEP Team. That is a hearing officer function (Board of Education of Fayette County v. L.M. 478 F.3d 307, 47 IDELR 122 (United States Court of Appeals, 6th Circuit (2007))).
7. The District Court ordered the IEP Team to meet to determine what special education services the student needed as a result of not being timely found eligible for special education. The Court of Appeals upheld this approach especially in light of the fact that the evidentiary record was not sufficient to permit the Court to make this judgment (Mr. and Mrs. I. v. Maine School Administrative District No. 55 480 F.3d 1, 47 IDELR 121 (United States Court of Appeals, 1st Circuit (2007))).

B. Hearing Officer Authority—Generally

1. According to OSEP, SEAs are required to establish systems ensuring all procedural safeguards regarding due process hearings are complied with. As a result of this obligation, states must set up a due process system which gives hearing officers the authority to order any relief necessary to ensure a student receives a FAPE. Nowhere in Part B does it state what specific remedies hearing officers must have at their disposal, therefore, state law controls. OSEP noted that SEAs must give hearing officers the power to order any necessary relief, and ensure the implementation and enforcement of any hearing officer's order (Letter to Armstrong, 28 IDELR 303. (OSEP (1997))).
2. The granting of course credit and expending notations of suspensions from a student's permanent school record are forms of relief which can be granted by a hearing officer at due process (Prins v. Independent School District No. 761, Owatonna, Minnesota, 23 IDELR 544, (D. Minn. (1995))).

3. The Court overturned the hearing officer's decision which included, in part, an order for the school district to establish and implement a K-12 curriculum addressing disability awareness and sensitivity. The Court noted that this was beyond the scope of authority for a due process hearing officer (Alex R. v. Forrestville Valley Community Unit School District #221, 375 F. 3d 603 (U.S. Court of Appeals, 7th Circuit (2004)).

C. Mediation/Settlement Agreements

1. A voluntary mediation agreement is a binding contract which is enforceable. The Court expressed concern that a decision which would allow a party to void a settlement agreement when it becomes unpalatable would work a significant deterrence contrary to a federal policy of encouraging settlement (D.R. v. East Brunswick Board of Education 109 F.3d 896, 25 IDELR 734 (United States Court of Appeals, 3rd Circuit (1997))).
2. The Court held that a hearing officer has the authority to enforce the terms of a voluntary settlement agreement. In so holding, the Court affirmed the decision of the hearing officer not to hear issues previously resolved through mediation. The hearing officer found that the terms of the mediation agreement were controlling since it stated the agreement "is in full and final settlement of all issues which were raised or could have been raised in a due process hearing" for the school year in question (Mr. J. v. West Hartford Board of Education 32 IDELR 202 (D. CT (2000))).
3. The Court affirmed the ALJ's dismissal of a due process hearing involving the enforcement of a voluntary settlement agreement. The Court held it is a court, not a special education hearing officer, that properly should hear the contractual dispute (School Board of Lee County v. M.C. (Florida District Court of Appeal, 2nd District (2001))).
4. The Court affirmed the ALJ's dismissal of a due process complaint based on a previous settlement agreement which released the school from "any and all claims whether known or unknown" related to the student's education. The Court found no error in the hearing officer's examination of the terms of the settlement agreement to determine whether the parent's due process complaint claims were

moot and therefore outside of his jurisdiction (Linda P. v. State of Hawaii, Department of Education 46 IDELR 73 (D.Ct. HI (2006))).

D. Attorney's Fees

1. Parents who prevail in a due process hearing are not entitled to recover the costs of experts or consultants under the IDEA's attorney's fees provision. The majority opinion rejected the argument that the legislative history of the IDEA supported such award basing its analysis on what it termed the "unambiguous text of the IDEA" (Arlington Central School District Board of Education v. Murphy, 126 S.Ct. 2455, 45 IDELR 267 (United States Supreme Court (2006))).

2. The Court, in denying the parents' attorney's fees, held that a private settlement which was addressed through several pre-hearing orders issued by the hearing officer did not provide sufficient "judicial imprimatur" (as required by the Supreme Court in Buckhannon) to make them prevailing parties.

The hearing officer simply issued the order memorializing an agreement between the parties as an effort to keep settlement negotiations moving. The hearing officer never reviewed the merits of the settlement (Smith v. Fitchburg, 401 F.3d 16, 43 IDELR 28 (United States Court of Appeals, 1st Circuit (2005))).

3. The hearing officer's dismissal order which directed the school district to comply with the terms of the settlement agreement (which was incorporated into the order) and signed by the parties and the hearing officer resulted in the parents being deemed "prevailing parties" under the IDEA's attorney's fees provision.

The fact that the parties were required to comply with the order, which required full implementation of the settlement agreement, was a key factor in the Court's analysis (A.R. v. New York City Department of Education, et al., 407 F.3d 65, 43 IDELR 108 (United States Court of Appeals, 2nd Circuit (2005))).

4. The parties reached a private settlement after the due process hearing was requested. The Court, in denying attorney's fees to the parents, held that since the settlement agreement lacked judicial approval, the

parents cannot be deemed to be prevailing parties (P.N. v. Seattle, 458 F.3d. 983, 46 IDELR 61 (2006) Amended Opinion 107 LRP 5909 (2007) (United States Court of Appeals, 9th Circuit).

5. The Court applied the standard “degree of success” to determine whether parents who prevail in a due process hearing should be awarded full or partial reimbursement of their attorney’s fees (Aguirre v. Los Angeles School District, 461 F3d 1114, 46 IDELR 91 (United States Court of Appeals, 9th Circuit (2006))).
6. The Court held that a parent who is also an attorney is not entitled to be reimbursed attorney’s fees for representing their child in an IDEA proceeding (Ford v. Long Beach Unified School District, 461 F3d. 1087, 46 IDELR 92 (United States Court of Appeals, 9th Circuit (2006))).

E. Hearing Officer Liability

1. The parents initiated a lawsuit against the State Department of Education, State Superintendent, and the Due Process Hearing Officer alleging, in part, that their IDEA due process hearing rights were violated. The parent’s claim was based on the refusal of the hearing officer to recuse himself, as requested by both parties, due to his health problems and the subsequent failure of the SEA to remove him.

The Court held that there was no evidence to conclude that the hearing officer was disqualified due to bias, prejudice or conflict of interest (A.D. v. Clay Community Schools, Indiana Department of Education et. al., 43 IDELR 192 (S.D. IN (2005))).

2. The parents of a student with a disability brought a Section 1983 action against the three hearing officer members of the state’s due process hearing panel alleging violations of his due process rights in the hearing. The allegations include an insufficient opportunity for cross-examination, prejudicial limits on expert testimony, no discovery and the inaccurate transcript of the hearing.

The Court refused to dismiss the claims holding that the Hearing Officers were not entitled to absolute or qualified immunity. Since the issue of immunity is in part a factual inquiry, the Court found the

defendants have failed to present an evidentiary record to support the application of immunity (Green v. Cape Henlopen School District, et al., 44 IDELR 210 (Dist. Ct. Delaware (2005))).

F. Miscellaneous Hearing Issues

1. The Court of Appeals found that the District Court did not apply the proper standard in reviewing a decision from a due process hearing officer. The Court must give due weight to the hearing officer's findings of fact. If the findings are thorough, the Court must explain why it will not follow them. In this matter, the hearing officer's decision was thorough with numerous citations and references making it clear that they gave careful consideration of all of the evidence. The case was remanded to the District Court to make required findings under the proper standard (County School Board of Henrico County v. Z.P., 399 F.3d 298, 42 IDELR 229 (United States Court of Appeals, 4th Circuit (2005))).

2. The school district denied the parent's request for a due process hearing since the district was misled regarding their legal residency status. The school district pursued residency issues in a separate state court action.

The Court of Appeals upheld the dismissal of the parent's IDEA claims that they were denied due process. The Court found that the parents failed to allege any connection between the denial of the due process hearing and any substantive harm to the students (D.L. v. Unified School District #497, 392 F.3d 1223, 42 IDELR 139 (United States Court of Appeals, 10th Circuit (2004))).

3. Based on the failure of the school district to implement two hearing officer decisions regarding FAPE for the student, the Court ordered an award of compensatory education. The Court directed the school district to convene an IEP Team meeting within 20 days to deter the appropriate scope and amount of compensatory services. Further, the Court stated that the school would be fined up to \$5,000 per day for failure to do so (Blackman v. District of Columbia, 43 IDELR 195 (D. D.C. (2005))).

4. The Court held that a parent's expert has the right under the IDEA to observe a placement which was proposed by the school district

which was the subject of a due process hearing. In so doing, the Court overturned the hearing officer's decision which was based on a state law allowing such observation only as part of a parent's Independent Educational Evaluation of the child (Benjamin G. v. Special Education Hearing Office, 44 IDELR 7 (Cal. Ct. of Appeals (2005))).

XVII. Questions/Comments/Conclusions:

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.