IMPARTIAL HEARINGS UNDER THE IDEA:
LEGAL ISSUES AND ANSWERS

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Updated and Revised

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

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This updated Question-and-Answer document is specific to impartial hearing officers (IHOs) and the impartial hearings that they conduct under the Individuals with Disabilities Education Act (IDEA). It does not cover the IHO’s remedial authority, which is the subject of separate comprehensive coverage.\(^1\) The sources are limited to the pertinent IDEA legislation and regulations, court decisions and the U.S. Department of Education’s Office of Special Education’s (OSEP) policy letters\(^2\) that the author’s research has revealed. Thus, the answers are subject to revision or qualification based on 1) applicable state laws; 2) additional legal sources beyond those cited; and 3) independent interpretation of the cited and additional pertinent legal sources.

The items are organized into various subject categories within two successive broad groups. For the specific organization, see the Table of Contents on the next page.

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\(^2\) Although OSEP policy letters do not have the binding effect of the IDEA and, within their jurisdictions, court decisions, they provide a nationally applicable interpretation that courts tend to find persuasive. See, e.g., Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 EDUC. L. REP. 391 (2003).
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I. IHO ISSUES

IHO QUALIFICATIONS

1. Does the IDEA provide any standards for IHO competence?

Yes, the 2004 amendments provided, for the first time, the competence standards in terms of knowing special education law, conducting hearings and writing decisions. Specifically, the IDEA competency standards require IHOs to:

(ii) possess knowledge of, and the ability to understand, the provisions of [the IDEA], Federal and State regulations pertaining to [the IDEA], and legal interpretations of [the IDEA] by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.3

2. Similarly, does the IDEA provide for individually enforceable training requirements for IHOs?

No, training requirements are entirely a matter of state law,4 which the courts have interpreted as not incorporated in the IDEA.5

3. What about the impartiality requirements of the IDEA?

In contrast to competence and training, IHO impartiality has been the subject of extensive litigation, and the courts have been notably deferential in providing wide latitude to IHOs in these cases, generally not requiring the appearance of impropriety standard that applies

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4 See, e.g., OSEP commentary accompanying 1999 IDEA regulations, 64 Fed. Reg. 12,613 (Mar. 12, 1999). In the commentary accompanying the 2006 IDEA regulations, OSEP added that the general supervisory responsibility of each SEA includes ensuring that its IHOs are sufficiently trained to meet these newly specified qualifications. 71 Fed. Reg. 46705 (Aug. 14, 2006).

The leading but still not per se exception is *ex parte* communications. 7

4. Would a school district’s notification to an IHO of his or her selection subject to the parent’s approval violate the IDEA?

Not according to OSEP’s interpretation, because the IDEA does not provide parents’ with a veto right in the appointment of IHOS. However, a few states provide for party participation in the selection process, which would appear to suggest the opposite answer. 8

**IHO IMMUNITY**

5. Do IHOS have the same sort of sweeping, absolute immunity that judges have?

Yes. 9

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II. HEARING/DECISION ISSUES

RESOLUTION SESSIONS

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

No, OSEP has said that this process is not required in such cases.\(^{10}\) Rather, the 45-day period starts when the state education agency (SEA) and the parent receive the school district’s complaint. OSEP added: “If the complaint is determined to be insufficient under 34 CFR §300.508(d)(2) and is not amended, the complaint could be dismissed.”\(^{11}\) Moreover, in such cases, OSEP stated that the parent’s right to a sufficiency challenge and the parent’s obligation to respond to the issues raised in the district’s complaint remain the same.\(^{12}\)

7. Are the discussions that occur in resolution sessions confidential?

According to OSEP’s interpretation, the only confidentiality provisions that apply are the student records provisions in 34 C.F.R. § 300.610 and the Family Educational Rights and Privacy Act (FERPA).\(^{13}\) Absent a voluntary agreement between the parties to do otherwise, OSEP’s position is that either party may introduce evidence at the hearing of the discussions unaffected by the cited, limited confidentiality provisions.\(^{14}\) Nevertheless, the admissibility and the weight of such evidence would appear to be within the IHO’s discretion, including the effect of the prevailing posture concerning offers of settlement. Although OSEP’s opinion is that “[a] State could not … require that the participants in a resolution meeting keep the discussions confidential,”\(^{15}\) some states have adopted laws saying so.\(^{16}\)

8. After filing for the hearing, may the parent unilaterally waive the resolution session?

No, unlike mediation, which must be voluntary on the part of each party,\(^{17}\) waiver of the resolution session must be mutual.\(^{18}\) A recent court decision seems to support this

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\(^{11}\) Id.

\(^{12}\) Id.


\(^{14}\) Id.; Letter to Baglin, 53 IDELR ¶ 164 (OSEP 2008) (LEA may not require a parent to sign a confidentiality agreement as a condition for having a resolution session, but the parties could agree to confidentiality).


\(^{17}\) 34 C.F.R. § 300.506(b)(1) (2008).

\(^{18}\) Id. § 300.532(c)(3). The parties’ other option is a mutual agreement to mediation. Id.
interpretation. Moreover, the regulations require delay of the due process hearing if the parent fails to participate in the resolution session in the absence of such mutual agreement, and they also authorize the IHO to dismiss the case upon the district’s motion if the parent’s refusal to participate persists for the 30-day period despite documented reasonable efforts on the district’s part to obtain parental participation.

9. In a case where the parent filed for the hearing and either party refused to participate in the resolution session, must the other party seek the IHO’s intervention?

Yes, according to OSEP, which has interpreted 34 C.F.R. § 300.510(b)(3)–(5) to mean: “The hearing officer’s intervention will be necessary to either dismiss the complaint or to commence the hearing, depending on the circumstances.”

10. Would a parent’s request to participate in the resolution session by phone justify an IHO’s dismissal of her due process complaint?

Not according to OSEP without considering whether the parent had valid reasons for refusing to physically attend the meeting.

11. May the parties mutually agree to extend the 15-day resolution period to resolve an expedited due process complaint?

No, according to OSEP. The agency based its conclusion that this deadline was absolute on the lack of any such waiver authority in 34 C.F.R. § 300.542(c) and the overriding purpose of promptness in the applicable disciplinary cases.

12. If 15 days after the parent’s filing for a due process hearing, the school district fails to convene or participate in the resolution session, what may the parents do to move the matter forward?

The parent may seek the IHO’s intervention to start the timeline for the hearing. In a recent ruling, a federal district court concluded that this parental right is voluntary; thus, the parent’s choice not to exercise it did not excuse the district’s failure.

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22 Id.
23 Letter to Walker, 59 IDELR ¶ 262 (OSEP 2012).
24 Id.; see also Letter to Gerl, 51 IDELR ¶ 166 (OSEP 2008).
26 Dep’t of Educ. v. T.G., 56 IDELR ¶ 97 (D. Hawaii 2011).
13. If, after the parent files for a hearing, the parties neither waive nor hold the resolution session after 30 days, what happens on day 31?

According to OSEP, on day 31, the 45-day timeline for conducting the hearing and issuing a decision starts.\(^{27}\)

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

Not according to OSEP. More specifically, the commentary accompanying the regulations declared: “We agree with S. Rpt. No. 108–185, p. 38 [i.e., the IDEA’s legislative history], which states that the resolution meeting should not be postponed when the LEA believes that a parent’s complaint is insufficient.”\(^{28}\)

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

Not according to OSEP, even if the advocate is entitled under state law to represent the parent/student at a due process hearing.\(^{29}\)

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

Not necessarily.\(^{30}\)

**SUFFICIENCY PROCESS**

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

Citing the pertinent IDEA regulations and the comments accompanying them, OSEP answered that 1) the IHO must identify the specific insufficiencies in the notice; 2) the filing party may amend its complaint if the other party provides written consent and has an opportunity for mediation or a resolution session; 3) the IHO may, if the filing party does not exercise this amendment option, dismiss the insufficient complaint; and 4) the party may re-file if within the two-year limitations period.\(^{31}\)

\(^{27}\) Letter to Worthington, 51 IDELR ¶ 281 (OSEP 2008). However, mitigating this eventuality, OSEP also stated that the SEA has the responsibility to enforce the LEA’s affirmative obligation to convene the resolution meeting within 15 days of receiving the parent’s complaint. *Id.*


\(^{29}\) Letter to Lawson, 55 IDELR ¶ 232 (OSEP 2010).

\(^{30}\) See, e.g., J.D.G. v. Colonial Sch. Dist., 748 F. Supp. 2d 361 (D. Del. 2010) (no denial of FAPE where parents contributed to the delay and no harm to child).

18. If the filing party, with written consent from the other party, amends its complaint, do the 15-day timeline for the resolution meeting, the 30-day resolution period and the party participation requirement re-commence?

Yes, according to OSEP.  

19. Are courts supportive of strict IHO interpretations of the IDEA’s sufficiency requirements?

The limited case law to date leaves the answer to this question unsettled. The Third Circuit upheld an IHO’s dismissal of a case where the parent unsuccessfully argued that the Supreme Court’s characterization in Schaffer v. Weast of the IDEA’s pleading requirements as “minimal” allowed less than strict compliance with all of the required elements of the complaint.  

Yet, in another unpublished decision, the federal district court in New Hampshire reversed an IHO’s dismissal for insufficiency, alternatively citing with approval this dictum in Schaffer and the school district’s failure to contest the matter within the prescribed 15-day window.  

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

20. Conversely, do courts favor a strict interpretation of the IDEA’s requirements for the defendant’s response to the complaint?

No, to the extent that the federal district court in the District of Columbia has ruled that a default judgment, i.e., dismissal with prejudice, would generally not be—without affecting the student’s substantive rights—an appropriate sanction for failure to adhere to requirement.

JURISDICTION

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

The issue is not clearly settled. According to a federal district court decision in the District of Columbia, the answer is yes.  

The court based its conclusion on the language of the IDEA that

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32 Id.
35 Knight v. Washington Sch. Dist., 56 IDELR ¶ 189 (8th Cir. 2011). According to the court, the proper resolution for the IHO is to dismiss the case without, not with, prejudice.
triggers a school district’s obligations, including Child Find, on residency, not enrollment.  
Other courts have extended this answer even if the child’s residency changes. OSEP agrees with this answer. However, the Eighth Circuit answered the question no at least under a Minnesota law that requires the impartial hearing to be “conducted by and in the school district responsible for assuring that an appropriate program is provided.” The court reasoned that such challenges were moot because the new school district is responsible for providing the hearing. OSEP subsequently explained that, “without additional legal authority,” it could not take action contrary to change this jurisdictional difference.

22. Who has the authority to determine whether a parent’s hearing request constitutes a new issue compared to the parent’s previous adjudicated request?

According to OSEP commentary accompanying the 1999 IDEA regulations, this jurisdictional issue is for the IHO—not the school district (or the SEA)—to decide.

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

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

24. Do IHOs have jurisdiction for cases that the parent has previously subjected to the SEA’s IDEA complaint resolution process (“CRP”)?

Yes, and they are not bound by the CRP rulings. However, the IHO does not have jurisdiction in such cases as the appellate mechanism for the SEA’s CRP rulings.

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38 This obligation is different from the child find and proportional-services obligations for children voluntarily placed in private schools, which are based on the school’s location, not the child’s residency. See infra note 45 and accompanying text.


40 Letter to Goetz & Reilly, 57 IDELR ¶ 80 (OSEP 2011).

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

42 Letter to Goetz & Reilly, 58 IDELR ¶ 230 (OSERS 2012).

43 64 Fed. Reg. 12,613 (Mar. 12, 1999).


25. Do IHOs have jurisdiction over free appropriate public education (FAPE) issues for students whom parents have voluntarily placed in private, including parochial, schools (in contrast with those unilaterally placed for tuition reimbursement)?

No, except for the Child Find obligation of the school district where the private school is located. Arguably, an additional exception is the extent that a few courts have interpreted state laws, such as those providing for dual enrollment, as extending local education agency (LEA) obligations for special education and/or related services to parentally placed children in private schools.

26. Do IHOs have jurisdiction for a complaint based on the child’s teacher not being highly qualified?

No, not according to the administering agency’s interpretation.

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

Yes, according to a recent Ninth Circuit decision.

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

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

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

Not in most cases.

50 Compton Unified Sch. Dist. v. Addison, 598 F.3d 1191 (9th Cir. 2010).
52 See, e.g., Chavez v. New Mexico Pub. Educ. Dep’t, 621 F.3d 1275 (10th Cir. 2010); cf. R.W. v. Georgia Dep’t of Educ., 48 IDELR ¶ 207 (N.D. Ga. 2007), aff’d, 353 F. App’x 422 (11th Cir. 2009).
30. Do IHOs have jurisdiction to determine and order the stay-put for a child with disabilities?

Yes.\(^{53}\)

31. Do IHOs have jurisdiction for parental challenges to an IEP that the parent agreed to or an IEP that is not the most recent one?

Yes, according to OSEP, provided that the filing is within the prescribed statute of limitations.\(^{54}\)

32. Do IHOs have jurisdiction to override a parent’s refusal to provide consent for initial services or for a parent’s subsequent revocation of consent for continued services?

No, the regulations are rather clear that these matters are no longer within the IHO’s jurisdiction.\(^{55}\)

33. What if the parent’s refusal is for consent for an initial evaluation and the child is either parentally placed in a private school or is home-schooled?

Similarly, the IHO does not have jurisdiction to override the parent’s refusal.\(^{56}\)

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

No, according to OSEP’s interpretation. IHOs do not have jurisdiction for any disputes between parents as compared to disputes between parents and “public agencies.” In such cases, the IDEA allows either parent to provide or revoke consent, with their disagreements being subject exclusively (i.e., not under the IDEA) to the resolution mechanisms available “based on State or local law.”\(^{57}\) Such consent disputes when concerned with evaluation, rather than services, may be another matter.\(^{58}\)

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

Although various hearing and review officers have broadly answered this question with a “no,” often based on the coverage of the Family Educational Rights and Privacy Act (FERPA),\(^{59}\) the


\(^{54}\) Letter to Lipsett, 52 IDELR ¶ 47 (OSEP 2008).

\(^{55}\) 34 C.F.R. §§ 300.300(b)(3)(i) and 300.300(b)(4)(ii).

\(^{56}\) Id. § 300.300(d)(4); see also Fitzgerald v. Camdenton R-III Sch. Dist., 439 F.3d 773 (8th Cir. 2006); Durkee v. Livonia Cent. Sch. Dist., 487 F. Supp. 2d 313 (W.D.N.Y. 2007).

\(^{57}\) Letter to Cox, 54 IDELR ¶ 60 (OSEP 2009); see also Letter to Ward, 56 IDELR ¶ 237 (OSEP 2010).


\(^{59}\) See, e.g., Bourne Pub. Sch., 37 IDELR ¶ 261 (Mass. SEA 2002); Northwest R-1 Sch. Dist., 40 IDELR ¶ 221 (Mo. SEA 2004); Fairfax County Pub. Sch., 38 IDELR ¶ 275 (Va. SEA 2003).
more defensible answer would appear to be “it depends” in light of the overlapping coverage of the IDEA. More specifically, if the student records issue concerns the identification, evaluation, FAPE, or placement of the child, it would appear to be within the concurrent jurisdiction of the IHO, with one possible exception—if the issue concerns amending the child’s record (based, for example, on inaccurate or misleading information), the IDEA regulations may be interpreted as reserving the matter exclusively for the FERPA hearing procedure.

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

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

37. Do IHOs have jurisdiction for enforcement of private settlement agreements?

The limited case law is unsettled on this question. Some jurisdictions support an affirmative answer, but others, in unpublished decisions, say no. OSEP has stated that 1) the IDEA only provides for judicial enforcement of settlement agreements as part of mediation or the resolution process and 2) a state may have uniform rules specific to an IHO’s authority or lack of authority to review and/or enforce settlement agreements reached outside of the mediation or resolution processes.

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

No. The, prevailing view is that the appropriate forums are the state complaint resolution

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60 34 C.F.R. §§ 300.507(a) and 300.613-300.621.
61 Id. §§ 300.619-300.621. The additional copy of education records that, alternatively, “are otherwise in violation of the privacy or other rights of the child” extends the boundaries of the exception to potentially swallow the rule. Id. § 300.619. The opposing interpretation is that these regulations require, exhaustion-like, resort to the FERPA hearing procedure as a prerequisite for IHO jurisdiction.
65 Letter to Shaw, 50 IDELR ¶ 78 (OSEP 2007).
process\textsuperscript{66} and, alternatively, the courts,\textsuperscript{67} rather than the H/RO process.\textsuperscript{68}

39. Do IHOs have the authority—whether viewed as a matter of jurisdiction or remedies—to raise and resolve an issue \textit{sua sponte}, i.e., on their own without either party raising it?

In the same, more recent commentary, OSEP stated that “[s]uch decisions are best left to individual State’s procedures for conducting due process hearings.”\textsuperscript{69} However, in an earlier policy interpretation, OSEP seemed to suggest that an IHO had the authority to decide the particular issue of the child’s “stay-put” \textit{sua sponte}.\textsuperscript{70} Conversely, the limited case law arguably answers “no” to this question as a matter of remedial authority, whether for declaratory\textsuperscript{71} or injunctive\textsuperscript{72} relief.

\begin{itemize}
\item \textsuperscript{66} See, e.g., Wyner v. Manhattan Beach Unified Sch. Dist., 223 F.3d 1026, 1028-29 (9th Cir. 2000); Bd. of Educ. of Wappingers Cent. Sch. Dist., 47 IDELR ¶ 115 (N.Y. SEA 2006); Crown Point Cent. Sch. Dist., 46 IDELR ¶ 269 (N.Y. SEA 2006); Newtown Bd. of Educ., 41 IDELR ¶ 201, at 827 (Conn. SEA 2004). \textit{But cf.} Lake Travis Indep. Sch. Dist. v. M.L., 50 IDELR ¶ 105 (W.D. Tex. 2007) (allowing IHO enforcement based on state law). However, parents need not exhaust the state’s complaint resolution process before seeking judicial enforcement of an H/RO order. Porter v. Bd. of Trustees, 307 F.3d 1064, 1074 (9th Cir. 2002). Moreover, the complaint resolution process—in contrast to a court—does not have jurisdiction for an IHO’s refusal to hear or decide an issue. Letter to Hathcock, 19 IDELR 631 (OSEP 1993); \textit{cf.} Letter to Jacobs, 48 IDELR ¶ 287 (OSEP 2007) (interpreting the IDEA to allow appeals of IHO decisions to court—or, presumably, to the second tier in the two-tier states—but not to the SEA where the IHO does not work under the auspices of a “public agency,” such as when a separate state office of administrative law conducts the hearing).
\item \textsuperscript{68} However, for a recent case where the enforcement route was a second IDEA hearing, see \textit{Bd. of Educ. v. Illinois State Bd. of Educ.}, 741 F. Supp. 2d 920 (N.D. Ill. 2010). For the related issue of whether the IHO has the jurisdiction to reopen the case upon the request of either party for enforcement purposes, see \textit{Bd. of Educ. of Ellenville Cent. Sch. Dist.}, 28 IDELR 337 (N.Y. SEA 1998).
\item \textsuperscript{69} \textit{Id.}
\item \textsuperscript{70} Letter to Armstrong, 28 IDELR 303 (OSEP 1997). The question to OSEP contained the at least partial \textit{sua sponte} condition that “stay put is not raised as an issue during the pre-hearing stages,” but the answer did not specifically differentiate this contingency.
\item \textsuperscript{71} \textit{See}, e.g., Saki v. State of Hawaii, Dep’t of Educ., 50 IDELR ¶ 103 (D. Hawaii 2008); Mifflin County Sch. Dist. v. Special Educ. Due Process Appeals Bd., 800 A.2d 1010 (Pa. Commw. Ct. 2002); Bd. of Educ. v. Redovian, 18 IDELR 1092 (N.D. Ohio 1992). The second case provides only limited authority, because the court was addressing the authority of the second-tier review panel, not the IHO, and its rationale included that doing so “without the benefit of a full factual record and adjudication on the issue [would result in] in a premature interruption of the administrative process.” \textit{Id.} at 1014.
\item \textsuperscript{72} \textit{See}, e.g., Sch. Bd. of Martin County v. A.S., 727 So.2d 1071 (Fla. Ct. App. 1999); \textit{cf.} Neshaminy Sch. Dist. v. Karla B., 26 IDELR 827 (E.D. Pa. 1997); Slack v. Delaware Dep’t of Educ., 826 F. Supp. 115 (D. Del. 1993); Mars Area Sch. Dist. v. Laurie L., 827 A.2d 1249 (Pa. Commw. Ct. 2003)(ruling specific to IDEA review officers). The first decision was the only one specific to IHOs, and it is ambiguous as to whether the basis was \textit{functus officio} rather than \textit{sua sponte}. 
\end{itemize}
40. Does expiration of the 45-day period, including any extensions, prior to the start of the hearing deprive the IHO of jurisdiction for the case?

No, according to a federal district court decision in Hawaii. Contrary to the IHO’s interpretation, the court concluded that this automatic divestiture of jurisdiction would “fly in the face of the very spirit of the IDEA and could result in a “serious injustice” to the rights of the parent and child with a disability.\(^{73}\)

**TIMELINES IN GENERAL**

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

It depends on the circumstances, especially whether the delay results in a denial of FAPE to the child. For example, in a Seventh Circuit case where the court upheld the IHO’s decision that the district had provided an appropriate program for the child, the parent’s claim was to no avail.\(^{74}\) Conversely, if this procedural violation is prejudicial, this conclusion may contribute to one or more consequences to the defendant LEA—attorneys’ fees,\(^{75}\) an exception to the exhaustion doctrine,\(^{76}\) or the extension of the period for tuition reimbursement.\(^{77}\) In a recent unpublished decision, the federal district court in Hawaii treated such a delay as a per se violation, but perhaps the dual status of Hawaii as the SEA and LEA may be a distinguishable factor.\(^{78}\)

42. Do the IDEA regulations’ allowance for extensions excuse any such alleged delay?

Yes, but 1) the extensions must be at the request of a party and for specific periods of time;\(^{79}\) and 2) the defendant agency—whether the LEA or the SEA—ultimately must be able to show the documentation and justification for the extensions.\(^{80}\)

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\(^{76}\) See, e.g., McAdams v. Bd. of Educ., 216 F. Supp. 2d 86 (E.D.N.Y. 2002). In a case where the court concludes that the SEA is the responsible agency, the SEA would be liable for the attorneys’ fees. See, e.g., Engwiller v. Pine Plains Cent. Sch. Dist., 110 F. Supp. 2d 236 (S.D.N.Y. 2000).


\(^{78}\) Dep’t of Educ. v. T.G., 56 IDELR ¶ 97 (D. Hawaii 2011).

\(^{79}\) 34 C.F.R. § 300.515(c) (2008). According to OSEP, the IHO need not grant the request for an extension, and where the IHO does grant it, the IHO must provide the parties with notice of not only this ruling but also the specific date for the final decision. Letter to Kerr, 22 IDELR 364 (OSEP 1994).

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

Yes, subject to state law.\(^{81}\) Denying continuances is within the good faith discretion of IHOs with due consideration to unrepresented parents.\(^{82}\)

**EXPEDITED HEARINGS**

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

The IDEA regulations require the opportunity for an expedited hearing when the parent challenges a manifestation determination or any other aspect of a district-imposed disciplinary change in placement or interim alternate educational setting.\(^{83}\)

45. Under what circumstances are school districts entitled to an expedited hearing?

The school district must have the opportunity for such a hearing upon requesting an interim alternate educational setting based on substantial likelihood of the current placement resulting in injury to the child or others.\(^{84}\)

46. What is the timeline for an expedited hearing?

Unless the state has adopted different procedural rules, the deadlines are as follows, starting with the receipt of the complaint: resolution session – within 7 days; hearing – within 20 school days; decision – within 30 school days (actually, within 10 school days of the hearing if the hearing is more than one session).\(^{85}\) According to OSEP, the reference to “school days” for the second and third parts of this specified schedule includes days during the summer period for school districts that “operate summer school programs for both students with, and students without, disabilities,” but not when the summer programming is only ESY.\(^{86}\) Moreover, OSEP clarified that the overall 45-day deadline, upon completion of the resolution period, applies regardless of whether the summer days count for these two steps.\(^{87}\)

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\(^{83}\) 34 C.F.R. § 300.532(c)(1) (2008).

\(^{84}\) *Id.* For elaboration, see Letter to Huefner, 47 IDELR ¶ 228 (OSEP 2007).

\(^{85}\) *Id.* § 300.532(c)(2)-(4). The references to school days would seem to conflict during the summer months with the general requirement for issuance of the decision within 45 calendar days after completion of the resolution-session period. *Id.* § 300.515(a). However, the absence of extensions, or postponements, in the regulations for expedited hearings potentially mitigates this possible conflict.

\(^{86}\) Letter to Cox, 59 IDELR ¶ 140 (OSEP 2012).

\(^{87}\) *Id.*
47. In expedited hearings, does the usual five-day disclosure rule apply or does a special two-day rule replace it?

Although the proposed IDEA regulations contained a two-day exception for expedited hearings, the final version retained the five-day rule without exception. The Agency’s stated reasoning was that “limiting the disclosure time to two days would significantly impair the ability of the parties to prepare for the hearing, since one purpose of the expedited hearing is to provide protection to the child.”

**Hearing Procedures, Including Evidentiary Matters**

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

The IDEA does not provide for discovery (beyond the five-day rule), and very few state laws provide for it in IDEA hearings. If state law is silent in this matter, OSEP has stated that whether discovery procedures are available and, if so, their nature and extent are within the discretion of the IHO. However, in a Florida case, the appellate court held that in the absence of state law the IHO lacked authority to order discovery.

49. Do IHOs have authority to dismiss a case and, if so, with prejudice?

Hearing officers certainly have the authority for dismissal in certain circumstances. For example, the IDEA regulations provide this authority explicitly with regard to parents’ failure to participate in resolution sessions and implicitly with regard to complaints that the hearing officer deems to be insufficient. A federal district court recently ruled that dismissal with prejudice should be reserved for extreme cases, with close calls—especially for pro se parents—being against this sanction. The scope of other circumstances and the extent of doing so “with prejudice” would appear to be a matter of state law. In general, it would appear to be advisable to 1) hold a hearing where the basis is a factual matter of material dispute; 2) limit dismissing the case with prejudice to cases of rather egregious conduct by the filing party, whether separately sanctionable or not; and 3) issue a written opinion with factual findings and

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90 Letter to Stadler, 24 IDELR 973 (OSEP 1996).
93 Id. § 300.508(c). As a general matter, OSEP has opined that “apart from the hearing rights set out at § 300.308, decisions regarding the conduct of Part B due process hearings are left to the discretion of hearing officers.” Letter to Anonymous, 23 IDELR 1073, 1075 (OSEP 1995).
96 See, e.g., Hazelton Area Sch. Dist., 36 IDELR ¶ 30 (Pa. SEA 2001).
legal conclusions sufficient to withstand judicial review.98

50. Do IHOs have wide discretion with regard in conducting the hearing, including determining the scope of evidence?

Yes, including, for example, whether to take evidence for the period before the statute of limitations.99 The generally applicable judicial standard of review is abuse of discretion, which usually favors the IHO.100 However, the federal district court for the District of Columbia has required IHOs to provide parents with a flexible opportunity for providing evidence to support the remedies of tuition reimbursement and compensatory education where the parents prove the requisite entitlement for such relief.101

51. What are the key factors that IHOs should carefully consider and reasonably explain in their credibility determinations?

Although various factors may apply depending on the circumstances, they include the extent of

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98 For an example of an IHO decision that did not meet this sufficiency test, see A.B. v. Clarke County Sch. Dist., 52 IDELR ¶ 259 (M.D. Ga. 2009). Of course, even where the decision is sufficiently specific, it is subject to being reversed on appeal to court. See, e.g., Alexandra R. v. Brookline Sch. Dist., 53 IDELR ¶ 93 (D.N.H. 2009).

99 See, e.g., Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1086 (9th Cir. 2002); Dep’t of Educ., State of Hawaii v. E.B., 45 IDELR ¶ 249 (D. Hawaii 2006). In the commentary accompanying the IDEA regulations, OSEP’s illustrations of IHO’s broad procedural discretion include 1) determining appropriate expert witness testimony (71 Fed. Reg. 46691 (Aug. 14, 2006)); 2) ruling upon compliance with timelines and the statute of limitations (id. at 46705-46706); 3) determining whether the non-complaining party may raise other issues at the hearing not specified in the complaint (id. at 46706); and 4) providing proper latitude for pro se parties (id. at 46699).


pertinent experience with the child and the relevant expertise of the witness.

52. May an IHO limit the number of days for the hearing?

Yes, just as long as the IHO provides the parties with the hearing rights that the regulations prescribe. Although OSEP has referred to the IHO’s responsibility “to accord each party a meaningful opportunity to exercise these rights during the course of the hearing,” the aforementioned abuse of discretion standard provides ample latitude to the IHO to rule in favor of efficiency, particularly in light of the 45-day regulatory deadline.

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

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

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102 See, e.g., Sebastian M. v. King Philip Reg’l Sch. Dist., 685 F.3d 79 (1st Cir. 2012); Bd. of Educ. v. Michael R., 44 IDELR ¶ 36 (N.D. Ill. 2005); cf. W. Windsor-Plainsboro Reg’l Sch. Dist. Bd. of Educ., 44 IDELR ¶ 159 (D.N.J. 2005) (ruling that exclusive reliance on parents’ experts as “utterly persuasive” was unsupported in the record and, thus, not entitled to any deference). The child’s teachers and other regular service providers merit special attention in this regard. See, e.g., Heather S. v. State of Wisconsin, 125 F.3d 1045, 1057 (7th Cir. 1997); Arlington Cnty. Sch. Bd. v. Smith, 230 F. Supp. 2d 704, 730 (E.D. Va. 2002). However, this factor is not without limits and is partly jurisdictional. For example, in the Ninth Circuit, the view was that according deference to the testimony of school personnel based on the child-experience factor, without careful consideration of the parents’ witnesses, would not only create a discriminatory standard but also obviate the need for an impartial hearing. See, e.g., K.S. v. Fremont Unified Sch. Dist., 545 F. Supp. 2d 995, 1004 (N.D. Cal. 2008), further proceedings, K.S. v. Fremont Unified Sch. Dist., 679 F. Supp. 2d 1046 (N.D. Cal. 2009), aff’d, 426 F. App’x 536 (9th Cir. 2011). For another example of the non-bright limits, compare the majority and minority (and lower court) opinions in the Fourth Circuit’s 2-to-1 decision in County School Board v. Z.P., 399 F.3d 298 (4th Cir. 2005).

103 This overlapping factor often extends to the child’s teachers and other district professional personnel, but not exclusively or arbitrarily. See, e.g., K.S. v. Fremont Unified Sch. Dist., 679 F. Supp. 2d 1046 (N.D. Cal. 2009), aff’d, 426 F. App’x 536 (9th Cir. 2011); see also Marshall v. Joint Sch. Dist. No. 2 v. C.B., 616 F.3d 632, 641 (7th Cir. 2009) (distinction between medical and educational professionals).


106 See, e.g., OSEP Commentary Accompanying 1999 IDEA regulations, 64 Fed. Reg. 12,614 (Mar. 12, 1999); Letter to Steinke, 18 IDELR 739 (OSEP 1992); see also LJ v. Audubon Bd. of Educ., 51 IDELR ¶ 37 (D.N.J. 2008); Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261 (D. Conn. 2002); There are no “tests” for the IHO to follow in making such determinations, but the purpose of the rule is, in OSEP’s view, “to allow all parties the opportunity to adequately respond to the impact of the evidence presented, and to eliminate the element of surprise as a strategy a party may employ to influence the outcome of the hearing decision.” Letter to Steinke, 18 IDELR 739 (OSEP 1992); cf. Letter to Bell, EHLR 211:166 (OSEP 1979) (“It is not interpreted to mean that everything that will be used by either party must be revealed. It does mean that names of witnesses to be called and the general thrust of their testimony should be disclosed”). In the commentary accompanying the most recent IDEA regulations, OSEP added that nothing prevents parties from agreeing to a shorter period of time. 71 Fed. Reg. 46706 (Aug. 14, 2006).
54. Does the IHO have the authority to allow testimony by telephone or television?

According to OSEP, this matter is within the IHO’s discretion, subject to judicial review in terms of whether the parties had meaningful opportunity to exercise the rights specified in the IDEA regulations, including the right to “present evidence and confront, cross-examine and compel the attendance of witnesses.” However, except where the parties jointly agree or where state law provides such authority, an unpublished decision disagreed with the OSEP interpretation.

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

According to OSEP, yes.

56. May an IHO order the LEA to provide the parent with e-mails from or to school district personnel?

Presumably, this discretion is within the IHO’s subpoena power, even though the e-mails may not be student records under FERPA.

57. Do IHOs have contempt powers?

No, unless state law provides such authority.

58. Do IHOs have the authority to issue disciplinary sanctions against a party or the party’s attorney for what the IHO regards as hearing misconduct?

Again, the answer is a matter of state law, according to OSEP. The published case law is scant and somewhat supportive.

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110 Letter to Steinke, 28 IDELR 305 (OSEP 1997).
113 Letter to Armstrong, 28 IDELR 303 (OSEP 1997).
59. **May an IHO dismiss a hearing after multiple postponements?**

It depends on state law. In a recent Massachusetts case, the court reversed such a dismissal where the hearing officer did so after granting the latest postponement request, but state law required the hearing officer to either 1) deny the motion for postponement or 2) grant it and set a new hearing date.\(^\text{115}\)

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

Yes, according to OSEP, if the parent filed for the hearing. Conversely, according to OSEP, if the district filed for a hearing, the school district may do so but only after providing due disclosure to the parent and via witnesses, not on an *ex parte* basis.\(^\text{116}\)

61. **Does the IDEA entitle the parent to a choice between a written or electronic (e.g., audi-taped) transcript of the hearing?**

Yes. Although the IDEA previously did not offer that parent a choice,\(^\text{117}\) the 1997 amendments revised the language to provide parents with "the right to a written, or, at the option of the parents, electronic verbatim record of such hearing."\(^\text{118}\) The 2004 amendments have retained this choice-providing language.

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

Not in the absence of a state law, according to a Pennsylvania appellate court in a gifted education case.\(^\text{119}\)

63. **Does the failure to provide the parent with the complete transcript or recording amount to a denial of FAPE?**

It depends on whether the missing testimony is significant in terms of affecting the child’s substantive right to FAPE.\(^\text{120}\)

64. **May IHOs take official notice of a fact or standard akin to a court’s power of judicial notice?**

The pertinent case law is insufficient to provide a clear answer where state law does not

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\(^{116}\) Letter to Stadler, 24 IDELR 973 (OSEP 1996).

\(^{117}\) See, e.g., Edward B. v. Paul, 814 F.2d 52 (1st Cir. 1987).

\(^{118}\) See, e.g., Edward B. v. Paul, 814 F.2d 52 (1st Cir. 1987).

\(^{119}\) See, e.g., Stringer v. St. James Sch. Dist., 446 F.3d 799 (8th Cir. 2006).

\(^{120}\) See, e.g., Kingsmore v. Dist. of Columbia, 466 F.3d 118 (D.C. Cir. 2006); J.R. v. Sylvan Union Sch. Dist., 50 IDELR ¶ 130 (E.D. Cal. 2008).
expressly provide this power.\textsuperscript{121}

65. May an IHO admit hearsay evidence?\textsuperscript{121}

Generally yes unless state law dictates otherwise,\textsuperscript{122} but relying on it in the IHO’s decision without corroborative proof may be problematic.\textsuperscript{123}

66. May an IHO admit evidence from the period prior to the applicable statute of limitations?\textsuperscript{124}

Yes, but only as background information.\textsuperscript{124}

67. Does the “snapshot” rule, or evidentiary standard, apply for IHO’s assessment of the appropriateness of IEPs?\textsuperscript{125}

It depends on the jurisdiction. For example, the First, Second, Third, and Ninth Circuits have adopted this standard,\textsuperscript{125} whereas the Fourth and Tenth Circuits have partially disagreed.\textsuperscript{126} This approach considers the time of the educational decision, not the adjudicator’s deliberations, as controlling to determine appropriateness.

68. On the other hand, what is the “four corners” evidentiary rule in relation to FAPE determinations?\textsuperscript{127}

This standard, which originates in contract law, exclusively restricts consideration to the final version of the IEP that the school system offered during the IEP process.\textsuperscript{127} Various circuits


\textsuperscript{124} See, e.g., Dep’t of Educ. v. E.B., 45 IDELR ¶ 249 (D. Hawaii 2006).

\textsuperscript{125} See, e.g., R.E. v. New York City Dep’t of Educ., 694 F.3d 167 (2d Cir. 2012); Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 29 (1st Cir. 2008); Adams v. State of Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999); Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3d Cir. 1993) (Mansmann, J., concurring)


\textsuperscript{127} See, e.g., C.G. v. Five Town Cmty. Sch. Dist., 513 F.3d 279, 285 (2d Cir. 2008) (explaining but not either adopting or rejecting this standard).
have adopted it but typically only in limited circumstances or with exceptions.\textsuperscript{128}

69. \textbf{May the party that requested the hearing raise issues not in the complaint?}

Not unless the other party agrees\textsuperscript{129} or “opens the door” (e.g., via its opening statement).\textsuperscript{130}

70. \textbf{May the other (i.e., noncomplaining) party raise issues not in the complaint?}

The regulations do not address this question, but the accompanying commentary takes the position that the answer is a matter of state procedures and, in their absence, the IHO’s discretion.\textsuperscript{131}

71. \textbf{Does an IHO have authority to proceed with the hearing in the absence of a party?}

In general, courts review such matters on an abuse of discretion standard, which makes it advisable for the IHO to provide and document due notice to the non-appearing party and ample opportunity for rescheduling participation. Thus, it would appear to be in effect a last resort within the need for a prompt decision. In applying these limited circumstances, courts have upheld the IHO in the clear majority of cases.\textsuperscript{132}

72. \textbf{May an IHO order the evaluation of a child? If so, who is responsible for payment of the evaluator, and are there any limits to the cost and qualifications?}

The IDEA regulations make clear that the IHO has this authority and that the evaluation is at public expense (i.e., the district is responsible for payment).\textsuperscript{133} The limits are those that apply to the district’s use of evaluators.\textsuperscript{134}

\textsuperscript{128} See, e.g., D.S. v. Bayonne Bd. of Educ., 602 F.3d 503 (3d Cir. 2010); John M. v. Bd. of Educ., 502 F.3d 708 (7th Cir. 2007); A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 (4th Cir. 2007); Doe v. Defendant I, 898 F.3d 1106 (6th Cir. 1990); Union Sch. Dist. v. Smith, 15 F.3d 1519 (9th Cir. 1994). For another supportive decision, which is currently on appeal at the Second Circuit, see \textit{R.E. v. New York City Dep’t of Educ.}, 788 F. Supp. 2d 28 (E.D.N.Y. 2011).

\textsuperscript{129} 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 00.511(d). For application of this requirement to the levels beyond the IHO, see, e.g., R.C. v. Byram Hills Sch. Dist., __ F. Supp. 2d __, __ (S.D.N.Y. 2012); M.H. v. New York City Dep’t of Educ., 685 F.3d 217, 250 (2d Cir. 2012).


\textsuperscript{132} 34 C.F.R. § 300.502(d).

\textsuperscript{133} \textit{Id.} § 300.502(e).
**DECISIONAL ISSUES**

73. Is the “educational performance” component of the eligibility definition limited to the academic, as compared with the social, dimension?  

The two major appellate decisions are split on this interpretational issue.  

74. Are any of the procedural violations of the IDEA a per se denial of FAPE?  

The only seeming possibility, depending on the interpretation of the relevant IDEA language, is where the proof is preponderant that the district “[s]ignificantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child.”  

75. Has the *Rowley* floor-based substantive standard for denial of FAPE changed as a result of the subsequent amendments to the IDEA?  

No.  

76. What is the prevailing standard for FAPE implementation cases?  

Rather than 100% compliance, the judicial standard is failure to implement a material, i.e., substantial or significant, portion of the IEP.  

**WRITTEN DECISIONS**

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

Yes, within reasonable limits, basically based on the IHO’s consideration of the parties’

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135 Compare C.B. v. Dep’t of Educ., 322 F. App’x 20 (2d Cir. 2009) (academic only), with Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1 ¶ (1st Cir. 2007) (extends to social dimension).


arguments.\footnote{See, e.g., J.W. v. Fresno Unified Sch. Dist., 626 F.3d 431 (9th Cir. 2010); Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1096 (9th Cir. 2002); M.M. v. Lafayette School District, 58 IDELR ¶ 132 (N.D. Cal. 2012); K.E. v. Indep. Sch. Dist. No. 15, 54 IDELR ¶ 215 (D. Minn. 2010), aff’d on other grounds, 747 F.3d 795 (8th Cir. 2011); cf. Adam Wayne D. v. Beechwood Indep. Sch. Dist., 482 F. App’x 52 (6th Cir. 2012) (implicit notice to defendant-district); Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804 (5th Cir. 2003) (impartiality challenge); Renollet v. Indep. Sch. Dist. No. 11, 42 IDELR ¶ 201 (D. Minn. 2005), aff’d on other grounds, 440 F.3d 1007 (8th Cir. 2006) (limiting the issues).}

78. Do the IHO’s legal findings need support in the record?


79. Do IHOs have similar qualified discretion with regard to their legal conclusions?

Yes. For example, writing shortcuts, such as cutting and pasting a selected group of conclusions from another decision, are not legal error if well founded.\footnote{Joshua A. v. Rocklin Unified Sch. Dist., 49 IDELR ¶ 249 (E.D. Cal. 2008), aff’d, 391 F. App’x 692 (9th Cir. 2009).} Conversely, however, an IHO’s legal conclusion that fails to reference the supporting facts may not receive judicial deference.\footnote{See, e.g., Marc M. v. Dep’t of Educ., State of Hawaii, 762 F. Supp. 2d 1235 (D. Hawaii 2011).}

80. Are IHOs allowed to amend their decisions for technical errors?

OSEP interprets the matter was within the discretion of SEAs and IHOs, provided that where amendments are allowed, proper notice should be accorded to both parties.\footnote{OSEP Commentary Accompanying the IDEA regulations, 64 Fed. Reg. 12.613 (Mar. 12, 1999).}
**MISCELLANEOUS**

81. What is the standard of judicial review for an IHO’s decision?

The lower courts have varied in their interpretation and application of the Supreme Court’s “due weight”\(^ {146} \) standard.\(^ {147} \) However, the general theme is to provide a 1) presumptive deference to the IHO’s factual findings, particularly with regard to credibility of witnesses, and 2) de novo review for the IHO’s legal conclusions.\(^ {148} \) The deference for factual findings tends to be less for those based on additional evidence\(^ {149} \) and more for those that are careful and through.\(^ {150} \) Overall, those challenging an IHO’s decision face a steep “uphill climb.”\(^ {151} \)

82. Do an IHO have authority to grant res judicata or collateral estoppel effect to a previous IHO decision?

Yes.\(^ {152} \)

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

No, according to the Ninth Circuit; each school year represents a separate issue.\(^ {153} \)

84. What is the statute of limitations for filing for a due process hearing under the IDEA?

In short, two years unless state law prescribes a different period; however, the interpretation and application are not that easy because the statutory language, which the regulations repeat, 1) provides for two not completely clear exceptions; 2) requires determination of the triggering point of when the parent or district had actual or constructive notice of the alleged violation; and 3) arguably extends back up to another two years for when the alleged violation arose.\(^ {154} \)

85. Do IHOs have the authority to provide consent decree status to a settlement for purposes of attorneys’ fees, but only upon proper order?

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\(^ {148} \) See, e.g., Shore Reg’l Sch. Dist. v. P.S., 381 F.3d 194 (3d Cir. 2004); Amanda J. v. Clark County Sch. Dist., 267 F.3d 877 (9th Cir. 2001); Doyle v. Arlington County Sch. Bd., 953 F.2d 100 (4th Cir. 1991).

\(^ {149} \) See, e.g., Alex R. v. Forrestville Cmty. Unit Sch. Dist., 375 F.3d 603 (7th Cir. 2004).

\(^ {150} \) See, e.g., Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884 (9th Cir. 1995).


\(^ {153} \) T.G. v. Baldwin Park Unified Sch. Dist., 57 IDELR ¶ 33 (9th Cir. 2011).

\(^ {154} \) 20 U.S.C. §§ 1415(f) (3) (C); see also id. §1415(b)(6)(B).
Yes, but only upon proper order.\textsuperscript{155}

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

The answer is a matter of state law.\textsuperscript{156} Approximately 10 states expressly prohibit their representation, and approximately 12 expressly permit it.\textsuperscript{157} In the other states, the decision would appear to be in the IHO’s discretion, with some IHOs not allowing it as a matter of legal ethics in terms of the unauthorized practice of law.\textsuperscript{158}

87. To whatever extent it may bear on the IHO’s position in the previous item, if the lay advocate provides such representation, are his/her communications privileged at subsequent judicial proceedings to the same extent as allowed under the attorney-client privilege?

Yes, according to a published federal magistrate’s decision in New Jersey.\textsuperscript{159}

88. Who has the burden of persuasion at the hearing?

For FAPE cases, the Supreme Court held that under the IDEA, which is silent on this point, the burden of persuasion is on the challenging party, i.e., the parent.\textsuperscript{160} However, some state laws have put the burden of proof in such cases on the district.\textsuperscript{161} Conversely, lower courts have extended the Supreme Court’s ruling to other issues, such as whether the child is eligible\textsuperscript{162} and whether the child’s placement is in the least restrictive environment (LRE).\textsuperscript{163}

89. May an IHO remand a case back to the district for further action or information rather than deciding the case?


\textsuperscript{156} 34 C.F.R. § 300.512(a) (1).


\textsuperscript{159} Woods v. New Jersey Dep’t of Educ., 858 F. Supp. 51 (D.N.J. 1993). The court did not definitively rule on the related question of work-product protection, although seeming to lean in the same directions for the answer. \textit{Id}.

\textsuperscript{160} Schaffer v. Weast, 546 U.S. 49 (2005).

\textsuperscript{161} N.Y. EDUC. LAW § 4404[1][c] (McKinney 2008). The limited exception in New York is for the second step in tuition reimbursement cases, which is whether the parent’s unilateral placement is appropriate. \textit{Id}. Other state laws put the burden of production in FAPE cases on the district without making clear the possible distinction from the burden of persuasion. 105 ILL. COMP. STAT. 5/14-8.02a(g-55).


\textsuperscript{163} L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 (3d Cir. 2006).
No, such action would appear to violate the IDEA’s imperative for a timely final decision.\textsuperscript{164}

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

Not any longer. On October 5, 2010, the President signed legislation popularly known as "Rosa's law" that changes the reference from "mental retardation" in the IDEA and other federal legislation, such as Section 504, to "intellectual disability."\textsuperscript{165}

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

Not according to OSEP, because such notice limits “would impose additional procedural hurdles on the right to a due process hearing that are not contemplated by the IDEA.”\textsuperscript{166}

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

Only if 1) allowed by the state’s applicable procedures and 2) the reconsideration is before the final decision and is issued within the 45-day, or properly extended, timeline.\textsuperscript{167}

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

Only if allowed by the state’s applicable procedures and within a very limited time.\textsuperscript{168}

94. Does an IHO have the authority to retain jurisdiction \textit{sua sponte}?

No according to the limited applicable case law in light of the finality requirement for IHO decisions.\textsuperscript{169}

95. Does an IHO have authority to confer consent decree status on a settlement agreement?

Only in limited circumstances. However, the case law is not sufficiently on point for a clearer answer. The court decisions concerning whether the parent is entitled to attorneys’ fees as the prevailing party as the result of such a consent decree are only indirectly applicable and, in any event, has varying limits.\textsuperscript{170}


\textsuperscript{165} 124 STAT. 2643 (2010).

\textsuperscript{166} Letter to Lenz, 37 IDELR ¶ 95 (OSEP 2002).

\textsuperscript{167} Letter to Weiner, 57 IDELR ¶ 79 (OSEP 2011). For the similar but separable issue of whether the state may seek clarification of the IHO’s decision via the complaint resolution process, see Gumm v. Nevada Dep’t of Educ., 113 P.3d 853 (Nev. 2005).

\textsuperscript{168} See, e.g., T.G. v. Midland Sch. Dist., 848 F. Supp. 2d 902 (N.D. Ill. 2012); \textit{see also} 71 Fed. Reg. 12,613 (Mar. 12, 1999).


96. Do parents have the right to place under seal the transcript and exhibits of an open due process hearing and for which the redacted IHO decision is available on the SEA website?

Yes, according to an unpublished federal district court decision in Ohio. The court relied on FERPA and the child’s right to privacy.\footnote{171}

97. Does the IDEA permit interlocutory appeals of IHO interim rulings (e.g., partial dismissal) to court?

No, according to a recent Ninth Circuit decision in light of the plain language of the IDEA and the final judgment principle.\footnote{172}

\footnote{171} Oakstone Cmty. Sch. v. Williams, 58 IDELR ¶ 256 (S.D. Ohio 2012).

\footnote{172} M.M. v. Lafayette Sch. Dist., 681 F.3d 1082 (9th Cir. 2012). Stay-put is a possible exception. See, e.g., Houston Indep. Sch. Dist. v. V.P., 582 F.3d 576 (5th Cir. 2011).