



*The Academy for*

IDEA ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS

*Seattle University School of Law*

10<sup>th</sup> National Academy for IDEA  
Administrative Law Judges and Hearing Officers

**Basics of Special Education and Dispute Resolution**

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*Tuesday, July 12, 2011*

Seattle University School of Law

July 12-15, 2011

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# Contents

## Basics of Special Education and Dispute Resolution

Tuesday, July 12, 2011

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# Faculty

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## Basics of Special Education and Dispute Resolution

Barbara Bateman, Ph.D., J.D.  
Professor Emeritus of Special Education  
University of Oregon

32223 DeBerry Rd.

Creswell, OR 97426-9717

(541) 895-3858

[bbateman000@centurytel.net](mailto:bbateman000@centurytel.net)

Barbara D. Bateman, J.D., Ph.D., is a nationally recognized leader in special education law. In collaboration with Dr. Samuel Kirk, she helped to distinguish the category of learning disabilities in the 1960s and to develop the special services that would later serve this population.

Dr. Bateman has 40 years of experience as an educator, author, and researcher, and she has written more than 100 books, monographs, book chapters, and articles on special education and legal issues. She has long been associated with the Learning Disabilities Association and has served as an advocate for parents of children receiving special education services, representing them in due process hearings and as a consultant.

Dr. Bateman is Professor Emeritus of Special Education at the University of Oregon, Eugene. She has consulted with and assisted school districts, state departments, and individuals throughout the United States. Her most recent publication, *Better IEPs: How to Develop Legally Correct and Educationally Useful Programs*, updates the IEP process to accommodate the changes under the 1997 IDEA Amendments. Bateman also authored *IEP Success* and *Legal Issues in School Transportation*.

Deusdedi Merced

Deusdedi Merced, P.C.

923 Saw Mill River Road, #277

Ardsey, NY 10502

(914) 231-9370

[dmerced@me.com](mailto:dmerced@me.com)

Deusdedi Merced is an accomplished litigator who represented the nation's largest school district and hundreds of parents of children with disabilities. Presently, Mr. Merced is a hearing officer in the District of Columbia where he has presided in over 150 due process hearings in less than two years. He has been recognized for his stellar performance as a hearing officer, and was instrumental in developing standard practices for hearing officers and special education attorneys in D.C. Mr. Merced also served as a consultant to several private schools on legal issues relating to children with special needs and has been a featured speaker at numerous special education

Deusdedi Merced, P.C. functions to provide agencies and/or attorneys with consulting services on all matters related to special education, including, but not limited to, implementing, and complying with, IDEA, Section 504, ADA and NCLB; provide compliance and policy reviews; offer professional development and/or training presentations to parents, staff, or lawyers; serve as special counsel in impact or class action suits; and, develop parent engagement and involvement programs and policies.

Stephen A. Rosenbaum  
Law Offices of Michael S. Sorgen (Of Counsel)

240 Stockton Street, 9th Floor

San Francisco, CA 94108

(510) 644-3971

[srosenbaum@law.berkeley.edu](mailto:srosenbaum@law.berkeley.edu)

Stephen Rosenbaum has been a Lecturer at his alma mater, University of California, Berkeley School of Law, since 1988, where he teaches professional skills and other courses in mental health law, policy and advocacy, social justice practice, civil rights litigation, cultural competency and student rights. He has also taught disability rights law at Stanford University and administrative law at Golden Gate and J.F. Kennedy Schools of Law. At Berkeley Law, Steve has served as an advisor to the Advocates for Youth Justice, Campus Rights Project and Napa Advocacy Project student organizations. He is also Of Counsel to the Law Offices of Michael Sorgen.

Steve has conducted numerous workshops for lawyers, administrative law judges, school professionals and parents and served as an expert reviewer for Project SEAT (Special Education Advocate Training). He has written journal articles on the subjects of special education, disability, lay advocacy, legal education and international human rights. In 2011, he conducted research for Syracuse University's Burton Blatt Institute and in 2008 was a Visiting Scholar at the University of Auckland (NZ) School of Critical Studies in Education.

Steve has served on special education advisory committees to the California Office of Administrative Hearings and the Berkeley unified district, where his three children attended school, including a son with intellectual and physical disabilities. He is a former staff attorney with California's protection and advocacy agency and Disability Rights and Education & Defense Fund. He has represented hundreds of clients in mediations, administrative hearings and class action litigation.

Julie K. Waterstone  
Director of the Children's Rights Clinic  
Associate Clinical Professor of Law

Southwestern Law School

3050 Wilshire Boulevard

Los Angeles, CA 90010

(213) 738-5727

[jwaterstone@swlaw.edu](mailto:jwaterstone@swlaw.edu)

Professor Julie Waterstone returned to her native Southern California after graduation from Northwestern University Law School and spent the next three years working as a civil litigator at Milbank, Tweed, Hadley & McCloy in Los Angeles. But because of desire to pursue public interest law full time, Professor Waterstone accepted a position with the Civil Legal Clinic at the University of Mississippi School of Law. There, as a clinical professor, she created and developed the Child Advocacy Clinic, supervised students and taught the accompanying clinic seminar. Three years later, she once again returned to Los Angeles where she joined Public Counsel as a staff attorney, litigating special education cases and training lawyers and law students as pro bono special education advocates.

In Fall 2007, Professor Waterstone was appointed to the Southwestern faculty to establish and direct the law school's new Children's Rights Clinic. She works closely with students to hone their lawyering skills in the context of live client representation. Her students represent youth in special education and school discipline cases.

Professor Waterstone also maintains an active role in the community. She is a member of the Dignity in Schools Campaign, on the advisory board of DREAMS and has served on a number of other boards, including the Executive Board of the Mississippi chapter of the American Civil Liberties Union, the Advisory Board of the Southern Juvenile Defender Center, and the Legal Advisory Committee of the Anti-Defamation League of Los Angeles.



TAB 1

# An Introduction to the Special Education Process

*The Basics: Child Find to Due Process*

Presenter: Stephen A. Rosenbaum

July 2011

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## Objectives of This Presentation

- Why and how of special education law
- Overview of basic concepts and procedures
- Key concepts
- Some areas of uncertainty

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## Why Special Education Law?

### A Brief Look at History

- Education in U.S. : state v. federal interaction
- States usually denied education to disabled based on inability to benefit
- Traditional view of persons with disabilities  
*Buck v. Bell, 274 U.S. 200 (1927)*, per Holmes:  
"Three generations of imbeciles are enough."

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## Landmark Caselaw

### The Judicial Precursors to Legislation

- Federal legislation rooted in desegregation cases and two class actions concerning persons with disabilities
  - *Brown v. Board of Education (1954)*: Separate settings are inherently unequal
  - *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania (1972)*
  - *Mills v. Board of Education of the District of Columbia (1972)*
- Julie Waterhouse will tell you more

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## Landmark Legislation

### The Legislative Precursors to IDEA

- PL 89-10 The Elementary and Secondary Education Act of 1965
- PL 89-313 The Elementary and Secondary Education Amendments of 1965
- PL 89-750 The Elementary and Secondary Education Amendments of 1966
- PL 93-112 The Vocational Rehabilitation Act of 1973
- PL 93-380 The Education Amendments of 1974
- PL 94-142 The Education for All Handicapped Children Act of 1975

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## How Education Law Is Made

### ... the Federal-State "dance"

- Congress enacted EAHCA
  - grant in aid statute + civil rights
- But "education" is a State concern
  - Precluding Federal resolution of systemic problems
- Leaving states to "fill in the blanks" to their individual benefit
  - Cf. variety of state hearing systems

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## Why Federal Action Was Necessary

### Congressional Statement of Findings/Purpose

- Here's what Congress said (**original** §1400(b)):
  1. There are more than 8 million children with disabilities in the U.S. today;
  2. The special education needs of such children are not being fully met;
  3. More than half of these children do not receive appropriate educational services that would enable them to have full equality of opportunity;
  4. One million of these children are excluded entirely from the public school system and will not go through the educational process with their peers;

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**Why Federal Action Was Necessary**  
 Congressional Statement of Findings/Purpose

5. There are many children with participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;
6. Families are forced to find services outside the public school system, often at great distance from their residence and at their own expense, because of a lack of adequate services within the public school system;

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**Why Federal Action Was Necessary**  
 Congressional Statement of Findings/Purpose

7. There are many children with participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;
8. Families are forced to find services outside the public school system, often at great distance from their residence and at their own expense, because of a lack of adequate services within the public school system;

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**Why Federal Action Was Necessary**  
 Congressional Statement of Findings/Purpose

9. Developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, schools can and will provide effective special education and related services to meet the needs of children with disabilities;
10. Schools have a responsibility to provide education for all children with disabilities, present financial resources are inadequate to meet the special education needs of children with disabilities;

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## Why Federal Action Was Necessary

### Congressional Statement of Findings/Purpose

11. It is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

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## Current Structure of IDEA

### We Concentrate on Parts A & B

- Part A: General Provisions, Definitions and Other Issues
- Part B: Assistance for Education of All Children with Disabilities
- Part C: Infants and Toddlers with Disabilities
- Part D. National Activities to Improve Education of Children with Disabilities

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## Key Definitions

### 34 CFR Subpart A (regulations)

- § 300.8 Child with a disability
- § 300.17 Free appropriate public education
- § 300.22 Individualized education program
- § 300.34 Related services
- § 300.39 Special education
- § 300.43 Transition services

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### Key Concepts

34 CFR Subpart s B-F (regulations)

- § 300.101 - 102 Free appropriate public education
- § 300.114 - 118 Least restrictive environment
- § 300.301 - 306 Evaluations
- § 300.320 - 328 Individualized education programs
- § 300.500 - 518 Procedural safeguards
- § 300.530 - 536 Discipline procedures

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### The Major Procedural Steps

What Can/Does Happen

- Child find/Identification
- Testing and evaluation
- Eligibility
- IEP
- Implementation/Monitoring
- Dispute resolution

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### Child Find/Identification

You can't educate them if you don't know who they are

- Identify and evaluate all children with disabilities in state/district
  - Includes private school/homeless/hospitalized/incarcerated children
- Use PSAs, school newsletters, newspaper ads
- Screening used as first step
  - "Evaluate" doesn't mean formal evaluation
- Objective: eligibility determination

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### Child Find/Identification

Eligibility and "child with a disability"

- Under IDEA, "child with a disability" means:
  - Evaluated per IDEA procedures
  - Has one/more of disabilities defined in statute
  - Needs special education/related services because of disability
- Screening used as first step
  - "Evaluate" doesn't mean formal evaluation
- Objective: eligibility determination

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### Child Find/Identification

Are There Any Limitations?

- Severability of disability: "zero reject"
- Location/basic health not barrier
- Behavior: no (special provisions for this)
- "Aging out": beyond age limit set by state law
- Graduation from secondary school
- Need for "education": the educational needs of a child with a disabling condition include **non-academic** as well as academic areas (OSEP 1990)

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### Testing and Evaluation

What, exactly, is the problem?

- No initial provision of services before evaluation
- Purposes of the evaluation
  - Eligibility
  - Nature and extent of all needs, not just those linked to primary disability
- Include functional/developmental information re involvement in general curriculum

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**Testing and Evaluation**  
 Frequency of evaluation/re-evaluation

- At any time if:
  - School determines it is warranted
  - Parent/teacher requests it
- Not more than once per year unless school/parent agree it is needed
- At least once every three years unless school/parent agree it is unnecessary

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**Testing and Evaluation**  
 Notice and consent ( 300.300, 300.503)

- Prior notice to and consent by parent for initial evaluation or initial placement
  - "Reasonable" efforts to obtain consent required
  - Different rules for child who is ward of state
  - School may use dispute resolution procedures where no response
- Notice should be specific
  - §300.503(b)(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

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**Testing and Evaluation**  
 Other notice and consent

- Prior parent consent NOT required for:
  - Review of existing data
  - Tests administered to all children (general screenings)
- Parent may refuse consent to specific services
- School may not override lack of consent:
  - student home-schooled
  - privately placed at parent expense

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**Testing and Evaluation**  
 Timelines ( 300.301)

- Initial evaluation within 60 days from receipt of request
  - State may establish earlier date
- Timeline inapplicable if:
  - Parent does not produce child
  - Child is subsequently enrolled in another school district and evaluation there will meet timeline

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**Testing and Evaluation**  
 Evaluation criteria

- tests/measures administered in child's native language
- valid for the specific purpose used
- administered by trained personnel
- tailored to assess specific areas of educational need
- selected/administered to ensure it measures what it purports to measure
- not used as a single procedure/sole criterion
- assess in all areas of suspected disability

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**Testing and Evaluation**  
 Independent Educational Evaluation ( 300.502)

- Parents may obtain own evaluation (IEE) at their expense at any time
- Parents may ask school to pay IEE; school must either:
  - Pay for independent evaluation, OR
  - File for due process hearing to show its evaluation is appropriate
- School may require same criteria for IEE as used for its own evaluation (qualifications; location)
- IEP team required to "consider" IEE results

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### Eligibility Determination

What, who, and how

- What: sets “primary” disability (eligibility) and identifies any other disabilities requiring special education and related services
- Who: one/more qualified professionals and parents
- How: consensus based on evaluation (and “considers” other materials)

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### Eligibility Determination

Other factors that may preclude eligibility

- No IDEA eligibility if “determinant factor” is:
  - Lack of appropriate instruction in reading (*cf.* ESEA, §1208(3))
  - Lack of appropriate math instruction
  - Limited English proficiency
- No IDEA eligibility if child needs only related service (not special education)

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### Eligibility Determination

Additional procedures for SLD

- More detailed procedures for identification, eligibility for SLD
- Existence of SLD (§§300.307, 300.308)
  - Can’t require severe discrepancy
  - Permit use of RTI
  - Permit other research-based intervention
- Additional members of eligibility team (§300.308)
- Stricter observation, documentation (§300.310-311)

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**Individualized Education Program**  
Here's what we're going to try . . .

- IEP is agreement about student's needs, what program will be provided and how to determine whether it's working
- Criterion for success: is student "making progress," aka FAPE
- Process is consensual
- Regs. §§300.320-300.328

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**Individualized Education Program**  
Who's involved – IEP team members

- Minimum IEP team members
  - Parents
  - At least one regular education teacher
  - Child's special education teacher
  - District supervisor
  - Evaluation "interpreter" (instructional import)
  - "other individuals" with knowledge of child
  - Child (if appropriate)

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**Individualized Education Program**  
Other possible IEP team members

- Related service providers (e.g., transportation)
- Personnel from other agency providers (for transition services)
- Behavior specialists
- Private school representatives
- Interpreters (LEP/deaf)

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**Individualized Education Program**  
IEP attendance not required/excused

- School participant excused if parent/school agree in writing that service is not being modified/discussed
- Parents/school may agree to let school participant submit input in writing

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**Individualized Education Program**  
IEP contents: minimum

- Present levels of performance (PLOPs)
- Special education and related services (SPED & RS), based on peer-reviewed research
- Measurable annual goals
- Why removal from regular class required
- Modifications re state/district-wide assessment
- Term of IEP; frequency, location, duration of RS

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**Individualized Education Program**  
IEP contents: optional

- Transition plan and services (16 and older)
- Assistive technology needs and services
- Extended school year/summer school
- Behavior modification plan
- Language/communication needs (LEP/blind/deaf)

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**Related Services**  
 “required to assist a child . . . to benefit from special education”

- Types of services are virtually inexhaustible; regulation is illustrative
- May include services to parents
- Includes many services of “medical” nature, depending upon provider
- Services required across entire spectrum of possible educational placement

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**Individualized Education Program**  
 Procedural requirements

- Must be developed within 30 calendar days following evaluation
- Should be implemented “as soon as possible”
- Must be reviewed/revised at least annually
- Must be provided to parents, all service providers
- School does not guarantee student will achieve IEP goals, but must make good faith effort

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**Educational Placement**  
 Where will child attend school?

- Placement typically made by IEP team
- Must be in “least restrictive environment” (LRE)
  - This does not necessarily mean general education classroom
- Must be “individualized,” that is: not “the placement we send all kids with . . .”  
 [See diagram of placement process]

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## Educational Placement

### Least Restrictive Environment ( 300.114)

- Placement typically made by IEP team
- Education with children who are nondisabled to the maximum extent appropriate
- Removal “only if the nature or severity of the disability is such that education in regular cases with the use of supplementary aids and services cannot be achieved satisfactorily”

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## Educational Placement

### Least Restrictive Environment ( 300.114, et seq.)

- Continuum of alternative placements required
  - Regular classes
  - Special classes
  - Special schools
  - Home instruction
  - Instruction in hospitals and institutions
- Is as close as possible to the child’s home
- No removal from regular classroom because of needed modifications in general curriculum

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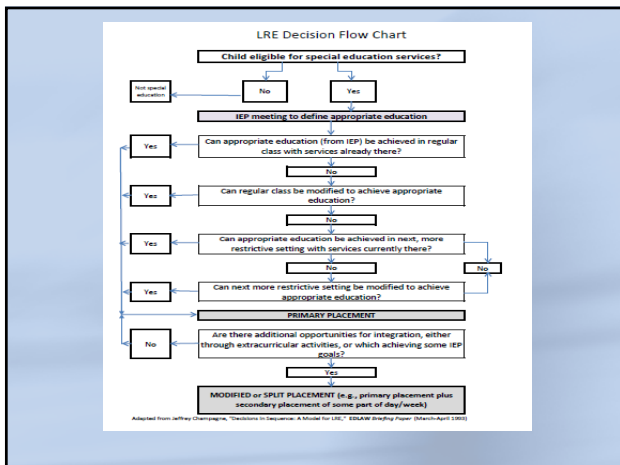
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### Implementation/Monitoring

So how's that working for you?

- IDEA requires reports by LEAs >> SEAs >> Feds for monitoring of compliance
  - We won't spend time on this unless you choose it for your paper
- States required to have system for filing of complaints against LEA
  - Specified timelines for filing, resolution
  - Effectiveness has varied by time, SEA

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### Dispute Resolution

Mediation ( 300.506)

- Paid by SEA and available for any problem
- Must be voluntary
- Conducted by qualified & impartial mediator
  - Must be trained in mediation
- Must offer opportunity to discuss benefits of mediation with "disinterested party"
- Maintain list of qualified mediators

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### Due Process Hearings

Can't we all just get along?

- Complaint may be filed regarding any aspect of child's educational program
  - Overwhelming majority filed by parents
- Child's educational placement maintained
- Impartial hearing officer (IHO) holds "trial"
  - Wide state variation in hearing systems
- IHO issues written decision
- Decision is appealable (administrative/civil)

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### Due Process Hearings

Post-filing, pre-hearing steps

- **Prior Written Notice** (§300.508(e))
  - LEA has opportunity to cure violation of §300.503
- **Sufficiency Motion** (§300.508(d))
  - Does complaint adequately describe problem or remedy
- **Resolution Process** (§300.510)
  - Last ditch effort to avoid formal hearing

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### Due Process Hearings

Quick look at structural variations

- Can be either one or two tier
  - Most states now provide one tier
- About 50/50 **Central Panel v. Contract IHOs**
  - Central panel = ALJs
- No uniform system of hearing rules
- Minimal training requirements
  - Know law, how to hold hearing, write decision

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### Due Process Hearings

Basic hearing rights ( 300.512)

- Counsel or person with special knowledge
  - State law governs representation by lay advocates
- Present evidence, cross-examine, compel attendance of witnesses
- Five-day disclosure rule (“discovery”)
- Written/electronic verbatim record
- Written/electronic decision

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### Due Process Hearings

Other procedural considerations

- Hearing closed unless parent opts otherwise
- Hearing reasonably convenient for parents
- Decision required within 45 days of filing
  - Plus additional 30 days for 2d tier review
- Extensions for specific periods of time by IHO
- Hearing officer cannot award attorneys' fees
- Appealable to state or federal court

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### Discipline: science vs. belief


What science tells us

Why do most 16-year-olds  
drive like they're  
*missing a part of their brain?*

— BECAUSE THEY ARE. —



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### Discipline: science vs. belief

What we believe: behavior is volitional

- Suspensions for up to 10 school days regardless
- Alternative placement for MORE than 10 school days is considered "change of placement"
  - Must convene IEP team for manifestation determination and new placement
- Weapons/drugs/infliction of serious bodily harm are different
- "Dangerous" student (likely to result in injury) is different

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TAB 2

# Testing: Theory, Practice and IDEA

Barb Bateman, Ph.D., J.D.  
bbateman000@centurytel.net

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## I. Introduction to Testing

### A. Terminology

1. Assessment; evaluation
2. Testing and other data sources

### B. IDEA contexts in which testing is important

1. Referral; screening (seldom an issue in hearings)
2. Eligibility (classification)
3. Program Planning (IEP development: Performance levels, services, goals)
4. Progress Assessment (can be a major factor in FAPE, as well as in IEP revisions)

### C. Truths about Testing

1. Test scores always contain error. "True" scores can be estimated only, never known.
2. Error can occur in test selection, administration, scoring, recording, interpreting, etc.
3. IDEA does not allow reliance on cut-off points or mathematical formulas over professional judgment.
4. To use norms meaningfully we must be able to assume the normative group shares acculturation, experimental background, stimulus-response capabilities and more with the subject being tested.
5. Tests inform us about present behavior; we can only infer future behavior.
6. Tests lose their power to discriminate near the extreme scores.

## II. Two major Types of Tests

### A. Norm referenced (N-R)

### B. Criterion referenced (CRT)

**III. Important terms**

**A. Validity - extent to which test measures what it purports to measure.**

**B. Reliability - consistency, accuracy of measurement**

**C. Correlation Coefficient (r) = % of variability that is true.**

Recommended = .90+

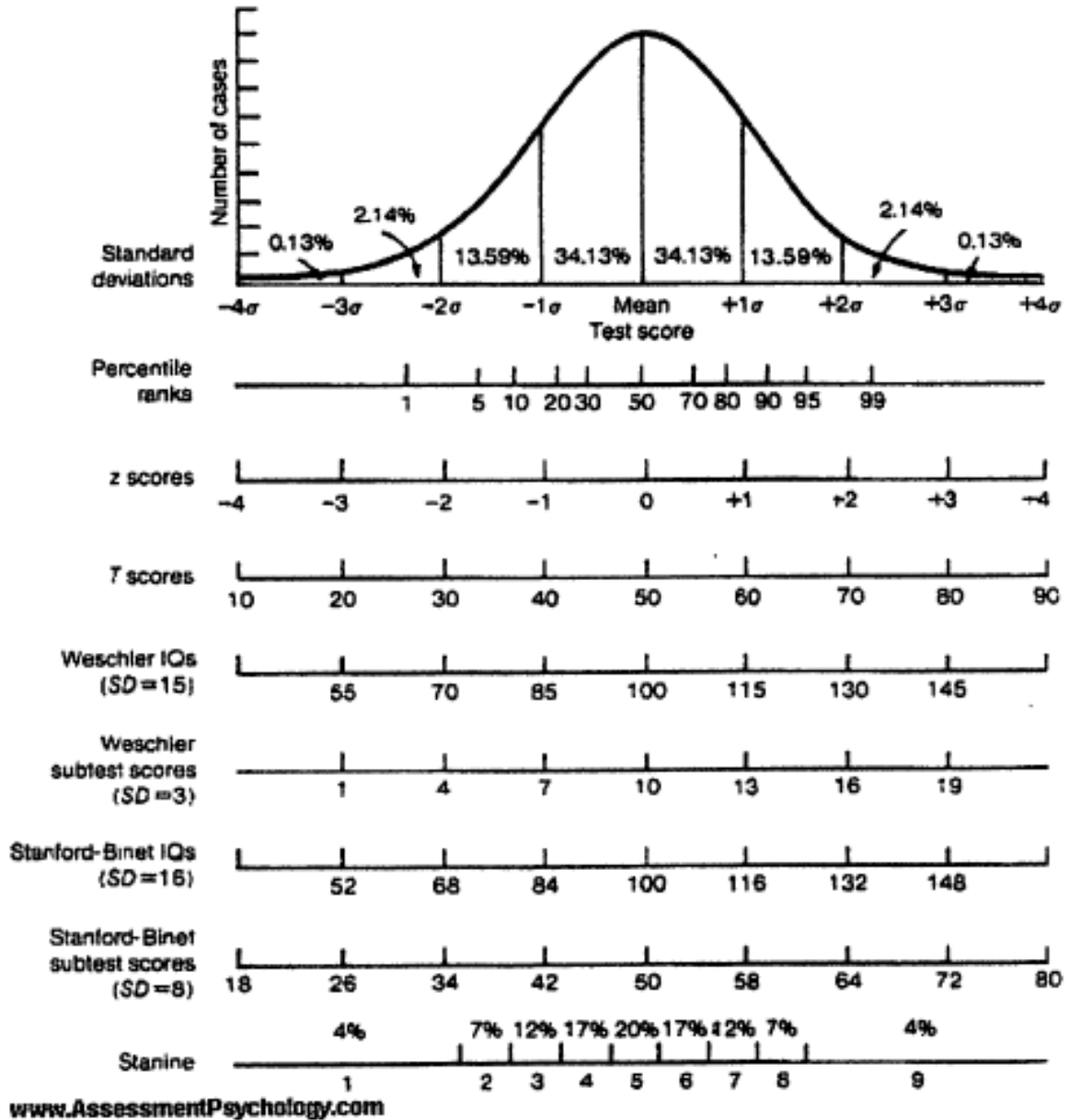
**D.  $1 - r$  = % of variability that is due to error.**

**IV. Types of Scores for N-R tests****A. Developmental**

1. Age, grade equivalents
2. Developmental quotients, e.g.,  $IQ = (MA/CA) \times 100$

**B. Relative Standing**

1. Percentile
2. Standard Scores (SS, z, T)
3. Deviation IQ



**V. Scores for CRTs (see AIMSweb, DIBELS) - - Compare student performance to an absolute, objective standard, i.e., criterion**

- A. Single-skill scores (pass-fail; right-wrong - - perhaps with some multiple points along continuum)**
- B. Multiple-skill scores (e.g., oral reading, division problems) # of correct/total or # correct/time (ORF = WCPM)**
- C. % correct**

Accuracy = # correct / # possible or

# correct / # attempted

- E. Verbal labels, e.g., 90% = mastery**

Instructional levels = frustration (85%); instructional = (85-95%);

independent = > 95%

**VI. Other "scores"**

- A. Global Ratings (Rubrics) - rating on a continuum or on a dichotomous scale. Usually unsatisfactory because:**

1. Not based on systematic analysis or quantification of performance, but on "impressions"
2. Little consistency between/among raters

- B. "Authentic Assessment": Portfolios**

1. Subjective, not objective.

**VII. "Purists" (Statisticians) leave us with:**

- A. Percentiles**
- B. Standard Scores**
- C. CRT with norms which allow comparison with others.**



## AIMSweb Norms

We are using the **50<sup>th</sup>ile** as cut off scores when  
conducting survey level assessments.

<b>AIMSweb® Growth Table Mathematics Computation Multi-Year Aggregate 2006-2007 School Year</b>								
Grade	Percentile	Fall		Winter		Spring		ROI
		Num	CD	Num	CD	Num	CD	
1	90		13		22		29	0.4
	75		8		16		20	0.3
	50		5		11		14	0.3
	25	4675	2	9635	7	10752	10	0.2
	10		0		4		6	0.2
	Mean		6		12		16	
	StdDev		11		8		10	
	90		20		36		41	0.6
2	75		14		30		30	0.4
	50		10		23		22	0.3
	25	8787	8	9879	16	10470	16	0.2
	10		5		10		10	0.1
	Mean		12		23		24	
	StdDev		8		11		13	
	90		26		38		46	0.6
	75		21		31		37	0.4
3	50		16		25		29	0.4
	25	7886	12	8362	18	8735	21	0.3
	10		10		13		15	0.1
	Mean		17		26		30	
	StdDev		8		12		13	
	90		62		74		86	0.7
	75		46		59		71	0.7
	50	8293	35	8735	44	8999	53	0.5
4	25		24		32		39	0.4
	10		16		22		28	0.3



DIBELS Benchmark Goals  
Three Assessment Periods Per Year

FIRST GRADE

DIBELS Measure	Beginning of Year Month 1 - 3		Middle of Year Month 4 - 6		End of Year Month 7 - 10	
	Scores	Status	Scores	Status	Scores	Status
Letter Naming Fluency (LNF)	0 - 24 25 - 36 37 and above	At risk Some risk Low risk	Not administered during this assessment period		Not administered during this assessment period	
Phoneme Segmentation Fluency (PSF)	0 - 9 10 - 34 35 and above	Deficit Emerging Established	0 - 9 10 - 34 35 and above	Deficit Emerging Established	0 - 9 10 - 34 35 and above	Deficit Emerging Established
Nonsense Word Fluency (NWF-CLS)	0 - 12 13 - 23 24 and above	At risk Some risk Low risk	0 - 29 30 - 49 50 and above	Deficit Emerging Established	0 - 29 30 - 49 50 and above	Deficit Emerging Established
Oral Reading Fluency (ORF)	Not administered during this assessment period		0 - 7 8 - 19 20 and above	At risk Some risk Low risk	0 - 19 20 - 39 40 and above	At risk Some risk Low risk
Retell Fluency (RTF)	Not administered during this assessment period		BENCHMARK GOALS FOR THIS MEASURE HAVE NOT YET BEEN ESTABLISHED. Preliminary evidence indicates that for students to be on track with comprehension they should meet both of the following criteria: 1) meet the Oral Reading Fluency benchmark goal and 2) have a retell score of at least 25% of their Oral Reading Fluency score.			
Word Use Fluency (WUF)	BENCHMARK GOALS FOR THIS MEASURE HAVE NOT BEEN ESTABLISHED. Tentatively, students in the lowest 20 percent of a school district using local norms should be considered at risk for poor language and reading outcomes, and those between the 20th percentile and 40th percentile should be considered at some risk.					

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Revision Date: July-31-2008



DIBELS Benchmark Goals  
Three Assessment Periods Per Year

FOURTH GRADE

DIBELS Measure	Beginning of Year Month 1 - 3		Middle of Year Month 4 - 6		End of Year Month 7 - 10	
	Scores	Status	Scores	Status	Scores	Status
DIBELS Oral Reading Fluency (ORF)	0 - 70 71 - 92 93 and above	At risk Some risk Low risk	0 - 82 83 - 104 105 and above	At risk Some risk Low risk	0 - 95 96 - 117 118 and above	At risk Some risk Low risk
DIBELS Retell Fluency (RTF)	BENCHMARK GOALS FOR THIS MEASURE HAVE NOT BEEN ESTABLISHED.*					

FIFTH GRADE

DIBELS Measure	Beginning of Year Month 1 - 3		Middle of Year Month 4 - 6		End of Year Month 7 - 10	
	Scores	Status	Scores	Status	Scores	Status
DIBELS Oral Reading Fluency (ORF)	0 - 80 81 - 103 104 and above	At risk Some risk Low risk	0 - 93 94 - 114 115 and above	At risk Some risk Low risk	0 - 102 103 - 123 124 and above	At risk Some risk Low risk
DIBELS Retell Fluency (RTF)	BENCHMARK GOALS FOR THIS MEASURE HAVE NOT BEEN ESTABLISHED.*					

SIXTH GRADE

DIBELS Measure	Beginning of Year Month 1 - 3		Middle of Year Month 4 - 6		End of Year Month 7 - 10	
	Scores	Status	Scores	Status	Scores	Status
DIBELS Oral Reading Fluency (ORF)	0 - 82 83 - 108 109 and above	At risk Some risk Low risk	0 - 98 99 - 119 120 and above	At risk Some risk Low risk	0 - 103 104 - 124 125 and above	At risk Some risk Low risk
DIBELS Retell Fluency (RTF)	BENCHMARK GOALS FOR THIS MEASURE HAVE NOT BEEN ESTABLISHED.*					

\*Preliminary evidence indicates that children's retell scores should typically be about 50% of their oral reading fluency score, and that it is unusual for children reading more than 40 words per minute to have a retell score 25% or less than their oral reading fluency score. A retell score of less than 25% of the oral reading fluency score may indicate a problem with comprehension.

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**VIII. Issues in Eligibility****A. IDEA criteria for eligibility**

1. Disability as defined in §300.300(8); role of DSM-IV.
2. Must need special education.
3. Must have an adverse effect on educational performance (except for SLD, DD ages 3-9, multiple disabilities)

**B. The evaluation must meet all IDEA requirements (§300.301-311).**

1. Use a variety of sources
2. Not rely on any single source
3. Individual and cover all areas related to the suspected disability

**C. Parental notice and consent for the evaluation**

1. If parents refuse to consent...
2. If parents' request for an evaluation is vague or ambiguous ...

**D. Response to Intervention (Instruction) (RTI) in evaluation for eligibility.**

1. IDEA refers to RTI only once, that in the context of SLD eligibility, and not by name.
2. RTI is allowed when properly documented
3. Participation in RTI may not be allowed to delay a special education evaluation.

**E. Independent Educational Evaluation (IEE)**

1. Parents are entitled to an IEE at public expense if they disagree with the district's evaluation. However . . .
2. If the district establishes at a hearing that its evaluation was appropriate, then it need not pay for the IEE.
3. The IEE must meet certain requirements and, if it does, must be "considered" by the district.

**IX. Issues in Program Planning (PP)**

- A. Does the evaluation provide an adequate and appropriate foundation for PP?**
- B. Range and intensity of needed services** (see excerpts from Shaywitz, beginning next page)
- C. District's ability/willingness to insure that all appropriate services are available**

**X. Issues in Progress Assessment**

- A. (IEP) Seldom is there a measured, objective beginning point (Present levels of educational and functional performance) from which to assess progress.** (See "Jordan")
- B. Most IEP annual goals are not measurable, so it is impossible to determine whether each has been reached.** ("Aaron" and "Michelle")
- C. Most IEP "progress reports" are subjective and nearly meaningless** ("Aaron" and "Michelle")
- D. Sometimes progress is claimed based on student's grades and/or passing from grade to grade. Remember that grading usually has a large subjective component, and even more universally, special education students are graded on a different standard, typically totally subjective and based on perceived ability, effort or teacher's desire to bolster self-esteem. In the case of a student who has changed schools, remember that different policies may apply, e.g., no Fs may be given or X% of the grades will be As, etc. There are no recognized standards for passing into the next grade. Chronological age is usually a major factor, not achievement.**
- E. Few standardized instruments are sensitive to small change and most cannot be administered repeatedly. A growing number of school personnel are learning to use the curriculum-based, criterion-referenced procedures that are necessary.**
- F. Improper use of AEs and GEs and failure to understand that a student's percentile scores can decline from one testing to the next and yet the student may have made significant progress.**

*Intense instruction* Shaywitz, S. (2003) Overcoming Dyslexia  
 N.Y. - A.A. Knopf.

Reading instruction for the dyslexic reader must be delivered with great intensity. This reflects the dyslexic child's requirement for more instruction, which is more finely calibrated and more explicit. Keep in mind that he is behind his classmates and must make more progress than they do if he is to catch up. He must make a leap; if not, he will remain behind.

Effective reading instruction is responsive to the child's unique needs, to his actions, and to his behavior. His teacher must know to slow down, to repeat, to speed up or change the pace, to find an alternative explanation, and to stop. This means that his teacher must interact with him often enough to be able to detect change and to adjust her instruction accordingly.

Optimally, a child who is struggling to read should be in a group of three and no larger than four students, and he should receive this specialized reading instruction at least four, and preferably five, days a week. A larger group or less time will greatly undermine the possibilities of success.

#### *High-quality instruction*

High-quality instruction is provided by a highly qualified teacher. As my colleague Louisa Moats often says, "Teaching reading is rocket science," and a teacher's knowledge of how children learn to read as well as her experience teaching a specific program will ultimately determine the success of even the best reading programs.

Recent studies highlight the difference that a teacher can make in the overall success or failure of a reading program. In one instance the same instructional method was used in two studies but with two different outcomes. According to the researcher who carried out both investigations, the study in which the program was most effective "employed highly skilled teachers who all had a number of years' experience teaching children with reading disabilities," while the other study "employed

inexperienced teachers." This is a powerful argument for ensuring that anyone who takes on such a responsibility be a knowledgeable reading teacher or a teacher who has had recent training and experience in scientifically based methods for teaching reading. The primary job of teaching a dyslexic child to read should not be left to classroom aides, peer tutors, or teachers who do not possess the necessary knowledge or experience.

In another study, computers were used to teach reading-disabled children comprehension strategies. The children seemed to learn the specific approaches very well but did not use what they had learned. When their teacher was seated alongside them at the computer, the children applied the mastered strategy. When the children were alone at the computer, however, they did not apply the strategies they had been taught. So learning a strategy and using a strategy are not necessarily the same. Computers are not a substitute for a good teacher.

Teaching a dyslexic child to read is hard work. It is a highly interactive process rapidly resonating back and forth between teacher and child. Gaining the child's attention requires constant effort on the part of the teacher who must work diligently to involve the child, asking him questions or asking him to justify a response. ("Sam, I wonder why you would say that. Can you tell me?") Reading is extremely hard work for a dyslexic student, and a teacher's goal is to prevent him from drifting away and daydreaming. A teacher is constantly delivering the necessary knowledge while at the same time working hard to ensure that it is accompanied by a "hook" that she thinks will be meaningful to the child. She is constantly thinking about how to convey this information to the child.

### *Sufficient duration*

One of the most common errors in teaching a dyslexic child to read is to withdraw prematurely the instruction that seems to be working. A child who is reading accurately but not fluently at grade level still requires intensive reading instruction. A child with a reading disability who is not identified early may require as much as 150 to 300 hours of intensive instruction (at least ninety minutes a day for most school days over a one-to-three-year period) if he is going to close the reading gap between himself and his peers. And, of course, the longer identification and effective reading instruction are delayed, the longer the child will require to catch up.

### Notes

- A. E. Cunningham and K. E. Stanovich, "What Reading Does for the Mind," *American Educator* 22 (1999): 8–15.
- 258 Reading instruction for the dyslexic reader: Joseph K. Torgesen has made eloquent arguments concerning the necessity for instruction that is more intense, explicit, and supportive for children at risk for reading difficulties. These conditions demand teachers who are well trained and highly skilled in teaching reading. See J. K. Torgesen, "The Prevention of Reading Difficulties," *Journal of School Psychology* 40 (2002): 7–26.
- 258 As my colleague Louise L. C. Moats, *Teaching Reading Is Rocket Science* (Washington, D.C.: American Federation of Teachers, 1998).
- 258 Recent studies highlight: B. Wise and R. K. Olson, "Computer-Based Phonological Awareness and Reading Instruction," *Annals of Dyslexia* 45 (1995): 99–122. This work demonstrates the importance of teachers even in computer-based reading instruction. Also see J. K. Torgesen et al., "Intensive Remedial Instruction for Children with Severe Reading Disabilities: Immediate and Long-term Outcomes from Two Instructional Approaches," *Journal of Learning Disabilities* 34 (2001): 33–58.
- 258 According to the researcher: J. K. Torgesen, et al., "Intensive Remedial Instruction for Children with Severe Reading Disabilities: Immediate and Long-term Outcomes from Two Instructional Approaches," *Journal of Learning Disabilities* 34 (2001): 33–58, quote on pp. 53. Torgesen attributes the success of experienced teachers to their expertise in interacting with the child, helping him first to identify and then to develop strategies for correcting his reading errors.
- 259 In another study: B. Wise, J. King, and R. Olson, "Training Phonological Awareness with and Without Explicit Attention to Articulation," *Journal of Experimental Child Psychology* 72 (1999): 271–304.
- 259 One of the most common: B. Wise, J. King, and R. Olson, "Individual Differences in Gains from Computer-Assisted Remedial Reading," *Journal of Experimental Child Psychology* 77 (2000): 197–235, and J. Torgesen et al., "Intensive Remedial Instruction for Children with Severe Reading Disabilities: Immediate and Long-term Outcomes from Two Instructional Approaches," *Journal of Learning Disabilities* 34 (2001): 33–58. These works emphasize that longer durations of intervention may be necessary in order to provide sufficient opportunities for a child to practice reading and develop fluency.

Sally Shaywitz, M.D., is a neuroscientist, a professor of pediatrics at Yale, and codirector of the Yale Center for the Study of Learning and Attention. She is a member of the Institute of Medicine of the National Academy of Sciences, and of the National Reading Panel, mandated by Congress to determine the most effective reading programs. She has written for *Scientific American* and the *New York Times Magazine*. Dr. Shaywitz lectures throughout the country and appears regularly in national media. She lives with her husband in Woodbridge, Connecticut, and Martha's Vineyard, Massachusetts.

Student's Name: JORDAN [REDACTED]

<b>10. PRESENT LEVELS OF EDUCATIONAL PERFORMANCE</b>			
Reading Assessment Used: SDRT 4th Ed. - Purple Level (Gr 4.5 - 6.5)			
Assessment Date: [REDACTED]	Grade Equivalent: 3.8	Scaled Score: 643	
<b>Strengths:</b>			
Jordan is doing well in his present structured classroom environment. Jordan's art, physical education, math, spelling, and social studies are in the average to above average range. On his good days Jordan contributes information and ideas in class discussions, wants to do his best to learn, and works hard to do well.			
.....			
.....			
.....			
<b>Needs:</b>			
Jordan is at times slow to begin his work and then has difficulty staying on task. He needs to improve completing his daily classroom tasks and needs to be more consistent completing and handing in homework assignments. To address behavioral issues, Jordan will continue to receive School Counseling services, and School Based Behavioral Health individual counseling.			
.....			
.....			
.....			

<b>17. MEASURABLE ANNUAL GOAL: ①</b>
By May [REDACTED], Jordan will achieve at least average proficiency in all personal and social attitudes areas.

<b>18. HOW WILL PROGRESS TOWARD THE ANNUAL GOAL BE MEASURED:</b>
Observation; Records

<b>17. MEASURABLE ANNUAL GOAL: ②</b>
Jordan will increase skills necessary to maintain focus on tasks at hand

<b>18. HOW WILL PROGRESS TOWARD THE ANNUAL GOAL BE MEASURED:</b>
Other: Observation; records, and desk monitoring sheets



Annual Goal # \_\_\_\_\_ ESY Goal # \_\_\_\_\_  
To increase consumer/community participation skills

Special Educators

METHOD OF EVALUATION: 1 -Test  
 2 -Observation: records  
 3 -Daily work  
 4 -Other \_\_\_\_\_

EVALUATION CODE:  
 NP -No Progress: No gains/improvements  
 P -Progress: Shows gains/improvements  
 M -Mastered: Has learned the skills  
 NA -Not Applicable: Not yet covered

Short-Term Objectives	Method of Evaluation	Progress Report				
		Date: 11/99 Q1	Date: Q2	Date: Q3	Date: 4/1/01 Q1	Date: ESY
1. At a CBI site, Aaron will identify 4/4 crosswalks in town without more than 1 prompt. 2. While in the community, Aaron will independently: A) locate a payphone B) Select correct coins C) insert coins D) refer to his # cue card E) Dial the # F) Ask for his parent correctly in each of 3 consecutive trials. 3. In the store, Aaron will wait for his change after making a purchase with less than or = to 1 prompt per event.	P				P 2/4	
		M			NI	
		P			P+	
		M			M	
		P			P+	
		NP			P-	
		P-			P-	
					1/3 trials	
		P			P-	
					needs several prompts	
Comments:						

5e

DISTRIBUTION: WHITE-File Copy; BLUE-ESY; GREEN-1st Qtr.; CANARY-2nd Qtr.; PINK-3rd Qtr.; GOLDENROD-4th Qtr.

Individual Goal #1      ESY Goal #1  
 to improve oral language  
 and listening skills

EVALUATION CODE  
 NP - No Progress: No gains or improvements  
 P - Progress: Shows gains in learning the objectives  
 M - Mastered: Has learned the skills for objective  
 NA - Not Applicable: Objectives not yet covered

METHOD OF EVALUATION:  
 1 - Test  
 2 - Observation, records  
 3 - Daily work  
 4 - Other

Short Term Objectives:	Method of Evaluation	Progress Report				ESY
		11/16 Q1	1/17 Q2	3/16 Q3	6/16 Q4	
f. When presented with 2 objects, Michelle will gesture (point to, reach for) and vocalize for the object of her choice 50% of the time.	2	P	P	P	P	
g. Shown objects or pictures, Michelle will "give me" the item requested with 50% accuracy.	2	P-	P	NP	NP	
h. Given an oral direction of a physical nature (i.e. clap your hands, touch your nose), Michelle will execute the direction at least 50% of the time.	2	NP	NP	NP	NP	

Comments: Q1 11/16 When given a choice of items/activities, Michelle is able to indicate a want or preference by touching or reaching for objects and some pictures. Michelle is difficult to engage in verbal dialog, often preferring to manipulate or play with objects on her own.  
 Q2 1/17 While Michelle often verbalizes ("munge") during self-play with toys, puzzles, and a mirror she does not imitate verbal models consistently. She can sometimes be prompted to verbalize with songs.

5f

**XI. Example of IEP Present Performance Levels and Annual Goals that do allow meaningful progress assessment.**

**A. PLOP: S speaks 4 words that are intelligible to those who know him.**

**Goal: Goal: S will speak 50 words that are intelligible to those who know him, 35 of which are intelligible to strangers.**

**B. PLOP: S reads 2<sup>nd</sup> grade material orally at 32 wcpm.**

**Goal: Goal: S will read 3rd grade material orally at 60 wcpm.**

**C. PLOP: S tantrums in the classroom (requiring removal) an average of 3 times daily..**

**Goal: Goal: S will submit at least 90% of her homework assignments by April 15.**

**D. PLOP: S submits fewer than 10% of her homework assignments**

**Goal: Goal: S will submit at least 90% of her homework assignments by April 15.**

**E. PLOP: S is involved in an average of 3 physical fights per week during unstructured times.**

**Goal: Goal: S will not participate in a physical fight during the last two months of school.**

**F. PLOP: PLOP: S averages less than 30% correct on his Algebra I quizzes.**

**Goal: Goal: S will average 85% correct on his Algebra I quizzes.**

**G. See IEP GOALS (beginning next page) for more examples.**

## IEP Goals

April 2010

### Hand and Finger Strengthening

1. Annabella will engage in an activity to build hand and finger strength for 5 minutes without a break for 5 consecutive sessions utilizing a combination of the following strategies:
  - a. Annabella will manipulate (squeeze, push, pull, pinch) medium resistance theraputty, play doh or clay.
  - b. Annabella will independently manipulate (put together and take apart) small legos or other manipulative toys.
  - c. Annabella will move small objects from her palm to fingertips and fingertips to palm without dropping.
  - d. Annabella will wheelbarrow walk for 20 feet with support at her ribcage.
  - e. Annabella will hang from a trapeze or monkey bar for 15 seconds.

### Visual Motor/Visual Perceptual Skills

1. Using an adaptive scissors, Annabella will cut the length of a 10 inch line that is  $\frac{1}{2}$  inch wide without cutting off the line more than 20% of the length (or Annabella will cut a  $8\frac{1}{2}$  x 11 piece of paper into 2 equal pieces).
2. Annabella will open and close standard child size scissors to snip paper 10x with her right hand.
3. Annabella will color a simple 4 inch shape going outside the lines a maximum of 5 times and will fill 50% of the area of the shape.
4. Annabella will extend her index and 3<sup>rd</sup> finger while stabilizing her 4<sup>th</sup> and 5<sup>th</sup> fingers with her thumb to show the number two.
5. Annabella will extend her index, 3<sup>rd</sup> and 4<sup>th</sup> fingers, stabilizing her pinkie with her thumb, to show the number three.

### Adaptive/Self-Care Skills

1. Annabella will fasten and unfasten a series of 3 1-inch buttons independently for 5 consecutive sessions.
2. Annabella will either scoop food onto a spoon or pierce with a fork and bring to her mouth to feed herself 10 bites per meal with minimal spilling for 5 consecutive sessions.
3. Annabella will independently put toothpaste on her toothbrush, after assistance to unscrew the cap.
4. Annabella will doff/remove a loose fitting jacket or cardigan independently for 5 consecutive sessions.

5. Annabella will don a loose fitting jacket or cardigan independently for 5 consecutive sessions using modifications as needed.
6. Annabella will remove loose fitting pants, shorts or skirt independently 5 consecutive sessions.
7. While seated in a short chair, Annabella will put her legs into a loose fitting skirt, pants or shorts and pull them up with minimal assistance 5 consecutive sessions.
8. Annabella will remove a loose fitting short or long sleeved shirt or top independently.
9. Annabella will independently unzip a jacket.
10. Annabella will don a loose fitting short or long sleeved shirt or top independently.
11. Annabella will drink from an open top cup with minimal spillage 5 consecutive sessions.

### Bilateral Hand Coordination

1. Annabella will spontaneously use two hands during activities that require bilateral hand use such as stringing beads, holding paper down while drawing, and holding paper while cutting etc, independently for 5 consecutive sessions.
2. Annabella will independently unscrew the top of a small container, jar or tube.

### Community Integration (I see these goals as being worked on by Annabella's individual classroom Aide at her preschool)

1. Annabella will sit for circle time and attend to the teacher for a story for 5-10 minutes with a maximum of two verbal prompts.
2. Annabella will hang up her backpack and coat when entering the classroom with modifications as needed.
3. Annabella will wash hands independently when requested with modifications as needed.
4. Annabella will seek out a playmate in the classroom for an activity 2 out of 3 consecutive days.
5. Annabella will appropriately greet a teacher or a friend in the classroom every school day.
6. Annabella will stay with her class in and out of the classroom, not wandering away, for the length of her school day with a maximum of 5 verbal or visual cues.

**XII. Cautions for HOs and ALJs re: Norm Referenced Tests and their use in progress measurement.**

- A. Do not use Age or Grade Equivalents as performance measures from which progress or lack thereof can be assessed.**
- B. Do not use Developmental Quotients (e.g.  $IQ = MA/CA \times 100$ ) for similar reasons.**
- C. Do use relative standing scores, *i.e.*,**
1. Percentiles\* (but remember - a decrease may mean progress)
  2. Standard Scores (SS, z, T):
    - a) SS  $x=100, SD=15, 16$
    - b) T  $x = 50, SD = 10$
    - c) z  $x = 0, SD = 1$
  3. Percentiles are easily understood and highly recommended. However, standard scores have all advantages of percentiles and are the only scores that can be added subtracted or averaged.
- D. Always remember that every test score contains an unknown amount of ERROR. The amount is unknown but a probability may be known by using the standard error of measurement (SEM) for each test. The SEM is a function of the SD (the smaller, the less error) and the reliability (the larger, the less error) of the test.**

For example, the WISC ( $SD = 15, r = .9+$ ) SEM is about 5 points. This means there is a 68% chance (see the normal curve) that a student's "true" IQ lies between +5 and -5 points (1 SEM) from his obtained score. There is a 95% chance it lies between -10 and +10 points (2 SEMS) from his obtained scores. So if a student scores 92 on the WISC, 68% of the time his "true" IQ is between 87 and 97 while 95% of the time the true IQ falls between 82 and 102.

- E. Do not overly rely on mathematical formulas or "cut-off" scores in eligibility decisions. Federal law rightfully requires that professional judgment must override simply mathematical formulations, for the above reasons and more.**
- F. Remember that assessments must:**

1. Examine all areas related to the disability and that needs must be determined in all areas, regardless of whether they are commonly associated with the disability.
2. Take into account the effect of the disability on the assessments.

**G. Independent educational evaluations (IEEs) obtained by the parents must:**

1. Be considered by the district
  2. Paid for by the district, with no undue delay, unless the district establishes at a hearing that its evaluation was appropriate, *i.e.*, met all IDEA requirements.
- 

## Excerpt from Hearing Decision (40 IDELR 80)

### Re: Eligibility

A model decision in an eligibility issue in which the HO:

1. Gave a simple, clear statement of the issue, *i.e.*, whether S is IDEA – eligible under the category of mental retardation (now known as intellectual disability);
2. Cited the exact criteria IDEA uses to define that category of disability;
3. Systematically examines the evidence re: each of the three criteria and reports the evaluation results pertinent to each;
4. Presented all relevant evaluation information in context, with appropriate and meaningful scores, *i.e.*, deviation IQs and percentiles, considering developmental levels only where appropriate (eye-hand coordination and adaptive behavior);
5. Correctly rejected the "expert's" DSM-IV analysis because DSM-IV is not dispositive in an IDEA context; and he
6. Carefully examined the full range of assessment data presented resented in the case – test scores, teacher observations, grades, records, parental input and more.

pretation of the test scores and the finding by the IEP team that STUDENT was ineligible for special education. Accordingly, the Hearing Officer finds that the District's assessments were appropriate and comported with all federal and State special education standards in all significant respects. See, Cal. Education Code §§ 56320, 56322, and 56324.<sup>5</sup> The Hearing Officer will next determine whether the finding of ineligibility, based upon these assessments, was correct.

**ISSUE NO. 2: Should STUDENT have been found eligible for special education on the basis of a specific learning disability, mental retardation, or other health impairment at the January 30, 2001 IEP meeting?**

To be eligible for special education, a student must have a disability as defined by federal law and, because of the disability requires instruction, services or both, which cannot be provided with modification of the regular school program. Cal. Education Code § 56026(a) and (b).

Here, when the IEP team met in January 2001 after a review of the assessments, the IEP team determined that STUDENT was ineligible for special education. Respondent asserted that STUDENT should have been found eligible for special education under the categories of mental retardation and OHI. The IEP meeting notes reflected that the team considered whether STUDENT was eligible for special education under the category of mental retardation and the Hearing Officer will address that eligibility category.<sup>6</sup>

However, the IEP meeting notes did not reflect whether the IEP team considered the OHI category. The parties generally agree that STUDENT is a child who was diagnosed with ADHD and that it is chronic. Although Ms. Wolff briefly noted on her report that "attention was looked at because of concerns expressed by MOTHER" (District Exh. 15, pg. 7), Ms. Wolff's written opinion omitted any mention of OHI. Dr. Espinoza was not present at the January 2001 IEP meeting and admitted under cross-examination that she did not discuss the meeting with anyone who was present. No District witness who was present at that IEP meeting testified. Both MOTHER and Ms. Wagner testified that they could not recall whether OHI was addressed. Nevertheless, because there is no dispute the IEP team knew that STUDENT had been diagnosed as a child with ADHD making OHI a potential eligibility category (see, Cal. Education Code § 56339(a)), and because Dr. Espinoza addressed this eligibility category at hearing, the Hearing Officer will also decide whether STUDENT was eligible for special education as a pupil with OHI.

The Hearing Officer will next consider whether STUDENT should have been found eligible for special education under the categories of mental retardation or OHI.

#### **Mental Retardation.**

Under the IDEA, a child qualifies for special education if he is mentally retarded, and if, by reason of that disability, he needs special education and related services, 20 U.S.C. § 1401(3)(A)(i)(ii). State special education law defines a pupil as eligible for special education under the category of mental retardation when the "pupil has significantly below average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the develop-

mental period, which adversely affect a pupil's educational performance." C.C.R., tit. 5, § 3030(h); see also 34 C.F.R. § 300.7(c)(6).

#### **(1) Was STUDENT'S Intellectual Functioning Significantly Below Average?**

The District, through Dr. Espinoza's testimony, relied on the psychoeducational assessment report authored by Ms. Wolff in December 2000 and January 2001 in support of its contention that STUDENT was ineligible for special education under the category of mental retardation. Two tests were administered to measure STUDENT'S intellectual functioning. On the WISC-III, STUDENT received a verbal IQ score of 67, a performance IQ score of 65, and a full scale IQ score of 64. On the Leiter-R, STUDENT received an full scale IQ score of 74. (District Exh. 15.)

Based upon these test results, Ms. Wolff concluded that STUDENT'S cognitive ability fell within the "Intellectually Deficient range." (District Exh. 15.) Dr. Espinoza conceded under cross-examination that these two tests which were administered to measure intellectual functioning have a high correlation between each other, and conceded further that both test results were consistent with a finding of "significantly below average cognitive ability." Dr. Espinoza also agreed that several scores that STUDENT received on other tests, including those that measured STUDENT'S visual perception, memory, visual-motor skills, and communication, were commensurate with his low IQ scores. On the Test of Visual-Perceptual Skills-Revised (TVPS-R) that measured visual perception, STUDENT'S scores fell in the 1st percentile. The assessor noted that STUDENT'S scores on the Test of Auditory-Perceptual Skills-Revised (TAPS-R) indicated relative strength in the area of auditory perception with a score in the 26th percentile. According to the report, STUDENT did better remembering details of stories (standard score of 10), but had particular difficulty remembering abstract designs (standard score of 3). At the age of nine-years, one-month when the test battery was administered, STUDENT received scores that were below average and equivalent to a five-year, two-month-old child on the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI) that measured eye-hand coordination. On the Bender Visual Motor Gestalt Test that measured eye-hand coordination, the assessor reported that STUDENT'S scores were significantly below average and equivalent to a child of five-years, six-months to five-years, eleven-months old. STUDENT demonstrated difficulty spelling words phonetically, reading words, and performing single digit addition and subtraction on the Wide Range Achievement Test-RS (WRAT-3).

Dr. Espinoza conceded that all these scores taken together suggested that STUDENT was a child with mild mental retardation. The Hearing Officer finds that STUDENT'S intellectual functioning was significantly below average.

#### **(2) Did STUDENT Exhibit Deficits in Adaptive Behavior?**

In order to measure STUDENT'S adaptive behavior, Ms. Wolff administered the Vineland Adaptive Behavior Scales -- Interview Edition Survey Form to STUDENT'S mother and

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second grade teacher. These surveys assessed STUDENT'S social and practical living skills. Scores on both Vineland scales indicated that STUDENT'S adaptive behavior was significantly below what would be expected for children his age. On the Vineland administered to MOTHER, STUDENT scored in the 1st percentile on the communication, daily living skills and socialization domains. The classroom edition of the Vineland rating scale administered to Ms. Wagner, rated STUDENT'S adaptive functioning with similar low scores. The actual questionnaire added age equivalent scores to the adaptive levels quoted above and reflected that at the chronological age of nine years, one month, STUDENT'S adaptive behaviors in the communication domain were: receptive communication, one year, nine months; expressive communication, four years, seven months; and written communication, five years, ten months. STUDENT'S adaptive behaviors in the daily living skills domain were: personal, five years, three months; domestic, two years, one month; community, four years, two months; interpersonal relationships two years, seven months; play and leisure time, two years, four months; and coping skills, four years, one month. (Respondent Exh. G.) Ms. Wagner testified that her responses reflected her first-hand observations and experience with STUDENT.

Ms. Wolff concluded in her report under each of these test results that "STUDENT'S adaptive behavior is significantly below what would be expected for a student his age." (District Exh. 15; emphasis added.) Dr. Espinoza testified that the two Vineland test results were consistent with each other. She admitted under cross-examination that these adaptive behavior ratings were "very commensurate" with STUDENT'S IQ scores. Dr. Espinoza conceded that the full score communication domain scores were consistent with someone of significantly below average intelligence. However, the District pointed to the IEP meeting notes which reported that STUDENT could independently take care of some daily living skills, such as going to the restroom, making a sandwich, combing his hair, brushing his teeth and getting dressed, in support of its contention STUDENT had no adaptive functioning deficits. At nine years of age at the time of the testing, STUDENT'S highest score on the Vineland rating scales was equivalent only to a five-year-old and many of the ratings lagged seven years behind his chronological age. STUDENT'S ability to perform these isolated tasks did not diminish the significance of these very low scores. Consequently, the Hearing Officer finds that, based upon the weight of the evidence, STUDENT exhibited deficits in adaptive functioning.

#### Interpretation of Test Scores.

Despite STUDENT'S low intellectual functioning scores and adaptive functioning deficits, Dr. Espinoza testified that in her opinion, the decision to find him ineligible for special education as a child with mental retardation in 2001 was correct. According to Dr. Espinoza, both the Diagnostic Statistical Manual of Mental Disorders-Fourth Edition (DSM-IV) and an unnamed textbook on assessments by Dr. Sattler, advise that where as here, the student received a "scatter of scores" on the various IQ subtests, a "profile" of the child should be considered rather than the test scores alone in making the determination.<sup>7</sup> Applying this approach, Dr. Espinoza concluded that

STUDENT did not "present" as a child with mental retardation. Respondent asks the Hearing Officer to reject this method of interpretation.

The Hearing Officer finds that Dr. Espinoza's method of interpreting STUDENT'S test scores and the opinion she offered applying this approach is unconvincing for several reasons. First, while the DSM-IV may provide supplemental information, it is not correlated to the IDEA. Accordingly, while the Hearing Officer may consider the DSM-IV, it is not determinative of eligibility criteria; the Hearing Officer must apply the federal and State special education law criteria as written. Thus, for example, in *Gregory K. v. Longview School District*, 811 F.2d 1307 (9th Cir. 1987), the Ninth Circuit Court of Appeals relied solely on the Washington state statutory criteria and determined that the student was eligible for special education as a child with mild mental retardation. Second, the District did not provide the Hearing Officer with any reference material or make the unnamed Sattler text part of the record. Absent the text and considering that Respondent had no opportunity to effectively cross-examine Dr. Espinoza regarding its contents, the Hearing Officer is unable to assign it any evidentiary value.

Finally, even if it was legitimate to look beyond the specific test scores, Dr. Espinoza lacked the necessary foundation to provide a persuasive opinion concerning STUDENT'S learning ability. Dr. Espinoza did not assess STUDENT in 2001, did not meet or observe him in 2001, did not supervise Ms. Wolff, did not attend the IEP meeting where STUDENT'S eligibility was discussed, did not communicate with any District staff who had attended the IEP meeting, and did not talk to STUDENT'S teachers or parents in 2001. In reaching her conclusion that STUDENT did not carry the "flat profile" consistent with a mentally retarded child, Dr. Espinoza relied on Ms. Wolff's written report. Contained within the report were remarks by STUDENT'S parents and the resource specialist teacher who conducted the achievement tests suggesting that STUDENT was friendly and affectionate. (District Exh. 15.) The Hearing Officer finds that the argument that STUDENT was friendly and affectionate did not address STUDENT'S ability to learn in school or nullify the IQ test scores.

In contrast, based upon her five months of experience as STUDENT'S teacher, Ms. Wagner delivered a credible portrayal of STUDENT'S performance in the classroom and shed much more light on STUDENT'S ability to learn. STUDENT could not work independently, required one-on-one attention, worked more slowly than her other students, required simplification of all mathematics problems, needed close monitoring, and was emotionally immature. Ms. Wagner testified that it was clear to her that STUDENT "did not learn like other children," that he had "very low academic skills" and that STUDENT was "far below the mark." STUDENT did poorly in spelling and might know a word one day, but then would forget it the next. He reversed letters and numbers. He was a very slow reader and stumbled over words. STUDENT was not able to manage the regular education second-grade curriculum. In addition, STUDENT acted younger than the other children. He brought small action figures from home and made up incredible stories. This method of play was at a lower level than STU-

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DENT'S other classmates. According to Ms. Wagner, STUDENT "did not fit in." He "hung out" with kindergarteners instead of his second-grade classmates at recess. Ms. Wagner reported to Ms. Wolff that STUDENT had difficulty making age-appropriate judgments in social situations. (District Exh. 15.) Because of Ms. Wagner's teaching experience and first-hand familiarity with STUDENT'S classroom performance, the Hearing Officer accords her testimony great weight.<sup>8</sup> The Hearing Officer finds that STUDENT'S learning ability as just described was consonant with his IQ test scores.

In sum, the Hearing Officer finds Dr. Espinoza's approach and opinion unpersuasive. The DSM-IV is not correlated to the IDEA and the unnamed text had no evidentiary value. Even if the Hearing Officer accepted Dr. Espinoza's premise, the Hearing Officer finds that the facts of STUDENT'S classroom behavior presented a more accurate measure of STUDENT'S learning ability than Dr. Espinoza's selective reading of Ms. Wolff's report. As the Hearing Officer found in Issue No. 1, the District's assessment of STUDENT was valid and reliable. The Hearing Officer finds no justification to disregard STUDENT'S test scores in favor of Dr. Espinoza's approach. Accordingly, the Hearing Officer adheres to the earlier findings that STUDENT'S intellectual functioning was significantly below average and that he exhibited deficits in adaptive behavior.

### (3) Did These Deficits Adversely Affect STUDENT'S Educational Performance?

A key dispute in this case was whether STUDENT'S intellectual functioning scores combined with his deficits in adaptive behaviors adversely affected his educational performance. The evidence plainly established that STUDENT had to repeat the first grade. STUDENT'S second grade teacher described STUDENT as a very slow learner. STUDENT was not able to function within the second grade curriculum even though he had already been retained in the first grade and was provided with significant one-on-one assistance by his mother and grandmother, private tutoring, and other accommodations including preferential seating and assignment modifications. MOTHER testified that if she had graded STUDENT like his second grade classmates, he would not have progressed to the next grade. The IEP team was fully aware that STUDENT'S first quarter grades in his second grade class were either well below average or failing. The progress report added that STUDENT was not able to perform the second grade work and was being graded, not compared to his classmates, but rather on his own progress. The District resource specialist who administered the academic achievement tests reported that STUDENT was a very slow reader and had no concept of money. The resource teacher who administered the test noted that STUDENT required repeated instructions and extended work time. (District Exh. 13.) Even with this added help, STUDENT scored very low on these measures. On the Woodcock-Johnson Tests of Achievement, STUDENT received a broad reading score in the 3rd percentile, a basic reading score in the 7th percentile, a broad math score in the 1st percentile, and a broad written language score in the 6th percentile.

Nevertheless, Dr. Espinoza testified that in her opinion, STUDENT'S deficits did not adversely affect his educational performance. According to Dr. Espinoza, STUDENT was able

to function successfully in the general education second grade curriculum because his achievement scores exhibited skills at the first grade level. The fact that STUDENT had repeated the first grade and was the chronological age of third graders was of no consequence in the framing of her opinion. The Hearing Officer simply cannot disregard an event of this significance. The Hearing Officer finds that the statute plainly requires consideration whether the student's significantly below average general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period. Implicit in this requirement is a consideration of the student's chronological age. The Hearing Officer finds that omitting from the equation a comparison of STUDENT with children of his own age, ignored a crucial component of the statutory definition of mental retardation. There is no dispute that STUDENT lagged far behind children his own age.

The Hearing Officer finds Dr. Espinoza's opinion implausible for additional reasons. As discussed above, Dr. Espinoza had no first-hand knowledge of STUDENT. The Hearing Officer further finds that if Dr. Espinoza's opinion is carried to its logical conclusion, a student who had been retained one grade or more might never be eligible for special education because the "adverse affect on educational performance" prong could never be satisfied. Such a student would be "functional" in the grade level in which he had been placed no matter how many grades he repeated or how much older he was than his classmates. The Hearing Officer finds much more credible Ms. Wagner's testimony based upon her first-hand experience with STUDENT that he was completely unable to participate in the regular second grade curriculum.

In sum, the Hearing Officer finds that STUDENT met the eligibility criteria as a child with mental retardation. The IEP team's conclusion otherwise was incorrect.

### Other Health Impairment.

A student with ADHD is eligible for special education if the student meets the eligibility criteria for other health impairment, emotional disturbance, or specific learning disabilities. Cal. Education Code § 56339. A child meets eligibility criteria for special education as OHI when the pupil has: limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems, such as attention deficit hyperactivity disorder, which adversely affects a child's educational performance. 34 C.F.R. § 300.701(9); C.C.R., tit. 5, § 3030 (f); 20 U.S.C. § 1401(3)(A)(i); see also *Letter to Cohen*, 20 IDELR 73 (OSEP 1993). Respondent maintains that STUDENT was eligible for special education under the category of OHI.

### (1) Did STUDENT'S ADHD result in limited strength, vitality, or alertness?

The parties stipulated that at the time of the IEP meeting in January 2001, the IEP team was aware that STUDENT had been diagnosed with ADHD and that his condition is chronic. According to STUDENT'S nonpublic school teachers and the District staff who completed the assessments in 2001, STUDENT had a great deal of difficulty paying attention, following directions, and focusing on the assigned task. According to the

**Some commonly used tests** that have adequate technical characteristics, *i.e.*, validity, reliability and norms for decision making about an individual student\*

**I. Individual Intelligence Tests:**

- A. Wechsler Scales: WISC (ages 6-16), WPPSI (ages 3-7)  
WAIS (>16 yrs old), WASI (ages 6-89).
- B. Woodcock-Johnson (WJ) Psychoeducational Battery - Tests of Cognitive Abilities; Tests of Achievement

**II. Nonverbal Tests of Intelligence:**

- A. Comprehensive Test of Nonverbal Intelligence, 2nd Edition (CTON-2)
- B. Leiter International Performance Scale - Revised (Leiter-R):  
Norms and composite (not subtest) scores are adequate for individual decision-making
- C. Test of Nonverbal Intelligence - 3 (TONI-3)
- D. Peabody Picture Vocabulary Test - III (PPVT-III):  
Measures only receptive vocabulary, but does so very well.

**III. Individual Tests of Achievement**

- A. Kaufman Test of Educational Achievement (K-TEA)
- B. Peabody Individual Achievement Test - Revised (PIAT-R)
- C. Wide Range Achievement Test 3 (WRAT3) (called the 'rat')
- D. Wechsler Individual Achievement Test - Second Edition (WIAT-2)

**IV. Reading Tests - - Individual, Diagnostic**

- A. Gray Oral Reading Test, Fourth Edition (GORT-4)
- B. Woodcock Reading Mastery Tests (WRMT). Excellent Test.
- C. Woodcock Diagnostic Reading Battery (WDRB). Excellent Test.

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\* Tests are continually revised and updated, with new editions being released. No list, including this one can be guaranteed totally current.

D. Standardized Test for the Assessment of Reading (S.T.A.R.)

Administered using computer software, norm-referenced and provides instructional level.

E. Comprehensive Test of Phonological Processing (CTOPP)

Only the Phonological Awareness area score is sufficiently reliable for individual decision-making.

**V. Specific tests of Social-Emotional Behavior**

A. Child Behavior Checklist (CBCL/4-18)

B. Teacher's Report Form (TRF)

C. Walker-McConnell Scale of Social Competence and School Adjustment (W-M)

D. Behavior Assessment System for Children (BASC) for ages 4-18

E. Systematic Screening for Behavior Disorders (SSBD)

**VI. Specific Tests of Adaptive Behavior**

A. Vineland Adaptive Behavior Scales (VABS)

B. Adaptive Behavior Inventory (ABI) ages 6-18

**VII. Other valid & reliable tests frequently used in special education**

A. Stanford Diagnostic Mathematics' Test 4 (SDMT4)

B. Goldman-Fristoe Test of Articulation - Second Edition (GFTA-2)

C. Test of Adolescent Language - 3 (TOAL-3)

D. Test of Language Development Primary, Third Edition (TOLD-P:3)

E. Test of Language Development Intermediate, Third Edition (TOLD-L3)

F. Comprehensive Assessment of Spoken Language (CASL)

G. Developmental Test of Visual Perception (revised) DTVP-2)

H. Developmental Test of Visual - Motor Integration (VMI)

TAB 3

# Basic Hearing Procedures and Management\*

## Special Overview for New IDEA Hearing Officers

Deusdedi Merced, Esq\*\*.  
Deusdedi Merced, P.C.

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### I. INTRODUCTION

- A. In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act.<sup>1</sup> Implementing regulations followed in August 2006.<sup>2</sup> Both the IDEA and its implementing regulations added numerous requirements to the hearing process.
- B. IDEA hearings have grown in complexity and, arguably, the parties have become more litigious. A competent and impartial IDEA hearing system, nonetheless, promotes either the early resolution of disputes – through mediation, the resolution meeting, or traditional settlement discussions – or, should a hearing be necessary, the fair and timely conduct of the hearing.
- C. When a hearing is necessary, the parties can come before independent, contractual hearing officers or an independent, central panel agency that holds administrative hearings on behalf of certain other agencies, including local educational agencies (“LEA”). This central panel agency is typically called the Office of Administrative Hearings (“OAH”) and the individual tasked with presiding over the hearing is known as the administrative law judge (“ALJ”).<sup>3</sup>
- D. The OAH has no state policy making authority and, in hearing a case, the hearing officer uses the policies, law and regulations, and rules of the agency for which the OAH is conducting the hearing. While the OAH may have its own rules of procedure, which it uses to ensure a uniform application of practices, the rules supplement the procedures required by, and set forth in, the law and regulations of the agency involved in the dispute. Where Federal and State law requires that a

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\*© 2011 Deusdedi Merced, Esq. Deusdedi Merced, P.C., PMB No. 277, 923 Saw Mill River Road, Ardsley, New York 10502, (914) 231-9370; (914) 231-5461 (fax); dmerced@me.com; **Reprinted by Permission**

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**THIS OUTLINE IS INTENDED TO PROVIDE WORKSHOP PARTICIPANTS WITH A SUMMARY OF SELECTED STATUTORY PROVISIONS AND SELECTED JUDICIAL INTERPRETATIONS OF THE LAW. THE PRESENTER IS NOT, IN USING THIS OUTLINE, RENDERING LEGAL ADVICE TO THE PARTICIPANTS.**

<sup>1</sup> See Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act (“IDEA”). See Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) (“This chapter may be cited as the ‘Individuals with Disabilities Education Act.’”).

<sup>2</sup> See 34 C.F.R. Part 300 (August 14, 2006).

<sup>3</sup> Because in the IDEA reference to a “hearing officer” is common nomenclature, this writer will use said term throughout this outline. No disrespect is intended towards those IDEA decisionmakers who are appointed to sit as administrative law judges.

Federal or State procedure be observed, the rules of procedure adopted by the OAH are inapplicable.

- E. This outline highlights the major Federal statutory and regulatory requirements pertaining to the IDEA hearing process, which may preempt any rules of procedures employed by a central panel agency.<sup>4</sup>

## II. DUE PROCESS COMPLAINT

- A. Subject Matter – A parent or the LEA may file a due process complaint on any of the matters relating to the identification, evaluation or educational placement of a child with a disability or the provision of a free appropriate public education (“FAPE”) to the child.<sup>5</sup> The due process complaint shall remain confidential.<sup>6</sup>

The word “‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’”<sup>7</sup>

- B. Content of Complaint – The due process complaint must include –

1. the name of the child;
2. the address of the residence of the child<sup>8</sup>;
3. the child’s attending school;
4. a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and,
5. a proposed solution to the problem, to the extent known and available to the complaining party at the time.<sup>9</sup>

A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets these requirements.<sup>10</sup>

- C. Judicial Decisions / Federal Policy/Guidance

<sup>4</sup> This outline does not address any state laws or regulations, which may exceed the IDEA 2004 requirements.

<sup>5</sup> 20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.507(a).

<sup>6</sup> 20 U.S.C. § 1415(b)(7)(A).

<sup>7</sup> *Lillbask v. State of Connecticut Dep’t of Educ.*, 397 F.3d 77, 42 IDELR 230 (2d Cir. 2005) quoting *Department of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002).

<sup>8</sup> Should the child be homeless, the complaining party must provide available contact information and the name of the school the child is attending. 20 U.S.C. § 1415(b)(7)(A)(ii)(I), (II); 34 C.F.R. § 300.508(b)(4).

<sup>9</sup> 20 U.S.C. § 1415(b)(7)(A)(ii); 34 C.F.R. § 300.508(b).

<sup>10</sup> 20 U.S.C. § 1415(b)(7)(B); 34 C.F.R. § 300.508(c).

6. Although parents may have their own rights under the IDEA, States are free to enact laws that transfer all of the parent's IDEA rights to the student when the student reaches the age of majority.<sup>11</sup> Because the student had reached the age of majority under state law, the District Court concluded that the mother lacked standing to pursue an IDEA action and granted the LEA's motion to dismiss her from the due process complaint. *Neville v. Dennis*, 48 IDELR 241 (D. Kan. 2007).
7. An LEA has the right to initiate a hearing after the parent notifies the LEA that the parent intends to unilaterally place his or her child in a private school because FAPE is at issue to demonstrate that its proposed program offered the child a FAPE. *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, Question C-3 (OSERS 2009) citing *Yates v. Charles County Bd. of Educ.*, 212 F. Supp. 2d 470, 37 IDELR 124 (D. Md. 2002).
8. Hearing Officers have jurisdiction to review IEP safety challenges related to the educational placement or receipt of FAPE for children with disabilities. *Lillbask v. State of Connecticut Dep't of Educ.*, 397 F.3d 77, 42 IDELR 230 (2d Cir. 2005).
9. Hearing Officers can consider only those issues that are raised in the due process complaint. *Saki v. State of Hawaii, Dep't of Educ.*, 50 IDELR 103 (D. Haw. 2008).
10. The hearing officer exceeded his authority by hearing a claim on the appropriateness of the IEP for the 2006 – 2007 school year and granting the parents' request for relief on said IEP although the claim was not presented as an issue in the due process complaint. *Lago Vista Indep. Sch. Dist. v. S.F.*, 50 IDELR 104 (W.D. Tex. 2007).

### III. **SUFFICIENCY CHALLENGES**

- A. **Sufficient Notice.** The IDEA requires the complaining party to provide sufficient notice to the other side. Failure to provide sufficient notice may result in the complaining party not having a hearing<sup>12</sup> or in a reduction of attorney's fees if the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint.<sup>13</sup>

<sup>11</sup> A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined incompetent under State law), the LEA must provide any notice required by the IDEA to both the child and the parents and all rights accorded to parents under the IDEA transfer to the child. 20 U.S.C. § 1415(m); 34 C.F.R. § 300.520(a)(1).

<sup>12</sup> 20 U.S.C. § 1415(b)(7)(B); 34 C.F.R. § 300.508(c).

<sup>13</sup> 20 U.S.C. § 1415(i)(3)(F)(iv); 34 C.F.R. § 300.517(c)(4)(iv).



- B. Timeline. The due process complaint must be deemed sufficient unless the party receiving the complaint notifies the hearing officer and the complaining party in writing, within 15 calendar days of receipt of the complaint, that the receiving party believes the complaint does not include the requisite content.<sup>14</sup>
- C. Determination. Within five days of receipt of the notification, the hearing officer must decide on the face of the complaint of whether the complaint includes the requisite content.<sup>15</sup> Should the hearing officer agree that the complaint is not sufficient, the hearing officer must notify the parties in writing of that determination and identify how the complaint is insufficient.<sup>16</sup> The complaining party may amend the complaint.<sup>17</sup> An amended complaint resets the timelines for the resolution meeting and the resolution period.<sup>18</sup>
- D. Judicial Decisions / Federal Policy/Guidance
1. Should the hearing officer determine that the complaint is insufficient and the complaint is not amended (*see* Section VI, *infra*), the hearing officer may dismiss the complaint. *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 52 IDELR 266, Question C-4 (OSERS 2009).
  2. There is no requirement that the party who alleges that a notice is insufficient state in writing the basis for the belief. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46698 (August 14, 2006).
  3. The complaining party, however, is not required to include in the due process complaint all the facts relating to the nature of the problem. Nor is the complaining party required to set forth in the due process complaint all applicable legal arguments in “painstaking detail. *Escambia County Bd. of Educ. v. Benton*, 44 IDELR 272 (S.D. Ala. 2005).” *See also Anello*

<sup>14</sup> 20 U.S.C. § 1415(c)(2)(A), (C); 34 C.F.R. § 300.508(d).

<sup>15</sup> 20 U.S.C. § 1415(c)(2)(D); 34 C.F.R. § 300.508(d)(2).

<sup>16</sup> *Id.*; *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46698 (August 14, 2006).

<sup>17</sup> The party may amend the complaint if the other party consents in writing and is given the opportunity to resolve the complaint through a resolution meeting or the hearing officer grants permission not later than five days before the due process hearing begins. 34 C.F.R. § 300.508(d)(3)(i) and (ii).

<sup>18</sup> 34 C.F.R. § 300.508(d)(4). The resolution meeting, however, should not be postponed when the school district believes that a parent’s due process complaint is insufficient. OSEP advises that the resolution meeting should nonetheless go forward:

While the period to file a sufficiency claim is the same as the period for holding the resolution meeting, parties receiving due process complaint notices should raise their sufficiency claims as early as possible, so that the resolution period will provide a meaningful opportunity for the parties to resolve the dispute.

*Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46698 (August 14, 2006).

*v. Indian River Sch. Dist.*, 47 IDELR 104 (Del. Fam. Ct. 2007) (finding that the alleged facts and requested relief contained in the parents' due process complaint were consistent with a child find claim and that the school district was not denied ample notice to prepare for a child find claim because of the parents' failure to explicitly cite the child find provisions of the IDEA).

The IDEA's due process requirements imposes "minimal pleading standards." *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005). *But see M.S.-G., et. al v. Lenape Regional High Sch. Dist. Bd. of Ed.*, 51 IDELR 236 (3d Cir. 2009) (refusing to accept the suggestion that Schaffer's "minimal" pleading standard equates to a "bare notice pleading requirement").

4. Absent a hearing on the sufficiency of the parents' due process complaint, the District Court held, and the Eighth Circuit affirmed, that it lacked jurisdiction to hear an appeal from a hearing officer's decision that the complaint was not sufficient. *Knight v. Washington Sch. Dist.*, 54 IDELR 185 (E.D. Mo. 2010) *aff'd* 56 IDELR 189 (8th Cir. 2011) (unpublished) (note the Eighth Circuit modified the decision insofar as the dismissal would be without prejudice). *See also G.R. v. Dallas Sch. Dist. No. 2*, 55 IDELR 246 (D. Or. 2010) (holding that judicial review is limited to findings and decisions resulting from due process hearings).
5. A due process complaint is required for each child with a disability. The Ninth Circuit held that OAH was within its authority to reject a joint due process request, noting that the IDEA requires parents to file a due process request to address their individual child, and not the collective or common issues of a group of children. *Z.F. v. Ripon Unified Sch. Dist.*, 54 IDELR 3 (9th Cir. 2010).
6. Absent the State educational agency ("SEA") providing direct services to the child with a disability, or developing the IEP for the child with a disability, the SEA may not be a proper party to a due process complaint. *Chavez v. New Mexico Public Educ. Dep't.*, 621 F.3d 1275, 55 IDELR 121 (10th Cir. 2010).
7. A hearing officer erred by dismissing a parent's due process complaint because the student was not enrolled in a public school when the request was made. The District Court noted that the IDEA's child find requirement creates an affirmative, ongoing obligation on the LEA to identify, locate and evaluate all children with disabilities residing within the jurisdiction regardless of a child's enrollment status. *D.S. v. District of Columbia*, 54 IDELR 116 (D.D.C. 2010).

#### IV. STATUTE OF LIMITATIONS

- A. Timeline. The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint.<sup>19</sup>

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.<sup>20</sup>

A State may adopt a different timeline but the exceptions to the timeline described below shall also apply.<sup>21</sup>

- B. Exceptions. The timeline shall not apply to a parent if the LEA made specific misrepresentations to the parent that it had resolved the problem forming the basis of the complaint or it withheld information from the parent that was required to be provided to the parent.<sup>22</sup>

C. Judicial Decisions / Federal Policy/Guidance

1. The statute of limitations is triggered when the parent knew or should have known about the alleged action that forms the basis of the due process complaint and not when the parent becomes aware that the LEA's actions are actionable. *J.P. v. Enid Pub. Sch.*, 53 IDELR 112 (W.D. Okla. 2009).
2. A parent must be provided with actual notice of the procedural safeguards but IDEA does not require that the LEA explain to the parent what specific changes were made to the revised procedural safeguards. Telling the parent that one procedural safeguard statement replaced another, without more, did not result in the withholding of any information. *Natalie M. v. Dep't of Educ., State of Hawaii*, 47 IDELR 301 (D. Haw. 2007).

However, an administrator's remarks to the parents that the "laws remain 'basically the same,'" resulted in a remand to the hearing officer to determine whether the LEA withheld procedural safeguards information from the parents. *R.M. v. Dep't of Educ., State of Hawaii*, 47 IDELR 99 (D. Haw. 2007).

<sup>19</sup> 20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2).

<sup>20</sup> 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e).

<sup>21</sup> 20 U.S.C. §§ (b)(6)(B) and 1415(f)(3)(C); 34 C.F.R. §§ 300.507(a)(2) and 300.511(e).

<sup>22</sup> 20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(f).

3. The failure to include key personnel in an IEP team meeting resulted in the District Court holding that the State's statute of limitations did not apply because the LEA withheld requisite information from the parent, denying the parent the availability of important input regarding the student's need for services. *S.H. v. Plano Indep. Sch. Dist.*, 54 IDELR 114 (E.D. Tex. 2010).
4. Failure to provide the parents with the procedural safeguards after the LEA denied the parents repeated requests that her child be evaluated for eligibility for special education services resulted in the District Court setting aside the two-year statute of limitations because the LEA withheld information, i.e., that the parents can file a complaint and request a due process hearing. *D.G. v. Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 50 IDELR 70 (D.N.J. 2008). *See also El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 50 IDELR 256 (W.D. Tex. 2008) *aff'd El Paso Indep. Sch. Dist. v. Richard R.*, 591 F.3d 417, 53 IDELR 175 (5th Cir. 2009) (failure to provide the parent with the procedural safeguards and prior written notice resulted in the LEA withholding information from the parents).

## V. RESPONSE TO DUE PROCESS COMPLAINT

- A. Response. When the LEA has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint, the LEA shall send to the parent a response within 10 days of the LEA receiving the complaint.<sup>23</sup>
- B. Content. The response shall include –
  1. An explanation of why the LEA proposed or refused to take the action raised in the due process complaint;
  2. A description of other options that the IEP team considered and the reasons why those option were rejected;
  3. A description of each evaluation procedure, assessment, record, or report that the LEA used as the basis for the proposed or refused actions; and
  4. A description of the factors that are relevant to the LEA's proposal or refusal.<sup>24</sup>
- C. Sufficiency. Filing of the response by the LEA shall not be construed to preclude the LEA from asserting that the parent's due process complaint is insufficient,

<sup>23</sup> 20 U.S.C. § 1415(c)(2)(B)(i)(I); 34 C.F.R. § 300.508(e).

<sup>24</sup> 20 U.S.C. § 1415(c)(2)(B)(i)(I)(aa) – (dd); 34 C.F.R. § 300.508(e)(1)(i) – (iv).

where appropriate.<sup>25</sup>

- D. Other Party Response. Parents, too, are required to file a response when the LEA has initiated the due process hearing.<sup>26</sup>
- E. Judicial Decisions / Federal Policy/Guidance
1. The IDEA does not establish consequences for either party's failure to respond. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46699 (August 14, 2006).
  2. An LEA may not determine the form of its response. The required content of the written response must be consistent with what is required by the IDEA. *Massey v. District of Columbia*, 400 F. Supp. 2d 66, 44 IDELR 163 (D.D.C. 2005).
  3. IDEA does not specify default as the penalty for failure to serve an appropriate response to a due process complaint. Granting a default judgment would subvert the administrative process and assigned the student to the parent's preferred placement without a full examination of the record or his needs. *Sykes v. District of Columbia*, 518 F. Supp. 2d 261, 49 IDELR 8 (D.D.C. 2007). *See also Jalloh v. District of Columbia*, 535 F. Supp. 2d 13 (D.D.C. 2008) (the fact that the LEA issued a general denial of wrongdoing in response to the parent's due process complaint did not entitle the parent to a default judgment).

## VI. AMENDING THE DUE PROCESS COMPLAINT

- A. New Issues. The party requesting the due process hearing may not raise issues at the hearing that were not raised in the complaint, unless the other party agrees otherwise.<sup>27</sup>
- B. Amending the Complaint. 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. The hearing officer may only grant such permission at any time not later than five (5) calendar days before a

<sup>25</sup> 20 U.S.C. § 1415(c)(2)(B)(i)(II); 34 C.F.R. § 300.508(e)(2).

<sup>26</sup> *See* 20 U.S.C. § 1415(c)(2)(B)(ii); 34 C.F.R. § 300.508(f).

<sup>27</sup> 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d).

due process hearing occurs.<sup>28</sup>

- C. Timeline Recommences. When an amended due process complaint is filed, the timelines restart anew, including the resolution meeting timeline.<sup>29</sup>
- D. Judicial Decisions / Federal Policy/Guidance
1. The IDEA does not address whether the non-complaining party may raise other issues at the hearing that were not raised in the due process complaint. The comments specify that such matters should be left to the discretion of hearing officers in light of the particular facts and circumstances of a case. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46706 (August 14, 2006).
  2. A plain reading of § 1415(f)(3)(B) prevents only “the party requesting the due process hearing” from raising any new issues not included in the due process complaint. § 1415(f)(3)(B) does not address whether a respondent may raise new issues. Nonetheless, and in contrast to the Comments, the District Court held that the non-complaining party can only contest issues raised in the due process complaint and that hearing officers do not have discretion to hear issues raised by the non-complaining party which are not included in the due process complaint. *Saki v. State of Hawaii, Dep’t of Educ.*, 50 IDELR 103 (D. Haw. 2008).

## VII. RESOLUTION SESSIONS

- A. Resolution Meeting. Prior to the opportunity for an impartial due process hearing, the LEA shall convene a meeting with the parents and the relevant member(s) of the IEP team who have specific knowledge of the facts identified in the due process complaint –
1. within 15 calendar days of receiving notice of the due process complaint;
  2. which shall include a representative of the LEA who has decision-making authority on behalf of the LEA;
  3. which may not include an attorney of the LEA unless the parent is accompanied by an attorney; and
  4. where the parents discuss their due process complaint, and the facts that form the basis of the complaint, and the LEA is provided the opportunity to resolve the complaint.

<sup>28</sup> 20 U.S.C. § 1415(c)(2)(E)(i); 34 C.F.R. § 300.508(d)(3).

<sup>29</sup> 20 U.S.C. § 1415(c)(2)(E)(ii); 34 C.F.R. § 300.508(d)(4).

The resolution meeting is not required when the parents and the LEA agree in writing to waive the meeting, or agree to use the mediation process in lieu of the resolution process.<sup>30</sup>

B. Agreement. When the parents and the LEA resolve the complaint at the resolution meeting, the parties shall execute a legally binding, written agreement that is

–

1. signed by both the parents and a representative of the LEA who has the authority to bind the LEA; and
2. enforceable in any State court of competent jurisdiction or in a district court of the United States.<sup>31</sup>

C. Review Period. Either party may void the signed, written settlement agreement within three (3) business days of the agreement's execution.<sup>32</sup>

D. Timelines

1. 30-day Resolution Period. If the LEA has not resolved the due process complaint to the satisfaction of the parents within 30 calendar days of the receipt of the complaint, the due process hearing may occur.<sup>33</sup>
2. Adjustments to 30-day Resolution Period. The 45-day timeline for the due process hearing starts the day after –
  - a. both parties agree in writing to waive the resolution meeting;
  - b. the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or
  - c. both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or the LEA withdraws from the mediation process.<sup>34</sup>
3. Filing with the SEA. A State can adopt procedures that include a requirement that an LEA or SEA advise the parent in writing that the timeline for starting the resolution process will not begin until the complainant provides the LEA and SEA with a copy of the due process complaint, as re-

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<sup>30</sup> 20 U.S.C. § 1415(f)(1)(B)(i); 34 C.F.R. § 300.510(a).

<sup>31</sup> 20 U.S.C. § 1415(f)(1)(B)(iii); 34 C.F.R. § 300.510(d).

<sup>32</sup> 20 U.S.C. § 1415(f)(1)(B)(iv); 34 C.F.R. § 300.510(e).

<sup>33</sup> 20 U.S.C. § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.510(b)(1).

<sup>34</sup> 34 C.F.R. § 300.510(c).

quired by 34 C.F.R. § 300.508(a).<sup>35</sup>

- E. LEA Complainant. There is no provision requiring a resolution meeting when an LEA is the complaining party.<sup>36</sup> Since the resolution process is not required when the LEA files a complaint, the 45-day timeline for issuing a written decision begins the day after the parent and the SEA receive the LEA's complaint.<sup>37</sup> However, if the parties choose to use mediation, the 30-day resolution period is still applicable.<sup>38</sup>
- F. Failure to Participate / Hold Meeting
1. Except where the parties have jointly agreed in writing to waive the resolution process or to use mediation, the failure of the parent to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.<sup>39</sup>
  2. When the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and document, the LEA may request that the due process complaint be dismissed at the conclusion of the 30-day period.<sup>40</sup>
  3. Should the LEA fail to hold the resolution meeting within 15 calendar days of receiving notice of the parent's due process complaint or fails to participate in the meeting, the parent may seek the intervention of the hearing officer to begin the 45-day timeline.<sup>41</sup>
- G. Judicial Decisions / Federal Policy/Guidance
1. It is inconsistent with the IDEA and its implementing regulations for the State to adopt a regulation that permits suspension of the resolution timeline when the SEA/LEA receives the parent's due process complaint shortly before or during an LEA's winter break. *Letter to Anderson*, 110 LRP 70096 (OSEP 2010).
  2. Discussions held during the resolution meeting are not confidential. The District Court held that the hearing officer erred in excluding evidence from a resolution session. *Friendship Edison Pub. Charter Sch. v. Smith*,

<sup>35</sup> *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 52 IDELR 266, Question C-1 (OSERS 2009).

<sup>36</sup> *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46700 (August 14, 2006).

<sup>37</sup> *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 52 IDELR 266, Question D-1 (OSERS 2009).

<sup>38</sup> *Id.* at Question D-6.

<sup>39</sup> 34 C.F.R. § 300.510(b)(3).

<sup>40</sup> 34 C.F.R. § 300.510(c)(4).

<sup>41</sup> 34 C.F.R. § 300.510(c)(5).



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561 F. Supp. 2d 74 (D.D.C. 2008).

3. Nothing in the IDEA or the regulations would prevent the parties from voluntarily agreeing that the resolution meeting discussions will remain confidential, including prohibiting the introduction of those discussion at any subsequent due process hearing. *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 52 IDELR 266, Question D-4 (OSERS 2009). However, neither the SEA nor an LEA can require a confidentiality agreement as a condition of participation in the resolution meeting. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46704 (August 14, 2006).

## VIII. HEARINGS

### A. Hearing Officer

#### 1. Qualifications

- a. IDEA 2004 sets forth minimum qualifications for hearing officers who preside over IDEA hearings.<sup>42</sup> Specifically, an IDEA hearing officer shall -
  - i. possess knowledge of, and the ability to understand, the provisions of the IDEA, Federal and State regulations pertaining to the IDEA, and legal interpretations of the IDEA by Federal and State courts;
  - ii. possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
  - iii. possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.<sup>43</sup>
- b. However, because standard legal practice will vary depending on the State in which the hearing is held, the requirements that the hearing officer possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice, are general in nature.<sup>44</sup>

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<sup>42</sup> See, generally, 20 U.S.C. § 1415(f)(3)(A).

<sup>43</sup> 20 U.S.C. § 1415(f)(3)(A)(ii) – (iv).

<sup>44</sup> See, generally, *id.*

- c. Equally, the IDEA does not provide for training requirements.<sup>45</sup> However, each State must ensure that individuals selected to conduct impartial due process hearings are sufficiently trained.<sup>46</sup> Each State is tasked with determining the required training and the frequency of the required training, consistent with State rules and policies.<sup>47</sup>
2. Impartiality
- a. The IDEA recognizes the importance of an independent, fair and impartial hearing system. The IDEA prohibits –
- i. an employee of the SEA or LEA involved in the education or care of the child from serving as a hearing officer.<sup>48</sup>
- ii. persons with an actual bias because of a personal or professional conflict of interest from also serving as hearing officers.<sup>49</sup>
- b. However, IDEA does not establish standards for the ethical conduct of hearing officers. The application of State judicial code of conduct standards is a State matter.<sup>50</sup>
3. Judicial Decisions / Federal Policy/Guidance
- a. Hearing officers need only meet minimum standard of impartiality set out in the IDEA and “enjoy[] a presumption of honesty and integrity, which is only rebutted by a showing of some substantial countervailing reason to conclude that [the hearing officer] is actually biased with respect to factual issues being adjudicated.” *L.C. v. Utah State Bd. of Educ.*, 125 F. App’x 252, 43 IDELR 29 (10th Cir. 2005) quoting *Harline v. Drug Enforcement Admin.*, 148 F.3d

<sup>45</sup> See, generally, 20 U.S.C. § 1415(f)(3)(A); see also *C.S. by Struble v. California Dep’t of Educ.*, 50 IDELR 63 (S.D. Cal. 2008) (denying the parent’s request for a temporary restraining order to enjoin the California’s Department of Education from contracting with the Office of Administrative Hearings on the grounds that the parent did not have standing to challenge the Department’s training requirements, as the requirement is not in the IDEA but an obligation between two contracting parties); *Carnwath v. Grasmick*, 115 F. Supp. 2d 577, 33 IDELR 271 (D. Md. 2000) (dismissing the parent’s claims against the State education agency because there is no federal right to a competent or knowledgeable ALJ); *Cavanagh v. Grasmick*, 75 F. Supp. 2d 446, 31 IDELR 158 (D. Md. 1998) (“Standards for ALJ competency and training are not found within the statutory provisions of the IDEA.... Thus, ALJ competency and training appear to be governed solely by state law standards.”)

<sup>46</sup> *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46705 (August 14, 2006).

<sup>47</sup> *Id.*

<sup>48</sup> 20 U.S.C. § 1415(f)(3)(A)(i)(I).

<sup>49</sup> 20 U.S.C. § 1415(f)(3)(A)(i)(II).

<sup>50</sup> *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46705 (August 14, 2006).

1199 (10th Cir. 1998).

- b. Administrative adjudicators are entitled to a “presumption of honesty and integrity,” and in order to overcome this presumption and establish bias, “evidence is required that the decision maker ‘had it in’ for the party for reasons unrelated to the officer’s view of the law.” *B.H. v. Joliet Sch. Dist.*, 54 IDELR 121 (N.D. Ill. 2010) citing *Keith v. Massanari*, 17 Fed. Appx. 478 (7th Cir. 2001).
- c. An LEA superintendent is sufficiently involved in the child’s education and, therefore, is not able to sit as the hearing officer in the due process hearing. *Robert M. v. Benton*, 634 F.2d 1139, 552 IDELR 262 (8th Cir. 1980); see also *Helms v. McDaniel*, 657 F.2d 800, 553 IDELR 205 (5th Cir. 1981) (finding that Georgia’s then State review procedures which treated the findings of the State review officer as the findings of a special master, without an automatic appeal to State or Federal court, conflicted with the Education for All Handicapped Children Act’s, the IDEA’s predecessor, prohibition against employees of the State agency from conducting hearings).

## B. Burden of Persuasion

- 1. IDEA is silent on which party has the burden of persuasion and/or production.
- 2. Judicial Decisions / Federal Policy/Guidance
  - a. Generally, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief. *Shaffer v. Weast*, 546 U.S. 49, 44 IDELR 150 (2005).<sup>51</sup>
  - b. Even though Minnesota law explicitly assign the burden of persuasion on the LEA, the Eighth Circuit held that it was error to assign the burden of persuasion to a Minnesota school district in light of the *Weast* decision. The Eighth Circuit explained that the *Weast* Court declined to decide whether the default rule would apply in States such as Minnesota that explicitly assign the burden elsewhere. *M.M. v. Special Sch. Dist. No. 1*, 512 F.3d 455, 49 IDELR 61 (8th Cir. 2008) citing *School Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 45 IDELR 117 (8th Cir. 2006).

<sup>51</sup> The *Weast* Court did not address the burden of production. Nor does the decision address whether States can have laws shifting the burden of persuasion to their LEAs.

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D. Hearing Rights

1. The IDEA mandates that any party to a hearing has the right to –
  - a. be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
  - b. present evidence and confront, cross-examine, and compel the attendance of witnesses;
  - c. prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;
  - d. obtain a written or, at the option of the parents, an electronic verbatim record of the hearing; and
  - e. written or, at the option of the parents, an electronic findings of fact and decisions.<sup>52</sup>
2. The IDEA also provides that, 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 on the offering party's evaluations, that the party intends to use at the hearing.<sup>53</sup> However, unlike the right found in § 300.512(a)(3), i.e., any evidence, the hearing officer has discretion on whether to bar any party that fails to comply with § 300.512(b) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.<sup>54</sup>
3. The IDEA provides the parent with three additional hearing rights.
  - a. The right to have the child who is the subject of the hearing present;
  - b. The right to open the hearing to the public; and
  - c. The right to have the record of the hearing and the findings of fact and decisions provided to the parent at no cost.<sup>55</sup>

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<sup>52</sup> 20 U.S.C. § 1415(h)(1) – (4); 34 C.F.R. § 300.512(a)(1) – (5).

<sup>53</sup> 20 U.S.C. § 1415(f)(2)(A); 34 C.F.R. § 300.512(b)(1).

<sup>54</sup> 20 U.S.C. § 1415(f)(2)(B); 34 C.F.R. § 300.512(b)(2).

<sup>55</sup> 34 C.F.R. § 300.512(c).

4. Convenience of Hearings. Each hearing must be conducted at a time and place that is reasonably convenient to the parents and child involved.<sup>56</sup>
5. Judicial Decisions / Federal Policy/Guidance
  - a. The IDEA permits a non-attorney advocate to *accompany* and *advise* a party at a hearing. See 20 U.S.C. § 1415(h)(1); 34 C.F.R. § 300.512(a)(1). However, the IDEA does not address whether non-attorney advocates who have “special knowledge or training with respect to the problems of children with disabilities” can *represent* parties at hearings. The issue of whether non-attorney advocates may *represent* parties to a due process hearing is a matter that is left to each State to decide.<sup>57</sup> *Analysis and Comments to the Regulations*, Federal Register, Vol. 73, No. 156, Page 73017 (December 1, 2008). If State law is silent on the issue, a non-attorney advocate may *represent*, not just *accompany* and *advise*, a party at a hearing. *Analysis and Comments to the Regulations*, Federal Register, Vol. 73, No. 156, Page 73018 (December 1, 2008).
  - b. The failure to provide a complete transcript or recording is not necessarily a denial of a free and appropriate public education unless the student’s substantive rights under the IDEA were affected. *Kingsmore v. District of Columbia*, 46 IDELR 152 (D.C. Cir. 2006). Cf. *J.R. v. Sylvan Union Sch. Dist.*, 50 IDELR 130 (E.D. Ca. 2008) (holding that the ALJ had to rehear the last day of testimony because the missing testimony was so significant).
  - c. Admission of hearsay is permissible and does not deprive the other party of the right to confront witnesses. *Jalloh v. District of Columbia*, 535 F. Supp. 2d 13, 49 IDELR 190 (D.D.C. 2008).
  - d. A party to a hearing may attempt to introduce evidence at any time during the hearing process, provided the disclosure of the additional evidence would satisfy the five-day rule and the introduction of such evidence is not the sole reason for the hearing delay. *Letter to Steinke*, 18 IDELR 730 (OSEP 1992).
  - e. The five-day rule has two purposes. First, is to prevent the non-moving party from having to defend against undisclosed evidence produced at the last minute in the hearing. Second, is to ensure the prompt resolution of disputes. *L.J. v. Audobon Bd. of Educ.*, 51

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<sup>56</sup> 34 C.F.R. § 300.515(d).

<sup>57</sup> There are a number of States that expressly prohibit representation by non-attorney advocates while others expressly permit it. See Perry A. Zirkel, *Lay Advocates and Parent Experts under the IDEA*, 217 EDUC. L. REP. 19 (2007).

IDELR 37 (D.N.J. 2008).

- f. Other than the five-day rule, the IDEA does not provide for pre-hearing discovery. *Horen v. Bd. of Educ. of City of Toledo Pub. Sch. Dist.*, 655 F. Supp. 2d 794, 53 IDELR 79 (N.D. Ohio 2009). *See also Hupp v. Switzerland of Ohio Local Sch. Dist.*, 51 IDELR 131 (S.D. Oh. 2008) (holding that the parent is not entitled to information about all students within the LEA's borders who received special education services); *B.H. v. Joliet Sch. Dist.*, 54 IDELR 121 (N.D. Ill. 2010) (holding that IDEA hearings do not provide for the sort of extensive discovery that often occurs in litigation). *But see Letter to Stadler*, 24 IDELR 973 (OSEP 1996) (advising that IDEA does not prohibit or require use of discovery proceedings and that the nature and extent of discovery methods used are matters left to discretion of the hearing officer, subject to State or local rules and procedures).

#### E. Procedural Issues

1. Hearing Decisions – Generally. A decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a FAPE.<sup>58</sup>
2. Procedural Issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies –
  - a. impeded the child's right to a FAPE;
  - b. significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
  - c. caused a deprivation of educational benefits.<sup>59</sup>
3. Compliance with Procedural Requirements. A hearing officer may order an LEA to comply with the IDEA's procedural requirements.<sup>60</sup>
4. Judicial Decisions / Federal Policy/Guidance
  - a. A procedural violation alone without a showing that the child's education was substantively affected, does not establish a failure to provide a FAPE. *See, e.g., A.C. v. Bd. of Educ.*, 553 F.3d 165 (2d

<sup>58</sup> 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a)(1).

<sup>59</sup> 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2).

<sup>60</sup> 20 U.S.C. § 1415(f)(3)(E)(iii); 34 C.F.R. § 300.513(a)(3).

Cir. 2009) (the failure to conduct an FBA in accordance with State regulation did not deprive the student of a FAPE); *Lesesne v. Dist. of Columbia*, 447 F.3d 828 (D.C. Cir. 2006) (the failure to complete an evaluation in a timely manner did not result in substantive harm to the child); *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 (2d Cir. 2003) (the failure of the LEA to develop and review the student's IEP in a timely manner did not result in a denial of a FAPE where the parents had removed the student from the LEA and placed her in a private school months before they challenged the IEP).

- b. Only material failures to provide the services in an IEP are compensable under the IDEA. *See, e.g., Banks v. District of Columbia*, 720 F. Supp. 2d 83, 54 IDELR 282 (D.D.C. 2010); 583 F. Supp. 2d 169; *S.S. v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 51 IDELR 151 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 47 IDELR 223 (D.D.C. 2007). Minor discrepancies between the services recommended in the IEP and the services actually provided to the student are not a violation of the IDEA. A court and/or hearing officer must first ascertain whether the aspects of the IEP that were not followed were “substantial or significant,” or, in other words, whether the deviations from the IEP’s stated requirements were “material.” *A.P. v. Woodstock Bd. of Educ.*, 370 F. Appx. 202, 55 IDELR 61 (2d Cir. 2010); *Van Duyn v. Baker Sch. Dist.*, 481 F.3d 770, 47 IDELR 182 (9th Cir. 2007); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, n.3, 38 IDELR 61 (8th Cir. 2003); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 31 IDELR 185 (5th Cir. 2000).
- c. Failure to notify the student’s parents that the student was removed from an alternative assessment program and to inform the parents of their due process rights were not harmless, technical violations of the IDEA. *County Sch. Bd. of York Cty. v. A.L.*, 194 F. App’x 173, 46 IDELR 94 (4th Cir. 2006) (unpublished).

## F. Timelines

### 1. Non-Discipline Hearings

- a. Within 45 calendar days after the expiration of the 30-day resolution period, or the adjusted time periods described in 34 C.F.R. § 300.510(c), a final decision must be reached in the hearing and mailed to each of the parties.<sup>61</sup>

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<sup>61</sup> 34 C.F.R. § 300.515(a).

- b. A hearing officer may grant specific extensions of time beyond the 45-day period but only at the request of either party.<sup>62</sup>

## 2. Discipline Hearings

- a. Subject Matter. A parent of a child with a disability may challenge the placement decision resulting from a disciplinary removal or the manifestation determination.<sup>63</sup> An LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may seek to have the child placed in an interim alternative educational setting (“IAES”).<sup>64</sup>
- b. Expedited Hearing. In matters involving a challenge to the placement decision resulting from a disciplinary removal, the manifestation determination, or placement in an IAES, the parent or LEA must be given an opportunity for an expedited due process hearing, which must occur within 20 school days of the date the complaint is filed.<sup>65</sup> A decision must be made and provided to the parties within 10 school days after the hearing.<sup>66</sup>
- c. Resolution Period. A resolution meeting must occur, unless waived in writing by both parties, within seven calendar days of receiving notice of the due process complaint and the due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of the receipt of the due process complaint.<sup>67</sup> The resolution period runs concurrent with the hearing period.<sup>68</sup>
- d. Sufficiency Challenges. The sufficiency provision in § 300.508(d) do not apply to the expedited due process hearing.<sup>69</sup>

## 3. Judicial Decisions / Federal Policy/Guidance

- a. Inaction by a parent and LEA following the filing of a due process complaint does not toll the 45-day timeline. The timelines regarding due process complaints remain in effect and the hearing officer should contact the parties upon the expiration of the 30-day resolution period for a status report and/or to convene a hearing. *Letter*

<sup>62</sup> 34 C.F.R. § 300.515(c).

<sup>63</sup> 34 C.F.R. § 300.532(a).

<sup>64</sup> *Id.* See also 34 C.F.R. § 300.532(b)(2)(ii).

<sup>65</sup> 34 C.F.R. § 300.532(c)(1) and (2).

<sup>66</sup> 34 C.F.R. § 300.532(c)(2).

<sup>67</sup> 34 C.F.R. § 300.532(c)(3).

<sup>68</sup> *Letter to Gerl*, 51 IDELR 166 (OSEP 2008).

<sup>69</sup> *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46725 (August 14, 2006).



*to Worthington*, 51 IDELR 281 (OSEP 2008).

- b. An indefinite continuance of a due process hearing is not permissible under the IDEA. *J.D. v. Kanawha Cty. Bd. of Educ.*, 53 IDELR 225 (S.D. W. Va. 2009).
- c. The failure to issue a decision within the 45-day timeline and more than a year after the due process complaint was filed, while in violation of the IDEA, was nonetheless deemed harmless. Here, the student had been withdrawn from the LEA and enrolled in a private school before his parents requested a hearing. *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 51 IDELR 9 (D.D.C. 2008).

## IX. MANAGEMENT ISSUES

### A. Pre-Hearing Conference

1. Utility – Necessity – Authority. The IDEA and its regulations do not require a pre-hearing conference, but state statutes, regulations or procedures may require the conduct of a pre-hearing conference. Whether the pre-hearing conference is mandated, or a matter left to the discretion of the hearing officer (who has elected to exercise such discretion), how the conference is structured and the tone set by the hearing officer leading up to the pre-hearing conference is pivotal to the hearing officer taking control of the hearing process and the management of its participants.
2. Structure and Tone. Immediately after being appointed, the hearing officer should determine whether any of the events described in 34 C.F.R. § 300.510(c) require the hearing officer to adjust the timeline.<sup>70</sup> An effective approach may be to issue an order requiring the parties to provide the hearing officer with information pertaining to the resolution process.

Soon after determining that the timeline should be readjusted, or when the 30-day resolution period has expired, the hearing officer should issue an order outlining when the resolution period ended, when the 45-day timeline started, and when the decision is due. The hearing officer should also schedule a pre-hearing conference and provide the parties with an agenda for the conference. The pre-hearing conference should be held early on in

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<sup>70</sup> Pursuant to 34 C.F.R. § 300.515 (a), a decision in a due process hearing must be reached and mailed to each of the parties not later than 45 calendar days after the expiration of the 30-day resolution period under 34 C.F.R. § 300.510(b), or the adjusted time periods described in 34 C.F.R. § 300.510(c). Under 34 C.F.R. § 300.510(c), the 45-day timeline for the due process hearing starts the day after one of the following events: (1) both parties agree in writing that no agreement is possible; (2) after either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or (3) if both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

the 45-day time period,<sup>71</sup> and consideration should be given to the five-day rule,<sup>72</sup> the ten-day attorneys' fee rule,<sup>73</sup> and the time the parties will need to prepare for the hearing.

3. Pre-Hearing Conference Summary and Order. Upon completion of the pre-hearing conference, and within three business days, the hearing officer should issue a Pre-Hearing Conference Summary and Order that confirms the matters discussed during the pre-hearing conference.<sup>74</sup> The parties should be held to the matters agreed upon, ordered, or otherwise set forth in the order unless the hearing officer is advised immediately (e.g., three business days from issuance) of any corrections or objections.

## B. Identifying the Issues with Precision – Managing the Issues Presented

1. Authority. Hearing Officers have expansive discretionary authority when handling pre-hearing procedural matters. Said authority extends to requiring specification of the issues raised in the due process complaint, even in the absence of a sufficiency challenge.<sup>75</sup> OSEP, too, suggests that hearing officers have a role to play in managing the issues presented. Specifically, the Comments to the Regulations states:

To assist parents in filing a due process complaint, § 300.509 and section 615(b)(8) of the Act require each State to develop a model due process complaint form. While there is no requirement that States assist parents in completing the due process complaint form, resolution of a complaint is more likely when both parties to the complaint have a clear understanding of the nature of the complaint. Therefore, the Department encourages States, to the extent possible, to assist a parent in completing the due process complaint so that it meets the standards for sufficiency. However, consistent with section 615(c)(2)(D) of the Act, the final decision regarding the sufficiency of a due process complaint is left to the discretion of the hearing officer.

With regard to parents who file a due process complaint without the assistance of an attorney or for minor deficiencies or omissions

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<sup>71</sup> Some hearing officers prefer to hold the pre-hearing conference prior to the resolution period. While there is no reason that this cannot be done, the hearing officer should be mindful that what s/he says during the pre-hearing conference might sway the discussion during the resolution meeting.

<sup>72</sup> See 34 C.F.R. § 300.512(a)(2) and (b)(1).

<sup>73</sup> See 34 C.F.R. § 300.517(c)(2)(i)(A).

<sup>74</sup> Generally, it is at the discretion of the hearing officer on whether the pre-hearing conference is recorded. Consideration should be given to recording the conference when the parties are scheduled to discuss a significant motion, a party (the parties) is (are) difficult, or there is a need for limited testimony to decide a motion or an issue.

<sup>75</sup> See *Ford v. Long Beach Unified School District*, 37 IDELR 1, (9<sup>th</sup> Cir. 2002) (holding that the parents' due process rights were not violated when the hearing officer, in her written decision, formulated the issues presented in words different from the words in the due process complaint).

in complaints, we would expect that hearing officers would exercise appropriate discretion in considering requests for amendments.

*Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46699 (August 14, 2006).

2. Purpose. Managing the issues presented is critical to effective and efficient management of the hearing process. When the issues in the due process complaint are clear, the responding party is able to prepare for the hearing, the hearing is focused, there is meaningful opportunity for resolving the complaint during the resolution meeting or thereafter, and the hearing officer is able to better determine whether s/he has jurisdiction over the specific issues.<sup>76</sup>
3. Addressing the Issue(s) at the Pre-Hearing Conference. Good practice would be for the hearing officer to have a thorough discussion regarding the issue(s) presented in the due process complaint during the pre-hearing conference. To aid the hearing officer and the parties to detail the issue(s) with precision, the hearing officer should –
  - a. Get specifics by reviewing the IEP in question (even if line-by-line) and the parties' relative position on each issue in dispute;
  - b. Ask clarifying questions (Why do you disagree with the classification? What classification do you believe would be appropriate? How would the student's IEP be different if the classification was changed?)
  - c. Consider starting from the end, when the complaining party is a pro se parent who has difficulty identifying the issues. Ask the parent to identify the remedy.
  - d. Consider issuing an order listing specific questions that would need to be answered by the complaining party when more time is needed to respond. A schedule should be set identifying by when the complaining party should submit the answers and by when the responding party should submit his relative position on each identified issue.
4. Be Flexible. Other than the parents' right to inspect and review any education records relating to their children prior to an IEP meeting, resolution meeting or hearing, or the right to a response to reasonable requests for

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<sup>76</sup> See *Letter to Wilde* (OSEP 1990) (unpublished) ("Determinations of whether particular issues are within the hearing officer's jurisdiction ... are the exclusive province of the impartial due process hearing officer who must be appointed to conduct the hearing.").

explanations and interpretations of the records,<sup>77</sup> the IDEA does not provide for discovery. Naturally, some discovery takes place during the hearing process and hearing officers should weigh allowing related, new issues to be added during the hearing (or post the filing of the complaint) when it can be done fairly, without undue delay, and with the consent of the non-complaining party.<sup>78</sup> The alternative might be a second hearing, resulting in the additional expenses of time and money.<sup>79</sup>

5. Document Issues/Facts Not in Dispute. Identifying issues and facts not in dispute will focus settlement discussions and, should a hearing be necessary, the hearing. When at all possible, encourage/order the parties to stipulate to facts in advance of the hearing.
6. Eliminate Non-Hearable Issues. Issues that are not the appropriate subject of an IDEA due process hearing, or that are no longer viable, should be disposed of early on to avoid unnecessary preparation for, and prolonging, the hearing.<sup>80</sup> The hearing officer has authority to determine whether an issue is within his jurisdiction.<sup>81</sup>

Consideration should also be given to whether the parents can properly exercise their right to an administrative due process hearing when parents do not first address their concerns (of which they are now complaining) with the IEP Team or school district. At the heart of the IDEA, “is the cooperative process that it establishes between parents and schools.”<sup>82</sup>

Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, ... as it did upon the measurement of the resulting IEP against a substantive standard.<sup>83</sup>

“The central vehicle for this collaboration is the IEP process,” and parents play a significant role in this process.<sup>84</sup> Given this envisioned cooperative process, the hearing officer should weigh whether the issues in the due

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<sup>77</sup> 34 C.F.R. § 300.613(a) and (b)(1).

<sup>78</sup> Be mindful of the language in 34 C.F.R. § 300.508(c), requiring notice before a hearing. Note, however, the use of the permissive word, “may.”

<sup>79</sup> Prohibiting the complaining party from raising new issues at the time of the hearing could result in additional complaints or protracted conflict and litigation. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46747 (August 14, 2006).

<sup>80</sup> For example, matters that are beyond the two-year statute of limitations, absent an exception, or previously litigated and determined (i.e., res judicata and/or collateral estoppel) might warrant dismissing the issues (or the case) prior to the actual hearing.

<sup>81</sup> *Letter to Wilde* (OSEP 1990) (unpublished).

<sup>82</sup> *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005) citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982).

<sup>83</sup> *Rowley*, 458 U.S. at 205-06.

<sup>84</sup> *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005).

process complaint stem from the IEP Team or school district's proposal and/or refusal to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free and appropriate public education to the child<sup>85,86</sup> If it does not, the non-complaining party may call upon the hearing officer to determine whether the parent has the right to bring the claim.<sup>87</sup>

### C. Developing / Completing the Record

1. Can It Be Done. The IDEA mandates resort in the first instance to the administrative due process hearing so as to develop the factual record and resolve evidentiary disputes concerning the identification, evaluation or educational placement of a child with a disability, or the provision of a free and appropriate public education to the child.<sup>88</sup> The hearing officer's primary role is to make findings of fact and ultimately decide the issues raised in the due process complaint.<sup>89</sup>

When the record evidence is insufficient – whether because the parent appears pro se or counsel has done an inadequate job – and prior to the conclusion of the hearing, the hearing officer has the authority/discretion and, perhaps, the obligation or responsibility, to develop at least the minimal record necessary to determine the issue(s) presented.<sup>90</sup> Whether any given

<sup>85</sup> See 34 C.F.R. 300.503(a)(1) and (2).

<sup>86</sup> A “refusal” does not require purposeful action by the LEA. See *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181, 54 IDELR 71 (9th Cir. 2010) cert. filed 111 LRP 28067 (U.S. Jan. 6, 2011).

<sup>87</sup> Whether the IDEA's written notice procedures limit the jurisdictional scope of the due process complaint procedure is open to interpretation. In a recent case, which is on appeal to the United States Supreme Court, the Ninth Circuit held that the LEA's argument that there cannot be a due process right to file a claim unless the prior written notice provisions specifically apply to such a claim would produce “absurd” results. See *id.* See also *Letter to Zimmerman*, 34 IDELR 150 (OSEP 2000) (expressing the view that Connecticut's statute barring any issue at a due process hearing that was not raised at a planning and placement team meeting, to be inconsistent with the IDEA).

<sup>88</sup> See, e.g., *W.B. v. Matula*, 23 IDELR 411 (3d Cir. 1995) (determining that the parents were not required to exhaust their administrative remedies prior to coming to the District Court because, in part, the factual record had been developed, and the substantive issues were addressed, at the administrative due process hearing rendering the action ripe for judicial resolution). See also, *Hesling v. Avon Grove Sch. Dist.*, 45 IDELR 190 (E.D. Pa. 2006) (explaining that allowing the parent not to exhaust her administrative remedies would promote judicial inefficiency).

<sup>89</sup> See, generally, 34 C.F.R. § 300.512(a)(5) and 34 C.F.R. § 300.513.

<sup>90</sup> The IDEA serves as the primary vehicle by which all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. See, generally, 34 C.F.R. § 300.1(a), 34 C.F.R. § 300.2 and 34 C.F.R. § 300.511. To this end, the purpose of the hearing process is to ensure that the rights of the parties that avail themselves of the hearing process are protected, and the hearing officer is specifically tasked with the responsibility to accord each a meaningful opportunity to exercise his/its rights during the course of the hearing. 34 C.F.R. § 300.1(b); *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995).

hearing officer exercises his authority/discretion in this regard is a function of how he views his role and responsibilities, or whether state law speaks to the issue.<sup>91</sup>

2. When and How. Should the hearing officer exercise his authority/discretion, or state law mandates that the hearing officer completes the record, the following steps would constitute good practice:
  - a. Consider the issue(s) prior to the pre-hearing conference and, if necessary, research the law applicable to the issue(s). At the pre-hearing conference, when reviewing the issue(s), also discuss the type of evidence necessary for the hearing officer to decide the issue(s) and craft a remedy.<sup>92</sup>
  - b. During the hearing, ask the party, or his representative, whether the answer to a particular question, or a particular line of questioning, document or testimony, might be necessary to determine an issue. Should the party agree, the party should then be given the opportunity to ask the question, admit the document, or present the testimony of a witness.
  - c. Should the party disagree, consider asking the question(s) directly or calling the additional witness. The hearing officer should explain on the record why he has chosen to seek the additional evidence despite whatever objection might have been voiced by any given party; phrase questions carefully; and, allow the parties to ask follow up questions of their own.
  - d. Grant the parties additional time to supplement the record if the record is incomplete to enable the hearing officer to craft an award.
  - e. Consider an IEE.<sup>93</sup>

#### D. The Pro Se Litigant

1. Balance. A difficult situation presents itself when the parent appears pro se.<sup>94</sup> The hearing officer must strike a balance between maintaining his

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<sup>91</sup> For example, New York State law specifically grants the hearing officer the authority to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record. 8 N.Y.C.R.R. 200.5(j)(3)(vii).

<sup>92</sup> The Pre-Hearing Conference Summary and Order should accurately reflect the discussions had with the parties. Should any given party choose not to present the needed evidence, the hearing officer would have afforded the party the opportunity to develop the record without necessitating the hearing officer's direct involvement in the hearing.

<sup>93</sup> When weighing whether to seek an IEE, thought should be given to the impact on the 45-day timeline. Keep in mind, however, that a hearing officer may grant specific extensions of time beyond the 45 days only when it is at the request of either party. 34 C.F.R. § 300.515(c). The hearing officer cannot unilaterally extend the 45-day timeline. *See id.*

impartiality and allowing the pro se litigant to exercise his right to be heard according to law. Often, however, the hearing officer would have to extend assistance to the pro se litigant if such party is to receive a true opportunity to be heard. The other party may view said assistance as the hearing officer favoring the pro se litigant.

Not surprisingly, the IDEA offers no specific guidance on the role of hearing officers in managing due process hearings when the parent appears pro se. The IDEA, however, does require the decision of the hearing officer on whether the child received a free and appropriate public education to be based on substantive grounds.<sup>95</sup> In this regard, a hearing officer must take the necessary steps to structure the hearing process in a manner that would promote fairness between the parties and allow for the orderly presentation of relevant and reliable evidence to enable the hearing officer to reach a proper determination, while preserving his independence.

2. Procedural Issues. Unrepresented parents may not be as familiar, if at all, with the procedural requirements and the technical nuances embodied in the hearing process.<sup>96</sup> Understanding this, the hearing officer should take the time to fully explain each step of the hearing process, give the pro se litigant notice of any deficiencies, and liberally grant opportunities to remedy minor deficiencies, provided that the pro se party is acting in good faith.<sup>97</sup>
3. Advice. Under no circumstances should the hearing officer offer legal advice to the pro se parent. The hearing officer, however, should ascertain whether the pro se parent is familiar with the procedural safeguards applicable to the hearing process, as well as the hearing procedures.
4. Questioning Witnesses. Hearing officers are permitted to ask questions of witnesses in order to clarify testimony or develop facts necessary to determine a particular issue.<sup>98</sup> This questioning is of greater significance, albeit steeped in peril, when directed toward the pro se party or his witnesses. However, while the represented party may perceive such question-

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<sup>94</sup> In some jurisdictions, attorneys do not always represent school districts in due process hearings (e.g., New York City).

<sup>95</sup> See 34 C.F.R. § 300.513(a).

<sup>96</sup> For example, the parent may not be aware that s/he is obligated to send a response when the school district is the complaining party. The pro se parent may also not be familiar with the five-day rule, the format of a hearing, or the process of securing and serving a subpoena.

<sup>97</sup> In the judicial context, pro se litigants are held to less stringent standards than what would be expected from lawyers. See *Haines v. Kerner*, 404 U.S. 519 (1972). See also *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents with Children with Disabilities*, 52 IDELR 266 (OSERS 2009) (Although the comments to the IDEA regulations permit an SEA to dismiss State complaints that are unsigned or do not contain the parent's contact information, OSERS notes that the better practice might be to notify the parents of the defects in their complaints and allow the parent to remedy the deficiencies).

<sup>98</sup> See Section IX. C., *supra*.

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ing as giving the pro se litigant an unfair advantage, when done in an evenhanded manner, the hearing officer increases the likelihood that the resulting decision is made on the merits.<sup>99</sup>

5. Practical Considerations. The following are considerations in handling the pro se litigant throughout the hearing process:
- a. Clarify the pro se litigant's intent to proceed without representation. Any party to a hearing has the right to be accompanied to and advised by counsel and by individuals with special knowledge or training with respect to the problems with disabilities.<sup>100</sup>
  - b. Encourage parties to explore mediation<sup>101</sup> or settlement options. Mediation can be less formal than a due process hearing and the mediator can take more liberties that are not necessarily available to a hearing officer.
  - c. Set expectations about conduct. Hearings can be emotional and adversarial. Parties should be forewarned that rude, discourteous and/or unprofessional behavior is unacceptable and might lead to adverse consequences.
  - d. Review basic ethical principles, such as no ex-parte communication, copying the opposing side in all written communications, and that only things admitted into the record can be considered.
  - e. Hold the pre-hearing conference in person and take the time to explain the hearing process in addition to discussing the due process complaint.
  - f. Should the state have a hearing manual for parents, refer the pro se parent to it.
  - g. Clarify the issue(s) raised in the due process complaint, as well as the relief sought. Pro se litigant may need to understand what the hearing officer expects to hear during the hearing.
  - h. Discuss who has the burden of proof.
  - i. Confirm that the hearing officer has jurisdiction to hear the issue(s) and grant the relief being requested. It is critical that the pro se litigant fully appreciates the extent of the hearing officer's jurisdic-

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<sup>99</sup> Caution should be taken that the questions are unbiased and presented in a manner that do not reveal the hearing officer's concerns for a particular witness' credibility or the merits of the case.

<sup>100</sup> See 34 C.F.R. § 300.512(a)(1).

<sup>101</sup> See 34 C.F.R. § 300.506.



tion. Questions regarding jurisdiction should be decided early on in the process, and not after the hearing record has closed.

- j. Review the parent's hearing rights.
- k. Review hearing procedures, including –
  - i. The number of days that each party will require to present their case.
  - ii. The date(s), time and place for the hearing.<sup>102</sup>
  - iii. Format for hearing. In addition to discussing the traditional format (i.e., opening statement, which party will proceed first, direct and cross-examination, rebuttal case, closing statements), the hearing officer should discuss with the pro se parent on how s/he expects to testify. For example, the parent can submit a list of questions that s/he would like to be asked.
- l. Discuss attendance of witnesses and whether any witness would have to be compelled to attend.
- m. Be flexible on the hearing day and provide the pro se parent with breaks to collect thoughts and keep organized.

## **X. COMPENSATORY EDUCATION**

- A. Remedies Under the IDEA and/or Caselaw. The IDEA empowers a hearing officer and/or court to grant the relief that s/he / it determines to be appropriate.<sup>103</sup> Some of the commonly requested and awarded remedies are as follows:
  - 1. Appropriate education to meet the unique needs of a child with a disability, such as:
    - a. A particular educational placement
    - b. Specially designed instruction
    - c. Related services

<sup>102</sup> Each hearing must be conducted at a time and place that is reasonably convenient to the parents and child involved. 34 C.F.R. § 300.515(d).

<sup>103</sup> 34 C.F.R. § 300.516(c)(3).

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- d. Test accommodations
  - e. Qualified personnel that can implement the child's Individualized Education Program ("IEP")<sup>104</sup>
2. Tuition reimbursement
- a. An LEA may be required to reimburse parents for their tuition payment to a private school for the services obtained for the student by his or her parents if the services offered by the LEA were inadequate or inappropriate, the services selected by the parents were appropriate under the Act, and equitable considerations support the parents' claim.<sup>105</sup>
  - b. In *Burlington*, the Court found that Congress intended retroactive reimbursement to parents by an LEA as an available remedy in a proper case.<sup>106</sup>
  - c. "Reimbursement merely requires [an LEA] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."<sup>107</sup>
  - d. The mere fact that the SEA and/or the LEA has not approved the private school placement does not bar the parents from reimbursement.<sup>108</sup>
3. Order related to evaluations, IEPs or placements
- a. An order requiring one of the parties to take a specific action (e.g., development/implementation/revision of the IEP<sup>109</sup>; allow the observation of a student by an independent evaluator<sup>110</sup>)

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<sup>104</sup> This is other than a "highly qualified special education teacher," as the term is defined by the IDEA. See 20 U.S.C. § 1401(10)(F); 34 C.F.R. § 300.18.

<sup>105</sup> *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 20 IDELR 532 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 103 LRP 37667 (1985).

<sup>106</sup> *Burlington*, 471 U.S. at 370-71.

<sup>107</sup> *Id.*

<sup>108</sup> *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

<sup>109</sup> See, e.g., *Williamson County Bd. of Educ. v. C.K.*, 52 IDELR 40 (M.D. Tenn. 2009) (upholding the ALJ's administrative order requiring the LEA to develop an IEP for a gifted student with AD/HD).

<sup>110</sup> See, e.g., *School Bd. of Manatee County, Fla. v. L.H.*, 666 F. Supp. 2d 1285, 53 IDELR 149 (M.D. Fla. 2009) (upholding the ALJ's due process decision ordering the LEA to allow an in-school observation of a child with Asperger Syndrome by an independent evaluator).

- b. Independent educational evaluation (“IEE”)<sup>111</sup>
4. Preliminary injunctive relief
    - a. When seeking an order preventing an LEA from taking certain action, the parents must demonstrate
      - i. irreparable harm; and
      - ii. either a likelihood of success on the merits, or sufficiently serious questions going to the merits of the case, and a balance of hardships tipping decidedly in the parents’ favor.<sup>112</sup>
    - b. When seeking an order requiring an LEA to perform a certain action, the parents must demonstrate –
      - i. irreparable harm; and
      - ii. make a clear or substantial showing that they are likely to succeed on the merits of their claim.<sup>113</sup>
  5. Permanent injunctive relief
    - a. A party seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A party must demonstrate –
      - i. that it has suffered an irreparable injury;
      - ii. that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
      - iii. that, considering the balance of hardships between the parties, a remedy in equity is warranted; and

<sup>111</sup> 20 U.S.C. § 1415(d)(2)(A); 34 C.F.R. § 300.502. Also note that the hearing officer can request an IEE as part of a hearing on a due process complaint to enable him, for example, to craft a remedy. See 34 C.F.R. § 300.502(d).

<sup>112</sup> *D.D. v. New York City Dep’t of Educ.*, 465 F.3d 503, 46 IDELR 181 (2d Cir. 2006). See also *B.T. v. Department of Educ., State of Hawaii*, 51 IDELR 12 (D. Hawaii 2008) (The court enjoined the Hawaii ED from terminating the special education services of a 20-year-old student with autism who had purportedly “aged-out” because the ED allowed non-disabled students to attend high school through age 21.)

<sup>113</sup> *D.D. v. New York City Dep’t of Educ.*, 465 F.3d 503, 46 IDELR 181 (2d Cir. 2006); see also *Cave v. East Meadow Union Free Sch. Dist.*, 480 F. Supp. 2d 610, 47 IDELR 162 (E.D.N.Y. 2007) (The court denied a request for a mandatory injunction that would allow a student with a hearing impairment to bring his service dog to school.)

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- iv. that the public interest would not be disserved by a permanent injunction.<sup>114</sup>
  - b. The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.<sup>115</sup>
6. Monetary damages
- a. The U.S. Supreme Court has not decided whether parents can seek monetary damage for a denial of a FAPE. In *Burlington*, however, the Court noted that tuition reimbursement is permissible because it does not qualify as monetary damages, suggesting that the Court does not see the IDEA as permitting awards of compensatory or punitive damages.<sup>116</sup>
  - b. However, a majority of Circuit Courts have held that compensatory or punitive damages are not available under the IDEA.<sup>117</sup>
  - c. A number of Circuit Courts have held that monetary damages are available under Section 504<sup>118</sup> and at least one Circuit decision suggests that it may be available under Section 1983<sup>119</sup>.
7. Compensatory education
- B. Compensatory Education – Defined. An award of compensatory education is an equitable remedy<sup>120</sup> that “should aim to place disabled children in the same posi-

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<sup>114</sup> See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-313 (1982); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987).

<sup>115</sup> See, e.g., *Romero-Barcelo*, 456 U.S., at 320.

<sup>116</sup> *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 103 LRP 37667 (1985) (“In this Court, the Town repeatedly characterizes reimbursement as “damages,” but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP. Such a post hoc determination of financial responsibility was contemplated in the legislative history[.]”)

<sup>117</sup> See *Nieves-Marquez v. Commonwealth of Puerto Rico*, 353 F.3d 108, 40 IDELR 90 (1st Cir. 2003); *Polera v. Board of Educ. of the Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 36 IDELR 231 (2d Cir. 2002); *Sellers v. School Bd. of the City of Manassas*, 141 F.3d 524, 27 IDELR 1060 (4th Cir. 1998); *Gean v. Hattaway*, 330 F.3d 758, 39 IDELR 62 (6th Cir. 2003); *Charlie F. v. Board of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 24 IDELR 1039 (7th Cir. 1996); *Heidemann v. Rother*, 84 F.3d 1021, 24 IDELR 167 (8th Cir. 1996); *Robb v. Bethel Sch. Dist. #403*, 308 F.3d 1047, 37 IDELR 243 (9th Cir. 2002); *Ortega v. Bibb County Sch. Dist.*, 397 F.3d 1321, 42 IDELR 200 (11th Cir. 2005).

<sup>118</sup> See, e.g., *Mark H. v. Lemahieu*, 513 F.3d 922, 49 IDELR 91 (9th Cir. 2008); *Sellers v. School Bd. of the City of Manassas*, 27 IDELR 1060 (4th Cir. 1998).

<sup>119</sup> See *N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 24 IDELR 270 (11th Cir. 1996). For a district court decision in the District of Columbia finding that monetary damages are available for IDEA violations under Section 1983 see, e.g., *Walker v. District of Columbia*, 969 F. Supp. 794, 26 IDELR 996 (D.D.C. 1997).

<sup>120</sup> *Reid v. District of Columbia*, 401 F.3d 516, 523 – 524, 43 IDELR 32 (D.C. Cir. 2005) (finding that compensatory education is not a “form of damages” because the courts act in equity when remedying IDEA violations and must

tion they would have occupied but for the school district’s violation of the IDEA.”<sup>121</sup> It is not a contractual remedy.<sup>122</sup> More specifically, “[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court [and/or hearing officer] to remedy what might be termed an educational deficit created by an educational agency’s failure over a given period of time to provide a FAPE to a student.”<sup>123</sup>

- C. Authority of HO to Grant. Both the Office of Special Education Programs<sup>124</sup> (“OSEP”) and the courts<sup>125</sup> have established that hearing officers do have the authority to award compensatory education.
- D. Availability – The When
1. For Denials of FAPE. When an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or hearing officer fashioning appropriate relief<sup>126</sup> may order compensatory education.<sup>127</sup> Said denial must be more than *de minimis*.<sup>128</sup> Only material failures are actionable

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“do equity and ... mould each decree to the necessities of the particular case”) (*quoting Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)); *Gill v. District of Columbia*, 55 IDELR 191 (D.D.C. 2010) (“[W]hether to award compensatory education is a question for the Court’s equity jurisdiction, and is not a matter of legal damages.”)

<sup>121</sup> *Reid*, 401 F.3d at 518 (Compensatory education is “replacement of educational services the child should have received in the first place.”)

<sup>122</sup> *Reid*, 401 F.3d at 523 *citing Parents of Student W. v. Puyallup Sch. Dist., No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994).

<sup>123</sup> *Reid*, 401 F.3d at 523 *citing G. ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309, 40 IDELR 4 (4th Cir. 2003).

<sup>124</sup> *See, e.g., Letter to Riffel*, 34 IDELR 292 (OSEP 2000) (discussing a hearing officer’s authority to grant compensatory education services); *Letter to Anonymous*, 21 IDELR 1061 (OSEP 1994) (advising that hearing officers have the authority to require compensatory education); *Letter to Kohn*, 17 IDELR 522 (OSEP 1991).

<sup>125</sup> *See, e.g., Reid v. District of Columbia*, 401 F.3d 516, 522, 43 IDELR 32 (D.C. Cir. 2005); *G. ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309, 40 IDELR 4 (4th Cir. 2003) (“We agree with every circuit to have addressed the question that the IDEA permits an award of [compensatory education] in some circumstances.”); *D.W. v. District of Columbia*, 561 F. Supp. 2d 56, 50 IDELR 193 (D.D.C. 2008); *Diatta v. District of Columbia*, 319 F. Supp. 2d 57, 41 IDELR 124 (D.D.C. 2004) (finding that the hearing officer erred in determining that he lacked authority to grant the requested compensatory education); *Harris v. District of Columbia*, 1992 WL 205103, 19 IDELR 105 (D.D.C. Aug. 6, 1992) (declaring that hearing officers possess the authority to award compensatory education, otherwise risk inefficiency in the hearing process by inviting appeals); *Cocores v. Portsmouth Sch. Dist.*, 779 F. Supp. 203, 18 IDELR 461 (D.N.H. 1991) (finding that a hearing officer’s ability to award relief must be coextensive with that of the court); *cf. Lester H. v. Gilhool*, 916 F.2d 865, 16 IDELR 1354 (3d Cir. 1990) (where the Third Circuit commented, *in dicta*, that the hearing officer “had no power to grant compensatory education.”)

<sup>126</sup> *See* 20 U.S.C. 1415(i)(2)(C)(iii); 34 C.F.R. 300.516(c)(3); *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 103 LRP 37667 (1985).

<sup>127</sup> *Reid*, 401 F.3d at 522 – 523. The refusal of a parent to cooperate with an evaluation request or participate in an IEP Team meeting cannot serve as the basis for denying the parent’s claim for compensatory education for IDEA violations that preceded an evaluation or IEP Team meeting request. *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007).

<sup>128</sup> *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 75, 47 IDELR 223 (D.D.C. 2007) (court found no evidence that the handful of missed speech therapy sessions added up to a denial of FAPE) *quoting Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 348 – 349, 31 IDELR 185 (5th Cir. 2000).

under the IDEA.<sup>129</sup> Thus, under the IDEA for an award of compensatory education to be granted, a court and/or hearing officer must first ascertain whether the aspects of the IEP that were not followed were “substantial or significant,” or, in other words, whether the deviations from the IEP’s stated requirements were “material.”<sup>130</sup>

2. Presumption of Educational Deficit. If a parent presents evidence that her child has been denied a FAPE, she has met her burden of proving that the child may be entitled to compensatory education.<sup>131</sup>
3. Limited for Procedural Violations. While substantive violations of the IDEA may give rise to a claim for compensatory relief, “compensatory education is not an appropriate remedy for a purely procedural violation of the IDEA.”<sup>132</sup>
4. Sins of the Father Can Be Visited on the Child.<sup>133</sup> Courts have recognized that in setting an award of compensatory education, the conduct of the parties’ may be considered.<sup>134</sup>

#### E. Calculating the Award – The How

1. Period. Generally, the starting point in calculating a compensatory education award is when the parent knew or should have known of the denial of a FAPE.<sup>135</sup> Its duration (i.e., the end point) is the period of denial.<sup>136</sup>

<sup>129</sup> *Banks v. District of Columbia*, 720 F. Supp. 2d 83, 54 IDELR 282 (D.D.C. 2010); 583 F. Supp. 2d 169; *S.S. v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 51 IDELR 151 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 47 IDELR 223 (D.D.C. 2007).

<sup>130</sup> *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 47 IDELR 223 (D.D.C. 2007).

<sup>131</sup> *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010).

<sup>132</sup> *Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 19 (1st Cir. 2003). *See also* 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2).

<sup>133</sup> *See Exodus* 20:5.

<sup>134</sup> *Parents of Student W.* 31 F.3d 1489, 1497, 21 IDELR 723 (9th Cir. 1994) (holding that the parent’s behavior is also relevant in fashioning equitable relief but cautioning that it may be in a rare case when compensatory education is not appropriate); *Reid v. District of Columbia*, 401 F.3d 516, 524, 43 IDELR 32 (D.C. Cir. 2005); *Hogan v. Fairfax Cty. Sch. Bd.*, 645 F. Supp. 2d 554, 572, 53 IDELR 14 (E.D. Va. 2009).

<sup>135</sup> 20 U.S.C. § 1415(f)(3)(C); 20 U.S.C. § 1415(b)(6)(B); *See also Reid*, 401 F.3d at 523 (“[C]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency’s failure over a given period of time to provide a FAPE to a student.”) (*quoting G. ex rel. RG v. Fort Brag Dependent Schs.*, 343 F.3d 295, 343 F.3d 295, 309 (4th Cir. 2003)). *Brown v. District of Columbia*, 568 F. Supp. 2d 44, 50 IDELR 249 (D.D.C. 2008) *citing Peak v. District of Columbia*, 526 F. Supp. 2d 32, 49 IDELR 38 (D.D.C. 2007) (“Because compensatory education is a remedy for past deficiencies in a student’s educational program, however, [] a finding [of the relevant time period] is a necessary prerequisite to a compensatory education award.”). Note, however, that although the comments to the regulations suggest that the statute of limitations discuss in § 1415(f)(3)(C) is the same as § 1415(b)(6)(B), *see Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, 46706 (August 14, 2006), this is open to interpretation. § 1415(f)(3)(C) requires a party to request an impartial due process hearing within 2 years of the date the parent or

2. Extent. An award of compensatory education “must be reasonably calculated to provide the educational benefits that likely would have accrued.”<sup>137</sup> “This standard ‘carries a qualitative rather than quantitative focus,’ and must be applied with ‘[f]lexibility rather than rigidity.’”<sup>138</sup> In crafting the remedy, the court or hearing officer is charged with the responsibility of engaging in “a fact-intensive analysis that includes individualized assessments of the student so that the ultimate award is tailored to the student’s unique needs.”<sup>139</sup> For some students, the compensatory education services can be short, and others may require extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.<sup>140</sup>

*Reid* rejects an outright “cookie-cutter approach,” i.e., an hour of compensatory instruction for each hour that a FAPE was denied.<sup>141</sup> However, while there is no obligation, and it might not be appropriate to craft an hour for hour remedy, an “award constructed with the aid of a formula is not *per se* invalid.”<sup>142</sup> Again, the inquiry is whether the “formula-based award ... represents an individually-tailored approach to meet the student’s unique needs, as opposed to a backwards-looking calculation of educational units denied to a student.”<sup>143</sup>

An IEP must provide some educational benefit going forward.<sup>144</sup> Conversely, compensatory education must compensate for the prior FAPE denials<sup>145</sup> and must “yield tangible results.”<sup>146</sup>

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agency knew or should have known about the alleged action that forms the basis of the complaint. In contrast, § 1415(b)(6)(B) allows a party to present a complaint which sets forth an alleged violation that occurred not more than 2 years *before* the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint. Arguably, read together, the claim may extend back as much as four years.

<sup>136</sup> *See id.*

<sup>137</sup> *Reid*, 401 F.3d at 524.

<sup>138</sup> *Mary McLeod Bethune Day Academy Pub. Charter Sch. v. Bland*, 555 F. Supp. 2d 130, 135, 50 IDELR 134 (D.D.C. 2008) quoting *Reid*, 401 F.3d at 524.

<sup>139</sup> *Mary McLeod*, 555 F. Supp. 2d at 135 citing *Reid*, 401 F.3d at 524.

<sup>140</sup> *Id.*

<sup>141</sup> *Reid*, 401 F.3d at 523.

<sup>142</sup> *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt (“Nesbitt I”)*, 532 F. Supp. 2d 121, 124 (D.D.C. 2008).

<sup>143</sup> *Id.* See, e.g., *Mary McLeod Bethune Day Acad. Pub. Charter Sch.*, 555 F. Supp. 2d 130, 50 IDELR 134 (D.D.C. 2008) (finding that, although the hearing officer awarded the exact number of service hours that the LEA had denied, the hearing officer nonetheless conducted a fact-specific inquiry and tailored the award to the student’s individual needs by taking into account the results of an assessment and the recommendations of a tutoring center). *But see Brown v. District of Columbia*, 568 F. Supp. 2d 44, 50 IDELR 249 (D.D.C. 2008) (though agreeing with the hearing officer that a “cookie-cutter” approach to compensatory education was inappropriate, remanded the matter to the hearing officer for further proceedings).

<sup>144</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 553 IDELR 656 (1982).

<sup>145</sup> *Reid*, 401 F.3d at 525.

<sup>146</sup> *D.W. v. District of Columbia*, 561 F. Supp. 2d 56, 61, 50 IDELR 193 (D.D.C. 2008).

A presently appropriate educational program does not abate the need for compensatory education.<sup>147</sup> However, even if a denial of a FAPE is shown, “[i]t may be conceivable that no compensatory education is required for the denial of a [FAPE] ... either because it would not help or because [the student] has flourished in his current placement.”<sup>148</sup>

3. **Sufficient Record.** The hearing officer cannot determine the amount of compensatory education that a student requires unless the record provides him with sufficient “insight about the precise types of education services [the student] needs to progress.”<sup>149</sup> Pertinent findings to enable the hearing officer to tailor the ultimate award to the student’s unique needs should include the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services requested, and the student’s current educational abilities.<sup>150</sup>

The parent has the burden of “propos[ing] a well-articulated plan that reflects [the student’s] current education abilities and needs and is supported by the record.”<sup>151</sup> However, “*Reid* certainly does not require [a parent] to have a perfect case to be entitled to a compensatory education award....”<sup>152</sup> Once the parent has established that the student may be entitled to an award because the LEA denied the student a FAPE, simply refusing to grant one clashes with *Reid*.<sup>153</sup> The hearing officer may provide the parties additional time<sup>154</sup> to supplement the record if the record is in-

<sup>147</sup> See, e.g., *D.W. v. District of Columbia*, 561 F. Supp. 2d 56, 61, 50 IDELR 193 (D.D.C. 2008) citing *Flores ex rel. J.F. v. District of Columbia*, 437 F. Supp. 2d 22, 46 IDELR 66 (D.D.C. 2006) (holding that even though the LEA had placed the student in an appropriate school and revised the IEP, the student may still be entitled to an award of compensatory education).

<sup>148</sup> *Phillips v. District of Columbia*, 55 IDELR 101 (D.D.C. 2010) citing *Thomas v. District of Columbia*, 407 F. Supp. 2d 102, 115, 44 IDELR 246 (D.D.C. 2005). See also *Gill v. District of Columbia*, 55 IDELR 191 (D.D.C. 2010) (“The Court agrees that there may be situations where a student who was denied a FAPE may not be entitled to an award of compensatory education, especially if the services requested, for whatever reason, would not compensate the student for the denial of a FAPE.”)

<sup>149</sup> *Mary McLeod Bethune Day Acad. Pub. Charter Sch.*, 555 F. Supp. 2d 130, 50 IDELR 134 (D.D.C. 2008) citing *Branham v. District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005). See also *Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 53 IDELR 314 (D.D.C. 2010) (“[T]he record in an IDEA case is supposed to be made not in the district court but primarily at the administrative level[.]”)

<sup>150</sup> *Branham v. District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005). See also *Mary McLeod Bethune Day Acad. Pub. Charter Sch.*, 555 F. Supp. 2d 130, 50 IDELR 134 (D.D.C. 2008).

<sup>151</sup> *Phillips v. District of Columbia*, 2010 WL 3563068, at \*6, 55 IDELR 101 (D.D.C. Sept. 13, 2010) quoting *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt (“Nesbitt II”)*, 583 F. Supp. 2d 169, 172, 51 IDELR 125 (D.D.C. 2008). But see *Gill v. District of Columbia*, 55 IDELR 191 (D.D.C. 2010) (commenting that a remaining question is who bears the burden of producing evidence and ultimately fashioning a fact-specific award of compensatory education).

<sup>152</sup> *Phillips*, 2010 WL 3563068, at \*6 quoting *Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 53 IDELR 314 (D.D.C. 2010).

<sup>153</sup> *Id.*

<sup>154</sup> Should said additional time go beyond the 45-day timeline, the hearing officer may grant an extension of time at the request of either party. 34 C.F.R. § 300.515(c). The hearing officer cannot unilaterally extend the 45-day timeline. See *id.*



complete to enable the hearing officer to craft an award.<sup>155</sup> Simply “[c]hoosing instead to award [the parent] nothing does not represent the ‘qualitative focus’ on [the child’s] ‘individual needs’ that *Reid* requires.”<sup>156</sup>

#### F. Scope – The What

1. Form. Compensatory education can come in many forms and both hearing officers and courts have fashioned varying awards of services to compensate for denials of FAPE. Awards have included, but are not limited to, tutoring, summer school<sup>157</sup>, teacher training<sup>158</sup>, assignment of a consultant to the LEA<sup>159</sup>, postsecondary education<sup>160</sup>, prospective tuition award<sup>161</sup>, full-time aides<sup>162</sup> and assistive technology<sup>163</sup>.<sup>164</sup>
2. Continued Eligibility. Courts have also awarded compensatory education beyond age 22.<sup>165</sup>

#### G. IMPLEMENTATION

1. Who Decides. Compensatory education is to be determined by a hearing officer or a court.<sup>166</sup> The hearing officer “may not delegate his authority

<sup>155</sup> *Nesbitt I*, 532 F. Supp. 2d at 125. If the parent is unable to provide the hearing officer with additional evidence that demonstrates that additional educational services are necessary to compensate the student for the denial of a FAPE, then the hearing officer may conclude that no compensatory award should be granted. *Phillips*, 2010 WL 3563068, at \*8 n.4.

<sup>156</sup> *Phillips*, 2010 WL 3563068, at \*6 quoting *Nesbitt I*, 532 F. Supp. 2d at 125.

<sup>157</sup> *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 24 IDELR 831 (3d Cir. 1996).

<sup>158</sup> See, e.g., *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 46 IDELR 151 (9th Cir. 2006).

<sup>159</sup> *P. v. Newington Bd. Of Educ.*, 546 F.3d 111, 51 IDELR 2 (2d Cir. 2008).

<sup>160</sup> *Streck v. Board of Educ. of the E. Greenbush Cent. Sch. Dist.*, 642 F. Supp. 2d 105, 52 IDELR 285 (N.D.N.Y. 2009) (ordering a New York district to pay \$7,140 for a graduate’s compensatory reading program at a college for students with learning disabilities) *aff’d Streck v. Bd. of Educ. of the E. Greenbush Cent. Sch. Dist.*, 55 IDELR 216 (2d Cir. 2010) (unpublished).

<sup>161</sup> *Draper v. Atlanta Indep. Sch. System*, 518 F.3d 1275, 49 IDELR 211 (11th Cir. 2008).

<sup>162</sup> See, e.g., *Prince Georges Cty. Pub. Sch.*, 102 LRP 12432 (SEA Md. 2001).

<sup>163</sup> See, e.g., *Matanuska-Susitna Borough Sch. Dist. v. D.Y.*, 54 IDELR 52 (D. Ak. 2010).

<sup>164</sup> Thought should also be given to whether the child requires ancillary services to effectuate the compensatory education (e.g., transportation to the tutoring site when said services are being provided by an independent provider).

<sup>165</sup> *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 54 IDELR 274 (3d Cir. 2010); *Barnett v. Memphis City Schools*, 113 F. App’x 124, 42 IDELR 56 (6th Cir. 2004); *Manchester Sch. Dist. v. Christopher B.*, 807 F. Supp. 860, 19 IDELR 389 (D.N.H. 1992).

<sup>166</sup> *Reid v. District of Columbia*, 401 F.3d 516, 523 – 524, 43 IDELR 32 (D.C. Cir. 2005); see also *Bd. of Educ. of Fayette Cty, Ky. v. L.M.*, 478 F.3d 307, 47 IDELR 122 (6th Cir. 2007) (“We therefore hold that neither a hearing officer nor an Appeals Board may delegate to a child’s IEP team the power to reduce or terminate a compensatory-education award.”); Cf. *State of Hawaii, Dept. of Educ. v. Zachary B.*, 52 IDELR 213 (D. Haw. 2009) (where the court distinguished *Reid* and upheld a hearing officer’s decision to allow the private tutor and psychologist who were to provide the compensatory education the responsibility to determine the specific type of tutoring the child would receive provided that it did not exceed once weekly sessions for 15 months); *Mr. I. and Mrs. I. v. Maine Sch. Admin.*

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to a group that includes an individual specifically barred from performing the hearing officer's functions."<sup>167</sup>

2. Who Provides. Both independent providers and/or school personnel can provide compensatory education. However, school personnel providing compensatory services should meet the same requirements that apply to personnel providing the same types of services as a part of a regular school program.<sup>168</sup>
3. Failure to Provide. The failure to provide the student an award of compensatory education is not necessarily a harmless procedural violation.<sup>169</sup>

## **XI. THE DECISION – GENERALLY**

- A. The decision encompasses all that has happened prior to its issuance and all that should happen after it is issued. The decision often serves as the starting point for judicial review, when a case is appealed. However, it may also have a secondary effect – providing guidance to the LEA related to policy.
- B. Care should be given to the preparation and presentation of the decision. A case should be decided solely on the merits, and on the evidence presented on the record. Attorney [mis]conduct, or annoyances brought out by the hearing process, should not influence the decision, and the evidence must be weighed fairly and impartially.
- C. Content of Decision
  1. Writing Well and Good Writing. Understanding the difference between writing well (i.e., correct grammar and usage) and good writing (i.e., a combination of writing well and writing style) is critical to the decision writing process. There are some basic rules to keep in mind that sets apart writing well from good writing.
    - a. Understand the audience to whom the decision is addressed. Keep in mind that the intended readers are not necessarily the lawyers that represented the parties but rather the parents and school district personnel.

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*Dist. No. 55*, 480 F.3d 1, 47 IDELR 121 (1st Cir. 2007) (where the First Circuit upheld the district court's decision declining to award compensatory education on the grounds that the ordered "IEP will necessarily take into account" the effect of the denial of a FAPE).

<sup>167</sup> *Reid*, 401 F.3d at 526.

<sup>168</sup> *Letter to Anonymous*, 49 IDELR 44 (OSEP 2007).

<sup>169</sup> *D.W. v. District of Columbia*, 561 F. Supp. 2d 56, 50 IDELR 193 (D.D.C. 2008).

- i. Extensive use of legal terminology or complex terms should be limited.
    - ii. Balance the interest between clear, concise, and efficient communication with understandable terms and phrases.
  - b. Write concisely. Wordy sentences can make it more difficult to understand meaning.
    - i. Eliminate unnecessary words or phrases to achieve simpler sentences.
    - ii. Eliminate sheer repetition.
  - c. Be Candid. The hearing officer should be candid, but not necessarily outspoken. Limit criticism of the parties and/or their representatives, unless it is essential to the resolution.
    - i. Credibility findings should be factual, citing to the record for support.
    - ii. Do not embellish events or testimony to support a conclusion.
    - iii. Demonstrate judicial temperament by being respectful to the parties and how they are presented in the decision.
    - iv. Avoid condescending, insulting, or otherwise inappropriate adjectives.
2. Format. Other than the admonishment found in 34 C.F.R. § 300.513 (cautioning that a hearing officer's determination of whether a child received a free and appropriate public education be based on substantive grounds, unless an exception applies), the IDEA does not prescribe the content and/or format of the decision. Nonetheless, there are key components that should be included in the decision. Consideration should be given to include the following parts in the decision.
  - a. Introduction and Procedural History. This section includes all pertinent information starting from the date of the filing of the due process complaint leading up to issuance of the decision, including:
    - i. Identifying the parties and, to the extent applicable, their representatives;

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- ii. Summarizing all pre-hearing conferences, motions, and/or rulings;
  - iii. Summarizing resolution meeting timeline and information, hearing dates and extensions to the 45-day timeline, if any; and
  - iv. Identifying the witnesses called and the exhibits introduced during the hearing
- b. Jurisdiction. This section outlines the various statutes, regulations and/or rules pursuant to which the due process hearing was held, and a decision in the matter was rendered.
- c. Background. A brief statement as to what prompted the due process hearing provides the reader a synopsis of what the matter is all about.
- d. Issues and Relief Sought. The issue(s) listed in the due process complaint, and as modified, if at all, during the pre-hearing conference, should be identified. Also, to the extent that the complaining party included a proposed resolution in the due process complaint or made it known during the pre-hearing conference, the relief sought should also be identified in this section.

Other factors to consider include:

- i. The issue(s) should be stated succinctly and in question format;
  - ii. Multiple issues should be presented in logical sequence; and
  - iii. In addition to stating the issue(s), the hearing office might state each party's position concerning the issue(s)
- e. Findings of Fact. In this section, the hearing officer should set forth only those facts determined to be relevant and relied upon to decide the identified issue(s). A summary of all documentary evidence and testimony is not necessary.

Credibility findings can also be included under this section.<sup>170</sup>

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<sup>170</sup> There is a split amongst hearing officers on whether credibility findings should be included under findings of fact or conclusions of law. Either way, to the extent that credibility findings are made, said findings should be included in the decision under one of these sections.

The hearing officer should resolve disputes related to alleged facts. Simply restating various facts does not equate to making specific findings about the facts, and courts will accord “little deference” to the decision.<sup>171</sup> For example, if the issue is eligibility, simply stating, “The examiner determined that the student meets the criteria for Emotionally Disturbed,” is not a specific finding of fact, unless the factual dispute is whether the examiner made determinations as to what classification would be appropriate for the child. The more appropriate findings of fact on the question of eligibility as a child with an emotional disturbance might include: the student has not maintained satisfactory relationships with classmates or his teachers since starting in the school two years ago; and/or the student is sullen, withdrawn and despondent throughout the school day and has exhibited said behaviors for the past six months. The hearing officer would then cite to the examiner’s evaluation or witness testimony to support his finding.

Other good practices include:

- i. Setting the facts in chronological order (with dates spelled out);
  - ii. Citing to exhibits and, should a transcript be available, the transcript pages. Should a transcript not be available, then the hearing officer should cite to the testimony (e.g., Testimony of School Psychologist);
  - iii. Incorporate stipulated facts, to the extent relevant; and
  - iv. Include the basic facts necessary to apply the criteria to decide an issue. For example, if the issue is whether the student is emotionally disturbed, in addition to facts that speak to one of the five characteristics, the hearing officer should include facts relating to the degree in which the student has exhibited one or more of the five characteristics, the period of time for which the student has experienced one or more of the behaviors, and how the child’s educational performance has been adversely affected
- f. Conclusions of Law/Discussion. The hearing officer must set out the applicable legal standard for each disputed issue and apply the law to the facts. Also, in this section, the hearing officer should

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<sup>171</sup> *Kerkam v. District of Columbia*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. 1991). See also *County Sch. Bd. v. Z.P.*, 42 IDELR 229 (4<sup>th</sup> Cir. 2005) (finding that the district court should have given due weight to the hearing officer’s findings of fact because his decision was thorough and supported by numerous citations and references to the record evidence).

explain the basis for accepting one expert's opinion over another and giving greater weight to certain testimony.

Consideration should also be given to whether issues that need not be determined per se, because the disposition of other issues does not require the additional issues to be reached, should, nonetheless, be addressed. For example, in a tuition reimbursement dispute, the hearing officer might want to indicate how he would have disposed of the second and third prongs of the *Burlington/Carter* tri-partite test despite his finding that the school district offered the child a free and appropriate public education. Such indication might avoid a remand from a reviewing court, should the hearing officer be reversed on the initial issue.

Additional tips to keep in mind:

- i. Use subheadings for each issue;
  - ii. Cite to the relevant federal and state laws, regulations, and/or case law but only quote or highlight significant passages;
  - iii. Distinguish or apply case law offered by the parties; and
  - iv. Tell a "story." The reader should be able to discern how the hearing officer arrived at his conclusions. Stated differently, thought should be given to the organization and/or flow of the discussion.
- g. Decision/Order. In this section, the hearing officer must decide the disputed issue(s) and determine the remedy being ordered. The order should be in clear, specific, and mandatory (e.g., "School District shall...") language, as well as enforceable. Where necessary and appropriate, timelines should be imposed and discernable (e.g., "Within 15 calendar days from the date on this Order..."; "By no later than 5 p.m. on Friday, January 12, 2011...").

The hearing officer must determine the remedy and should not delegate his authority to an IEP team. For example, if the hearing officer determined that compensatory education is warranted, the hearing officer must determine what services will be provided to the child and not ask the IEP team to determine the compensatory education plan.<sup>172</sup>

The actions the parties are to take must be clear. In this regard, to

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<sup>172</sup> See, e.g., *Reid v. District of Columbia*, 43 IDELR 32 (D.C. Cir. 2005).

aid the hearing officer, and to the extent feasible, the hearing officer should seek from the complaining party with great specificity the relief sought during the prehearing conference. However, the inquiry should also extend to the non-complaining party. Although it might be difficult for the non-complaining party to come up with any relief, especially when the party denies any wrongdoing, the non-moving party should be given the opportunity to consider putting forth its own recommendations on what relief it deems appropriate should the hearing officer determine that the complaining party should prevail.

- h. Notice of Appeal. The parties should be advised on how to appeal the decision of the hearing officer.

**Basic Hearing Procedures and Management**

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*Desiree M. Miroso*  
*Tuesday, July 12, 2011*  
*1:30 p.m. - 3:00 p.m.*

1

**Objectives**

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- *Participants will -*
  - *be provided with a summary of key IDEA statutory and regulatory requirements impacting the hearing process*
  - *understand how IDEA hearings differ to other administrative hearings*

2

**OAH**

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- *IDEA hearings come before either independent, contractual HOs or a central panel agency that appoints an ALJ*
- *OAH has no state policy making authority, ALJ uses the policies, law and regulations, and rules of the agency party*

3



**OAH**

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- *OAH may use its own rules of procedures ("Rules") - to ensure a uniform application of practices - but the rules supplement the procedures required by, and set forth in, the law and regulations of the agency party (28.02.01.01(C))*

4

**OAH**

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- *Where Federal and State law requires that a Federal or State procedure be observed, the rules are inapplicable (28.02.01.01 (D))*

5

**Due Process Complaint**

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- *A parent or the LEA may file a DPC on any of the matters relating to the -*
  - *identification;*
  - *evaluation;*
  - *educational placement; or*
  - *provision of FAPE*

6

## Due Process Complaint

- *IDEA requires more in the DPC than Rule 28.02.01.03(B)*
- *Content must include -*
  - *the name of the child;*
  - *the address of the residence of the child*

7

## Due Process Complaint

- *the child's attending school;*
- *a description of the nature of the problem, including facts relating to the problem*
- *a proposed solution, to the extent known and available*

8

## Sufficiency Challenges

- *IDEA requires the complaining party to provide sufficient notice to the other side*
- *DPC is deemed sufficient unless the non-complaining party files a notice challenging the sufficiency of the DPC*
  - *Sufficiency limited to IDEA DPC requirements, cf. Rule 28.02.01.03(C)*

9

## Sufficiency Challenges

- *Notice must be in writing and filed within 15 calendar days of receipt of the DPC*
- *No requirement that the non-complaining party state in writing why the DPC is insufficient*

10

## Sufficiency Challenge

- *HO must issue written decision within 5 calendar days*
  - *HO must decide on the face of the DPC*
  - *HO must identify how the DPC is insufficient*
- *If insufficient, may seek leave to amend*

11

## Statute of Limitations

- *DPC must allege a violation that occurred not more than two years before the complaining party knew or should have known about the alleged action that forms the basis of the complaint*
  - *Request for hearing must be filed within two years the complaining party knew or should have known*

12

## Statute of Limitations

- *IDEA provides for only two exceptions to the statute of limitations -*
  - *where LEA made specific misrepresentations that it resolved the problem forming the basis of DPC*
  - *where LEA withheld information that was required to be provided*

13

## Response

- *LEA required to provide the parent with a written response to the issues in the DPC -*
  - *unless LEA already provided prior written notice on said issues*
  - *within 10 calendar days from LEA receiving the DPC, cf. 28.02.01.10(A)*

14

## Response

- *Filing of response does not waive sufficiency challenge*
- *Parents, too, must file response when LEA initiates DPC*
- *IDEA does not establish any consequences for failure to respond*

15

### Amending DPC

- *New issue(s) not permitted after filing DPC (cf. 28.02.01.03(C)), unless -*
  - *non-complaining party consents*
  - *HO grants permission, provided it is 5 calendar days before DPH*
- *Timelines restart anew, including the resolution period timeline*

16

### Resolution Meeting

- *LEA required to convene meeting after parent files DPC and within 15 calendar days of LEA receiving DPC*
- *Resolution meeting not required when -*
  - *Parties agree in writing to waive meeting or agree to use mediation*
  - *LEA files DPC*

17

### Resolution Meeting

- *Parent can seek HO intervention should LEA fail to participate or convene meeting within 15 calendar days*
- *LEA has 30 calendar days to resolve DPC to the parents satisfaction or DPH may occur*

18

### Resolution Meeting

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- \* *30-day period must be adjusted when -*
  - \* *both parties agree in writing to waive the meeting*
  - \* *mediation or resolution meeting starts but before end of the 30-day period, the parties agree in writing no agreement possible*

19

### Resolution Meeting

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- \* *both parties agreed in writing to continue with mediation beyond the 30-day period, but later, one party withdraws from the mediation process*

20

### Resolution Meeting

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- \* *Failure of parent not to participate delays start of DPH*
- \* *LEA can move to dismiss DPC, should parent not participate at conclusion of 30-day period*

21

## Resolution Meeting

- *Should the LEA and parents resolve the DPC, parties must execute a legally binding agreement which is -*
  - *enforceable in court*
  - *and can be voided within 3 business days*

22

## Burden of Persuasion

- *IDEA is silent on which party has the burden of persuasion and/or production*
- *Generally, however, the burden of persuasion in IDEA DPH is on the party seeking relief (Schaffer v. Weast)*

23

## Hearing Rights

- *The LEA or Parent has the right to -*
  - *be accompanied and advised by an attorney or by individuals with special knowledge or training (cf. 28.02.01.01 (B)(3), 28.02.01.08(B))*
  - *present evidence, examine witnesses, and compel attendance of witnesses*

24

## Hearing Rights

- *prohibit the introduction of any evidence not disclosed five business days before the hearing (cf. 28.02.01.13(A))*
- *obtain written record of the hearing and written decision, unless parent elects verbatim record or electronic decision*

25

## Hearing Rights

- *Parent has three additional rights -*
  - *decide whether child is present for the hearing*
  - *open hearing to the public (cf. 28.02.01.19(A))*
  - *obtain record / decision at no cost*

28

## Venue

- *DPH must be conducted at a time and place that is reasonably convenient to the parents and child involved (cf. 28.02.01.07)*

27



## Procedural Issues

- *Decision shall be made on substantive grounds*
- *A procedural violation is a denial of FAPE when -*
  - *impeded the child's right to FAPE;*

28

## Procedural Issues

- *significantly impeded the parent's opportunity to participate in the decision-making process; or*
- *caused a deprivation of educational benefits*

29

## Timelines - Generally

- *A non-discipline DPH has a different timeline than a discipline DPH*
- *Computation of timelines start the day after the non-complaining party receives notice of the DPC, cf. 28.02.01.04(C)(1)*
  - *Timelines do not begin with postmark (cf. 28.02.01.02(B)(5) and .04(D))*

30

## Timelines - Generally

- *In IDEA, a day means calendar day unless otherwise indicated as a business day or school day*
- *Unless indicated as a business day or school day, the last day of the period is computed even if a Sunday or a legal holiday (cf. 28.02.01.04(C)(2))*

31

## Timelines - Non Discipline

- *Within 45 calendar days after the expiration of the 30-day resolution period, or the adjusted time periods, a final decision must be reached and mailed to the parties*
- *Extensions beyond the 45-day period o.k. but -*

32

## Timelines - Non Discipline

- *must be for a specific number of days; and*
- *only at the request of either party (cf. 28.02.01.11(B)(7) and (8), 28.02.01.16(A))*

33

### Timelines - Discipline

- *An expedited DPH is available when -*
  - *the parent challenges the change in placement resulting from the disciplinary removal;*
  - *the parent challenges the manifestation determination; or*
  - *LEA seeks to place child in IAES*

34

### Timelines - Discipline

- *An expedited DPH must occur within 20 school days of the date the DPC is filed*
- *A decision must be made and provided to the parties within 10 school days after the hearing (cf. 28.02.01.06(D))*
- *No continuances can be granted for an expedited discipline hearing*

35

### Timelines - Discipline

- *Resolution meeting must occur within 7 calendar days, unless waived by both parties*
  - *LEA has 15 calendar days to resolve the issues in the DPC*
  - *Resolution period runs concurrent with the hearing period*

36

## Timelines - Discipline

- *There are no sufficiency challenges*
- *A motion for an expedited discipline hearing is not required (cf. 28.02.01.06(A)), expedited status is automatic*

37

## Timelines - Discipline

- *A motion for an expedited non-discipline hearing o.k. (cf. 28.02.01.06(A)) but -*
  - *the decision is due within 45 calendar days unless timeline extended at the request of a party (cf. 28.02.01.06(D))*

38

## Confidentiality

- *Discussions held during resolution meetings are not confidential*
  - *Parties can voluntarily agree to keep said discussions confidential but SEA or LEA cannot require it, cf. 28.02.01.18(D)(1)*

39



## Confidentiality

- *Discussions held during mediation are confidential*
- *The DPC is to remain confidential, as well as any other student record (cf. 28.02.01.19(B))*

40

## The Decision - Finality

- *A hearing decision is final (cf. 28.02.01.25(A) and (C))*
- *Once a final decision has been issued, no motion for reconsideration is permissible (cf. 28.02.01.27(A) and (B)), unless -*
  - *it does not delay or deny parents' right to a decision within the timelines*

41

## The Decision - Content

- *Understand the difference between writing well (i.e., correct grammar usage) and good writing (i.e., a combination of writing well and writing style)*
- *Keep intended readers in mind*

42

### The Decision - Content

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- *Limit legal terminology and complex terms*
- *Write concisely*
  - *Use simple sentences*
  - *Eliminate sheer repetition*

43

### The Decision - Content

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- *Be candid*
  - *Credibility findings should be factual*
  - *Do not embellish*
  - *Exercise judicial temperament even in decision*
  - *Avoid being condescending or insulting*

44

### The Decision - Format

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- *Introduction and Procedural History*
- *Jurisdiction*
- *Background*
- *Issues and Relief Sought*
- *Findings of Fact*
- *Conclusions of Law/Discussion*

45

**The Decision - Format**

- *Decision/Order*
  - *Order should be clear, specific, mandatory and enforceable*
  - *Where necessary and appropriate, timelines should be imposed and discernable*
  - *Do not delegate HO responsibilities*

46

**the end.**

47

TAB 4





# Review of Fundamental Caselaw under the IDEA

10<sup>th</sup> National Academy for IDEA  
Administrative Law Judges and Hearing  
Officers

Julie K. Waterstone  
Southwestern Law School  
July 12, 2011





## FOUNDATIONAL CASES

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**PARC v. Pennsylvania**  
343 F. Supp. 279 (E.D. Pa. 1972)

- Case forms the foundation for IDEA
  - Due Process Rights and Free, Appropriate, Public Education
- Denial of educational services to students with cognitive impairments violates the Equal Protection Clause

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**Mills v. Board of Education**  
348 F. Supp. 866 (D.D.C. 1972)

- Also provides foundation for IDEA
- School districts can not exclude children with disabilities and must provide them with a publicly-supported education
- Insufficient funds does not excuse a school district's obligation to provide due process and periodical review

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**Goss v. Lopez**  
419 U.S. 565 (1975)

- Student has an entitlement to a public education as a property interest
- Education can not be taken away for misconduct without minimum adherence to due process procedures

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**Plyler v. Doe**  
457 U.S. 202 (1982)

- A state may not refuse free public education to undocumented school-age children.

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**FREE APPROPRIATE PUBLIC EDUCATION (FAPE)**

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**Board of Education v. Rowley**  
458 U.S. 176 (1982)

- A child with a disability is entitled to a FAPE that is specifically designed to meet the unique needs of the child, supported by services as necessary to allow the child to gain **some educational benefit** from their education.
- Test: (1) Has the state complied with the Act's procedural requirements and (2) whether the IEP enables the child to receive educational benefits?

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**Timothy W. v. Rochester, New Hampshire, School District**  
875 F.2d 954 (1st Cir. 1989)

- All children are entitled to a free appropriate public education regardless of the severity of their impairment.

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**Polk v. Central Susquehanna Intermediate Unit 16**  
853 F.2d 171 (3rd Cir. 1988)

- The appropriateness standard articulated in *Rowley* means more than a trivial educational benefit.
- Congress intended to afford children with special needs an education that would confer meaningful benefit.

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**LEAST RESTRICTIVE ENVIRONMENT (LRE)**

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**Roncker v. Walter**  
700 F.2d 1058 (6th Cir. 1983)

- In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior can be provided in a non-segregated setting.
- If they can, the placement in the segregated school would be inappropriate under the IDEA.

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**Daniel R.R. v. State Board of Education**  
874 F.2d 1036 (5th Cir. 1989)

- Congress left educational methods to the schools; schools need flexibility in a child's educational plan to meet the child's unique needs.
- Test: (1) Can a disabled child be educated in the regular classroom with the use of aids and services; (2) If not, has the school mainstreamed the child to the maximum extent possible?

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**Sacramento Unified School District v. Rachel H.**  
 14 F.3d 1398 (9th Cir. 1994)

- In considering whether the district proposed an appropriate placement, district must evaluate:
  - Educational benefits of placement full-time in regular classroom
  - Non-academic benefits of interaction with non-disabled children
  - Effect of child's presence on teacher and other students
  - Costs of mainstreaming child in regular classroom

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**RELATED SERVICES**

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**Alamo Heights Independent School District v. State Board of Education**  
 790 F.2d 1153 (5th Cir. 1986)

- In determining eligibility for extended year services, test is whether child will suffer or experience severe or substantial regression without services during the summer.
- Transportation is a related service and shall be provided unless the request is unreasonable.

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**Irving Independent School District v. Tatro**  
468 U.S. 883 (1984)

- CIC is a covered related service and not an exception under medical service.
- To determine whether service is covered:
  - Child must be eligible under IDEA so as to require special education to be entitled to related service
  - Only those services necessary to aid a disabled child to benefit from special education must be provided
  - Only those services that can be performed by a nurse or other qualified person, not by a physician

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**Cedar Rapids Comm. Sch. Dist. v. Garrett F.**  
526 U.S. 66 (1999)

- A child with quadriplegia who uses a ventilator is entitled to nursing services during school hours.
- Upheld the test from *Tatro*.
- Cost is not part of the definition of a related service.

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**DUE PROCESS ISSUES**

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**Schaffer v. Weast**  
546 U.S. 49 (2005)

- Burden of proof (persuasion) falls on the party seeking relief.
- Congress addressed the fairness issue by obligating schools to share information with the parents; parents have a right to an expert through an IEE; parties need to disclose information before the hearing.

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**Burlington School Committee v. Department of Education**  
471 U.S. 359 (1985)

- Courts and hearing officers can order tuition reimbursement for parents who unilaterally place a child in a private school provided that the placement is deemed appropriate.
- Parents who unilaterally place do so at their own financial risk.

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**Florence County School District Four v. Carter**  
510 U.S. 7 (1983)

- Courts and hearing officers can order tuition reimbursement for a private school that is not on a state list of approved placements provided that the placement is deemed appropriate.

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**Forest Grove School District v. T.A.**  
129 S. Ct. 2484 (2009)

- Courts and hearing officers can order tuition reimbursement even if a child has not previously received special education if the court or hearing officer finds that the school district failed or provide FAPE and the private placement was appropriate.

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**Arlington Central School District Board Of Education v. Murphy**  
548 U.S. 291 (2006)

- The fee shifting provision does not authorize prevailing parents to recover fees for services rendered by experts in IDEA actions.
- There is no explicit statutory authority indicating that Congress intended for that type of fee-shifting.

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**Winkelman v. Parma City School District**  
550 U.S. 516 (2007)

- IDEA gives parents independent, enforceable rights concerning the education of their child. The statute conveys rights to the parents as well as the child.
- Parents have both procedural and substantive rights. It would be too confusing to try and distinguish these rights since they are so intertwined.

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**Padilla v. School District No. 1**  
233 F.3d 1268 (10th Cir. 2000)

- There is no claim for damages under 42 U.S.C. §1983 for a violation of the IDEA.
- If it is unclear whether the issue can be redressed through IDEA, exhaustion of administrative remedies is required.

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**John T. v. Iowa Department of Education**  
258 F.3d 860 (8th Cir. 2001)

- The school district is responsible for paying fees unless the state agency (department of education) is made a party in the underlying proceeding as well.
- If the state agency does not want to incur liability, they must seek to be dismissed from the suit.

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**STUDENT DISCIPLINE**

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**Honig v. Doe**  
484 U.S. 305 (1988)

- Schools do not have unilateral authority to exclude children with disabilities for dangerous or disruptive behavior caused by their disabilities.
- While a due process proceeding is pending, a child must remain in the current placement until the conclusion of the proceeding.
- School can use other measures to discipline a child while proceeding is taking place. If student poses an immediate threat to safety of others, school can suspend child for up to 10 days.

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**EARLY CHILDHOOD PROGRAMS**

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**Marie O. v. Edgar**  
1996 U.S. Dist. LEXIS 1070 (N.D. Ill., Feb. 2, 1996),  
aff'd 131 F.3d 610 (7th Cir. 1997)

- When a state chooses to participate in the funding for early intervention services, they are obligated to serve all those who are eligible.
- A state may not drag its feet in implementing the program because this stage is critical in a child's life.

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# Schedule and Program

## Basics of Special Education and Dispute Resolution

Tuesday, July 12, 2011

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<b>Time</b>	<b>Topic</b>	<b>Materials</b>
8:45 – 9:00	Welcomes	
9:00 – 9:30	IDEA – Purpose & Policy	Tab 1
9:30 – 10:15	Overview of the SPED Process: From Child Find to Court	
10:15 – 10:30	<i>Refreshment Break</i>	
11:00 – 12:15	Overview of Tests & Testing: Theory, Tools and Practice	Tab 2
12:15 – 1:30	<i>Lunch</i>	
1:30 – 2:45	Basic Hearing Procedures & Management	Tab 3
2:45 – 3:00	<i>Refreshment Break</i>	
3:15 – 5:00	Review of Fundamental Case Law	Tab 4
5:00 – 6:00	<i>Hosted Reception</i>	