

## A Comparison of the IDEA's Dispute Resolution Processes: Complaint Resolution and Impartial Hearings\*

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This tabular analysis canvasses the major similarities and differences between the complaint resolution process (CRP) and the impartial hearing officer (IHO) process under the Individuals with Disabilities Education Act (IDEA). For the sake of uniformity and because the IDEA legislation only tangentially addresses the CRP,<sup>1</sup> the framework citations are to the IDEA regulations.<sup>2</sup>

In contrast with the IHO process,<sup>3</sup> the CRP process has received insufficient attention in

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<sup>1</sup> 20 U.S.C. § 1411(e)(2)(B)(i) (2012) (authorizing use of IDEA funds for CRP); *id.* §§ 1412(a)(14)(E) and 1412(a)(10)(A)(v) (authorizing CRP for private school consultation complaints and parental complaints re teachers meeting highly qualified standard); and *id.* § 1215(f)(3)(F) (providing the right to IHO does not preclude parent from accessing CRP). In passing the ESSA, as the successor of the NCLB, Congress removed the highly qualified teacher requirement, effective by the end of the 2016–2017 school year, and amended the IDEA to conform to this removal for special education teachers.

<sup>2</sup> 34 C.F.R. §§ 300.1–300.817 (2013).

<sup>3</sup> See, e.g., Cali Cope-Kasten, Note, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501 (2013); Tracy Gershwin Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. DISABILITY POL'Y STUD. 131 (2011); Peter J. Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers Under the Individuals with Disabilities Act*, 83 N. DAKOTA L. REV. 109 (2007); Joseph McKinney & George F. Schultz, *Hearing Officers, Case Characteristics, and Due Process Hearings*, 111 EDUC. L. REP. 1069 (1996); Kristen Rickey, *Special Education Due Process Hearings: Students Characteristics, Issues, and Decisions*, 14 J. DISABILITY POL'Y STUD. 46 (2003); Perry A. Zirkel, *Longitudinal Trends of Impartial Hearings under the IDEA: A Follow-Up Analysis*, 303 EDUC. L. REP. 1 (2014)); Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONTANA L. REV. 403 (1994); Perry A. Zirkel, Zorka Karanxha, & Anastasia D'Angelo, *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27 (2007); Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3 (2010); Perry A. Zirkel & Cathy Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISP. RESOL. 525 (2014).

the literature to date.<sup>4</sup> These alternate avenues of IDEA dispute resolution merits a systematic and synthesizing comparison.<sup>5</sup> The table that follows provides, in general chronological sequence of processing of complaints, various features of the CRP and IHO avenues, respectively, along with supporting citations. The similarities are italicized, whereas the differences, which predominate, are in regular font.

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<sup>4</sup> See, e.g., Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process: An Update*, 313 EDUC. L. REP. 1 (2015). For some basic CRP resources on the Internet, see <http://www.advocacyinstitute.org/iscre/basics.shtml>

<sup>5</sup> Although some sources list mediation and resolution sessions as IDEA dispute resolution systems, the treatment here distinguishes these other steps as less formal mechanism that leave the matter to the parties' choice and that are preliminary to these primary avenues, with mediation available for both the IHO and CRP process and resolution sessions as an early step in the IHO process. For a practical treatment of these two avenues along with the alternatives under Section 504, see Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution under the Individuals with Disabilities Education Act*, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010). For a quick, simple guide that compares various IDEA dispute resolution mechanisms, extending to IEP facilitation and mediation, see <http://www.directionservice.org/cadre/pdf/DisputeResolutionProcessComparisonChart.pdf>

Feature	CRP	IHO
<b>Overall Structure</b>	administrative investigative—hearing as inapplicable <sup>6</sup>	administrative adjudicative—hearing as centerpiece <sup>7</sup>
<b>Overall Nature</b>	independent <sup>8</sup>	impartial <sup>9</sup>
<b>Interaction</b>	deferral and precedential effect of IHO <sup>10</sup>	entirely independent from <b>and not at all bound by</b> CRP <sup>11</sup>
<b>Model Forms</b>	<i>required to be available, though not mandatory to be used</i> <sup>12</sup>	<i>required to be available, though not mandatory to be used</i> <sup>13</sup>

<sup>6</sup> See, e.g., 34 C.F.R. § 300.152(a); **see also** *Everett H. v. Dry Creek Joint Elementary Sch. Dist.*, 68 IDELR ¶ 190 (E.D. Cal. 2016) (“CRP does not include full procedural protections like the right to confront and cross-examine witnesses”). State education agencies (SEAs) have broad discretion as to the methods for investigation. See, e.g., *Indep. Sch. Dist. No. 709 v. Bonney*, 705 N.W.2d 209, 202 Ed.Law Rep. 828 (Minn. Ct. App. 2005); Letter to Miller, EHLR 213:145 (OSERS 1988). Moreover, SEAs must resolve but not necessarily investigate every complaint that meets the formal criteria. Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-20; Letter to Nann, 36 IDELR ¶ 212 (OSEP 2001); **see also** *Larsen v. Indep. Sch. Dist. No. 361*, 39 IDELR ¶ 66 (Minn. Ct. App. 2003) (excusing lack of investigation where parent, despite repeated requests, failed to provide sufficient information to determine the issues in relation to those of parent’s due process complaint); Letter to Siegel, 33 IDELR ¶ 275 (OSEP 2000) (excusing the SEA from investigating premature complaints); **see also** 71 Fed. Reg. 46,603 (Aug. 14, 2006).

<sup>7</sup> See, e.g., 34 C.F.R. § 300.512.

<sup>8</sup> *Id.* § 300.152(a)(4).

<sup>9</sup> *Id.* § 300.511(c).

<sup>10</sup> *Id.* § 300.152(c); Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-28. *But cf.* Dear Colleague Letter, 65 IDELR ¶ 151 (OSERS/OSEP 2015) (“A [district’s] filing of a due process complaint after the parent has filed a State complaint on the same issues may unreasonably deny a parent the right to use the State complaint process.... The Department strongly believes that it is in the best interest of parents and school districts to respect the parents’ choice of forum for resolution of their disputes.”); Letter to Deaton, 65 IDELR ¶ 241 (OSEP 2015) (opining that the SEA may not postpone corrective actions upon completion of CRP when parent files for impartial hearing on some or all of same issues in the interim). **Moreover, for complaints with multiple issues, deferral does not apply to the issue(s) not subject to the IHO process.** 34 C.F.R. § 300.152(c)(1).

<sup>11</sup> See, e.g., *Sch. Dist. of Philadelphia v. Drummond*, 67 IDELR ¶ 170 (E.D. Pa. 2016); *Grand Rapids Pub. Sch. v. P.C.*, 308 F. Supp. 2d 815, 187 Ed.Law Rep. 76 (W.D. Mich. 2004); *Donlan v. Wells Ogunquit Cmty. Sch. Dist.*, 226 F. Supp. 2d 261, 171 Ed.Law Rep. 453 (D. Me. 2002); Letter to Douglas, 35 IDELR ¶ 278 (OSEP 2001); Letter to Chief State Sch. Officers, 34 IDELR ¶ 264 (OSEP 2000); *cf.* Letter to Johnson, 18 IDELR 589 (OSEP 1991) (“the results of a complaint investigation may be used as evidence”).

<sup>12</sup> 34 C.F.R. § 300.509(a).

<sup>13</sup> *Id.*

Feature	CRP	IHO
<b>Parental Cost</b>	minimal <sup>14</sup>	extensive <sup>15</sup>
<b>Filing Party</b>	any individual or organization, with implicit exception of the school district <sup>16</sup>	parent or school district <sup>17</sup>
<b>State Education Agency (SEA) As a Defendant</b>	yes, in addition or alternate to the school district <sup>18</sup>	generally not unless SEA is providing direct services <sup>19</sup>
<b>Subject Matter Jurisdiction: General</b>	any requirement(s) of Part B of the IDEA <sup>20</sup>	eligibility, evaluation, placement or FAPE <sup>21</sup>

<sup>14</sup> When the parent is the complainant, the reasons are that legal representation is not essential, and the agency personnel conduct the process with limited involvement (and, conversely, influence) of the parent.

<sup>15</sup> The reasons are the generally the converse of the CRP costs: an attorney is significantly beneficial and the amount of time the attorney and the parents' have to spend on the process is considerable.

<sup>16</sup> 34 C.F.R. §§ 300.151(a)(1) and 300.153(a). This breadth extends to a nonresident if the alleged violation is in the state. Letter to Barnhisser, EHLR 213:172 (OSEP 1988). If the parent refuses consent, the state must investigate but may not release personally identifiable information regarding the student to the filing party. Letter to Chief State Sch. Officers, 34 IDELR ¶ 264 (OSEP 2000); Letter to Tommasini, 38 IDELR ¶ 155 (FPCO 2002). Finally, the CRP need not address anonymous complaints. 71 Fed. Reg. 46,606 (Aug. 14, 2006) (The complainant should not remain unknown to the public agency that is the subject of the complaint because that public agency needs to know who the complainant is”).

<sup>17</sup> 34 C.F.R. § 300.507(a)(1). This right may transfer to the child upon reaching the age of majority. *Id.* 300.520(a).

<sup>18</sup> See, e.g., Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-12 (advising proper procedure).

<sup>19</sup> See, e.g., *Chavez v. N.M. Pub. Educ. Dep't*, 621 F.3d 1275, 261 Ed.Law Rep. 71 (10th Cir. 2010). The limited regulatory exception is for cases where the SEA provides FAPE or direct services under 34 C.F.R. § 300.175. For a comprehensive cataloging of the case law, see Perry A. Zirkel, *Sampling of Case Law Re State Education Agencies as Defendants under the IDEA and Related Laws*, EDUC. L. REP. (forthcoming 2017).

<sup>20</sup> 34 C.F.R. § 300.153(b). OSEP clarified that this broad jurisdiction extends to implementation, IEP inclusion, and appropriateness of BIPs. Letter to McWilliams, 66 IDELR ¶ 111 (OSEP 2015).

<sup>21</sup> 34 C.F.R. § 300.507(a)(1). See, e.g., *Fairfield-Suisun Unified Sch. Dist. v. Dep't of Educ.*, 780 F.3d 968, 969 (9th Cir. 2015) (“Either parents or school districts may initiate a due process hearing, but those hearings are limited to ‘any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child’”). For the difference, see Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-2 (“Therefore, while a matter that could be the subject of a due process complaint could also be the subject of a State complaint, the reverse is not always true.”).

Feature	CRP	IHO
<b>Subject Matter Jurisdiction: Special Issues</b>	<ul style="list-style-type: none"> <li>• including highly qualified teacher requirement<sup>22</sup></li> <li>• including private school consultation complaints and parental complaints for privately placed children<sup>23</sup></li> <li>• including systemic (i.e., group) complaints<sup>24</sup></li> </ul>	<ul style="list-style-type: none"> <li>• but not for highly qualified teacher requirement<sup>25</sup></li> <li>• but not for private school consultation complaints and parental complaints for privately placed children other than child find<sup>26</sup></li> <li>• generally not systemic (i.e., group) complaints<sup>27</sup></li> </ul>
<b>Enforcement of mediated settlement agreements</b>	permissible <sup>28</sup>	probably not permissible <sup>29</sup>

<sup>22</sup> 34 C.F.R. § 300.156(e).

<sup>23</sup> *Id.* §§ 300.136 and 300.140(c).

<sup>24</sup> Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-9.

<sup>25</sup> 34 C.F.R. § 300.156(e).

<sup>26</sup> *Id.* § 300.140(a)-(b).

<sup>27</sup> See, e.g., *N.J. Protection & Advocacy v. N.J. Dep't of Educ.*, 563 F. Supp. 2d 474, 487–88, 235 Ed.Law Rep. 964 (D.N.J. 2008) (explaining that the IHO process is “powerless” to address systematic deficiencies in a state’s education system).

<sup>28</sup> Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at A-27.

<sup>29</sup> See, e.g., *H.C. v. Colton-Pierrepoint Cent. Sch. Dist.*, 341 F. App'x 687, 251 Ed.Law Rep. 575 (2d Cir. 2009); *J.K. v. Council Rock Sch. Dist.*, 833 F. Supp. 2d 436, 450, 280 Ed.Law Rep. 159 (E.D. Pa. 2011); *Sch. Bd. of Lee Cty. v. M.C.*, 35 IDELR ¶ 273 (Fla. Dist. Ct. App. 2001); *Letter to Shaw*, 50 IDELR ¶ 78 (OSEP 2007). *But see* *Mr. J. v. Bd. of Educ.*, 32 IDELR ¶ 202 (D. Conn. 2000); *cf.* *Springfield Local Sch. Dist. Bd. of Educ. v. Jeffrey B.*, 55 IDELR ¶ 158 (N.D. Ohio 2010) (upholding IHO’s authority to enforce mediated settlement agreement within limited circumstances).

Feature	CRP	IHO
<b>Filing (i.e., Limitations) Period</b>	one year from the date of filing, <sup>30</sup> with exceptions (including state-established different period) <sup>31</sup>	two years from the “KOSHK,” with exceptions (including state-established different period) <sup>32</sup>
<b>Written Complaint Contents</b>	alleged violation, facts, complainant signature and contact info, and, <i>if specific to a child, same as for IHO complaint</i> <sup>33</sup>	<i>child’s name, address, school, problem including supporting facts, and proposed resolution</i> <sup>34</sup>

<sup>30</sup> 34 C.F.R. § 300.152(a)-(b). The controlling date, according to OSEP, is the filing date. See 71 Fed. Reg. 46606 (Aug. 14, 2006) (“We do not believe it is appropriate to change the timeline to begin when a parent first learns about the violation . . . because such a provision could lead to some complaints being filed well beyond one year from the time the violation actually occurred”). For example, this commentary accompanying the regulations also suggested the possibility of the SEA opting for an exception for continuing violations. *Id.*

<sup>31</sup> 71 Fed. Reg. 46,606 (Aug. 14, 2006) (“States may choose to accept and resolve complaints regarding alleged violations that occurred outside the one-year timeline, just as they are free to add additional protections in other areas that are not inconsistent with the requirements of the [IDEA] and its implementing regulations”). The commentary accompanying the regulations also suggested the possibility of the SEA opting for an exception for continuing violations.

<sup>32</sup> 34 C.F.R. §§ 300.507(a)(2) and 300.511(e)-(f) (unless the state has prescribed a different period). The controlling date is when the parent knew or had reason to know of the alleged violation, and the pertinent provision provides two express exceptions. *Id.* For an analysis that includes the relevant case law, including *G.L. v. Ligonier Valley Sch. Auth.*, 802 F.3d 601 (3d Cir. 2015), see Perry A. Zirkel, *Of Mouseholes and Elephants: The Statute of Limitations for Impartial Hearings under the Individuals with Disabilities Education Act*, 35 J. NAT’L ASS’N ADMIN. L. JUDICIARY 305 (2015).

<sup>33</sup> 34 C.F.R. § 300.153(b). The Office of Special Education Programs (OSEP) has opined that states may have an alternative format. Letter to Anonymous, 103 LRP 49610 (OSEP 2003). Similarly, OSEP’s view that the IDEA permits SEAs to establish procedures for electronic submission of complaints. Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at C-6; *see also* Letter to Copenhaver, 50 IDELR ¶ 197 (OSEP 2008). Finally, OSEP has opined that a state may use dismissal for lack of the required contents, except for the proposed resolution by third-party complainants, unless the state can clearly show that the filing party knew this information upon filing (but not in any case for systemic complaints). Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-15 and B-16.

<sup>34</sup> 34 C.F.R. § 300.508(b).

Feature	CRP	IHO
<b>Response to Complaint</b>	<i>required, with specified minimum</i> <sup>35</sup>	<i>required, including detailed specifications if district is respondent</i> <sup>36</sup>
<b>Complaint Sufficiency Procedure</b>	permissible <sup>37</sup>	required <sup>38</sup>
<b>Opportunity for Mediation</b>	<i>voluntary</i> <sup>39</sup>	<i>voluntary</i> <sup>40</sup>
<b>Resolution Meeting Process</b>	unspecified	required <i>where parent is filing party</i> <sup>41</sup>
<b>Processing Period (i.e., Deadline for Decision)</b>	60 days <sup>42</sup> • with limited circumstances for extensions <sup>43</sup>	75 days <sup>44</sup> • with specific extension upon request of either party <sup>45</sup>
<b>Representation</b>	permissible but peripheral <sup>46</sup>	clear and central right <sup>47</sup>

<sup>35</sup> *Id.* § 300.152(a)(3) (discretionary proposed resolution and mutual opportunity for mediation).

<sup>36</sup> *Id.* § 300.508(e)-(f). However, failure to respond to the complaint does not necessarily result in a default judgment. See, e.g., *G.M. v. Dry Creek Joint Elem. Sch. Dist.*, 595 F. App'x 698, 699, 315 Ed.Law Rep. 88 (9th Cir. 2014). Moreover, according to Letter to Inzelbuch, 62 IDELR ¶ 122 (OSEP 2013), the IHO procedures—not the CRP—would be the appropriate remedy to address a district's failure to respond.

<sup>37</sup> Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-15 (“an SEA could provide notice indicating that the complaint will be dismissed for not meeting the content requirements or that the complaint will not be resolved and the time limit not commence until the missing content is provided”).

<sup>38</sup> 34 C.F.R. § 300.508(d). See, e.g., *M.S.-G. v. Lenape Reg'l High Sch. Dist. Bd. of Educ.*, 306 F. App'x 772, 243 Ed.Law Rep. 27 (3d Cir. 2009) (affirming dismissal of complaint, via IDEA's sufficiency procedure, where parent “failed to provide a description of the nature of the problem that included facts; he merely identified the problem”). However, where the opposing party does not file a timely objection, the complaint “must be deemed sufficient.” 34 C.F.R. § 300.508(d)(1).

<sup>39</sup> 34 C.F.R. § 300.152(a)(3)(ii).

<sup>40</sup> *Id.* § 300.506(b).

<sup>41</sup> *Id.* § 300.510; see also 71 Fed. Reg. 46,700 (Aug. 14, 2006) (“There is no provision requiring a resolution meeting when an LEA is the complaining party”).

<sup>42</sup> 34 C.F.R. § 300.152(a).

<sup>43</sup> *Id.* § 300.152(b)(1); see also Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-21 (listing unacceptable excuses) and B-23 (for mediation).

<sup>44</sup> 34 C.F.R. §§ 300.510(b)-(c), 300.515(a) and 300.515(c) (resolution period of 30 days and hearing period ending in written decision within 45 days).

<sup>45</sup> *Id.* § 300.515(c); see also Questions and Answers on IDEA Part B Dispute Resolution Procedures, 61 IDELR ¶ 232 (OSEP 2013) at C-22 (not upon the IHO's initiative).

<sup>46</sup> Letter to Rutten, 104 LRP 1287 (OSEP 2003).

<sup>47</sup> 34 C.F.R. § 300.512(a)(1).

Feature	CRP	IHO
<b>Scope of Purview: <i>Sua Sponte</i> Extension</b>	generally not only permissible but also arguably mandatory <sup>48</sup>	generally not permissible <sup>49</sup>
<b>Scope of Issues: Procedural and Substantive</b>	<i>both</i> , but primarily procedural <sup>50</sup>	<i>both</i> , but primarily substantive <sup>51</sup>
<b>Decisional Basis</b>	primarily regulations <sup>52</sup>	primarily court decisions <sup>53</sup>

<sup>48</sup> The available authority, beyond the SEA’s general supervisory responsibility under 34 C.F.R. § 300.149, is not specifically on point, but prevailing practice, including providing the district with the opportunity to respond, supports this position along with various analogous OSEP interpretations. See, e.g., 71 Fed. Reg. 46,603 (Aug. 14, 2006) (latitude for addressing new information); *id.* 46,694 (“We view the State complaint procedures as a very important tool in a State’s exercise of its general supervision responsibilities, consistent with sections 612(a)(11) and 616(a) of the Act, to monitor LEA implementation of the requirements in Part B of the Act”); Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-10 (not only individual child but groups of children based on SEA’s general supervisory authority); Letter to Anderson, 56 IDELR ¶ 270 (OSEP 2010) (commenting that “nothing in the IDEA prevents a State from using information from State complaints as part of its broader monitoring procedures (e.g., when determining whether an LEA merits a focused review”); Letter to Copenhaver, 53 IDELR ¶ 165 (OSEP 2008) (“The [mandatory] legal authority for an SEA to require its LEAs to correct individual noncompliance is the same as the legal authority for an SEA to require its LEAs to correct systemic noncompliance—its general supervisory responsibility over all educational programs for children with disabilities administered within the State”).

<sup>49</sup> See, e.g., *C.W.L. v. Pelham Union Free Sch. Dist.*, 149 F. Supp. 3d 451, 331 Ed.Law Rep. 769 (S.D.N.Y. 2015); *Dist. of Columbia v. Walker*, 109 F. Supp. 3d 58, 325 Ed.Law Rep. 398 (D.D.C. 2015); *Lofisa S. v. State of Haw. Dep’t of Educ.*, 60 IDELR ¶ 191 (D. Haw. 2013); *Saki v. State of Haw., Dep’t of Educ.*, 50 IDELR ¶ 103 (D. Haw. 2008). *But cf.* Letter to Armstrong, 28 IDELR 303 (OSEP 1997) (partial exception for stay-put).

<sup>50</sup> Letter to Chief State Sch. Officers, 34 IDELR ¶ 264 (OSEP 2000); *see also* Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-6 and B-8 (not only procedures but also standards for eligibility and FAPE); 71 Fed. Reg. 46,601 (Aug. 14, 2006) (“We believe that an SEA, in resolving a complaint challenging the appropriateness of a child’s educational program or services or the provision of FAPE, should not only determine whether the public agency has followed the required procedures to reach that determination, but also whether the public agency has reached a decision that is consistent with the requirements in Part B of the Act in light of the individual child’s abilities and needs”); *cf.* Letter to McWilliams, 66 IDELR ¶ 111 (OSEP 2015) (rejecting SEA interpretation that CRP jurisdiction does not extend to appropriateness, of BIPs).

<sup>51</sup> 34 C.F.R. § 300.513(a).

<sup>52</sup> Perry A. Zirkel, *The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, \_\_\_ CONN. PUB. INT. L.J. (in press).

<sup>53</sup> *Id.*



Feature	CRP	IHO
<b>Procedural Issues</b>	generally strict compliance approach <sup>54</sup>	more district-favorable two-part test <sup>55</sup>
<b>Implementation Issue</b>	generally strict standard: per se approach <sup>56</sup>	more relaxed standard: materiality or materiality/benefit <sup>57</sup>
<b>Burden of Proof</b>	inapplicable? <sup>58</sup>	on the filing party, with the possible exception of state law <sup>59</sup>
<b>Quantum of Proof</b>	<i>preponderance of the evidence</i> <sup>60</sup>	<i>preponderance of the evidence</i> <sup>61</sup>

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*; see also 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

<sup>56</sup> See, e.g., *Paramount Sch. of Excellence*, 115 LRP 3638 (Ind. SEA Dec. 22, 2014); *Baltimore City Pub. Sch.*, 115 LRP 17134 (Md. SEA Sept. 4, 2014); *River Valley Sch. Dist.*, 114 LRP 43710 (Wis. SEA Aug. 21, 2014); *Hillsborough Cty. Sch. Dist.*, 114 LRP 47356 (Fla. SEA June 23, 2014); *Pinellas Cty. Sch. Dist.*, 114 LRP 47346 (Fla. SEA June 16, 2014). *But see Eugene Sch. Dist. 4J*, 115 LRP 3515 (Or. SEA Jan. 16, 2015) (citing *Van Duyn* in support of conclusion that district provided a "substantial portion" of the required assistive technology to the child). However, OSEP appears to have changed its interpretation from a strict to a FAPE-based approach. *Compare Letter to Clarke*, 48 IDELR ¶ 77 (OSEP 2007), *with Letter to Balkman*, 23 IDELR 646 (OSEP 1995).

<sup>57</sup> See generally Perry A. Zirkel & Eddie T. Bauer, *The Third Dimension of FAPE under the IDEA: IEP Implementation*, \_\_\_ J. NAT'L ASS'N ADMIN. L. JUDICIARY (forthcoming 2016).

<sup>58</sup> Letter to Reilly, 64 IDELR ¶ 219 (OSEP 2014) ("the Department believes that it is not consistent with the IDEA regulation for an SEA to treat a State complaint like a due process complaint and assign the burden of proof to either party"). This guidance addresses both meanings of "burden of proof." More specifically, in citing *Schaffer v. Weast*, 564 U.S. 49 (2005), OSEP addressed the burden of persuasion, but its discussion extended to the burden of production as follows: "[O]nce a State complaint is properly filed, it is solely the SEA's duty to investigate the complaint, gather evidence, and make a determination as to whether a public agency violated the IDEA. It is not the burden of the complainant—or any other party—to produce sufficient evidence to persuade the SEA to make a determination one way or another." *Id.* However, the bottom-line conclusion in a CRP decision of "insufficient information" or "not substantiated" effectively puts the burden of persuasion on the complainant. Yet, depending on the issue, this burden arguably should be on the district (e.g., required form or documentation).

<sup>59</sup> *Schaffer v. Weast*, 564 U.S. 49 (2005); *Reyes v. N.Y.C. Dep't of Educ.*, 760 F.3d 211, 219 (2d Cir. 2014) ("It remains an open question whether states may deviate from the IDEA's default rule, as New York does, by placing the initial burden on the school board"). For analysis of this issue, see, e.g., Perry A. Zirkel, *Who has the Burden of Persuasion in Impartial Hearings under the Individuals with Disabilities Education Act?* 13 CONN. PUB. INTEREST L.J. 1 (2013).

<sup>60</sup> Letter to Reilly, 64 IDELR ¶ 219 (OSEP 2014) ("It would not be inconsistent with the IDEA, however, for a State to use a "preponderance of the evidence" standard in making independent determinations as to whether a public agency violated a requirement of Part B of the IDEA, pursuant to 34 CFR § 300.152(a)(4), as this is the generally recognized standard for civil matters").

<sup>61</sup> 34 C.F.R. § 300.516(c)(3) (derivative from judicial review).

Feature	CRP	IHO
<b>Stay-Put</b>	not applicable with the narrow exception of one state law <sup>62</sup>	generally applies, with limited exception for interim alternate settings <sup>63</sup>
<b>Remedies</b>	<i>compensatory education, monetary reimbursement, and prospective services</i> <sup>64</sup> <ul style="list-style-type: none"> <li>• as part of broad, flexible authority extending beyond the individual child<sup>65</sup></li> <li>• but for eligibility – only order for reconsideration<sup>66</sup></li> <li>• inapplicability of one-year timeline for corrective action<sup>67</sup></li> </ul>	<i>appropriate relief, including the same remedies listed for CRP</i> <sup>68</sup> <ul style="list-style-type: none"> <li>• with limitations, depending on the jurisdiction, for delegating compensatory education to IEP team<sup>69</sup></li> <li>• applicability, with possibility of exceptions for justifying circumstances, of one-year timeline for corrective action<sup>70</sup></li> </ul>

<sup>62</sup> 05-071 ME. ADMIN. CODE Ch. 101, §§ XVI.20-A

<sup>63</sup> 20 U.S.C. § 1415(j) (2012); 34 C.F.R. § 300.518 (2013).

<sup>64</sup> *Id.* § 300.151(b); *see also* Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-30 (“could include compensatory services or monetary reimbursement, and measures to ensure appropriate future provision of services for all children with disabilities”). However, if the SEA uncovers in the course of its investigation violations not in the complaint, it must enforce its obligations but need not address them in the resolution of the complaint. Letter to Anonymous (OSEP 2003), [http://www2.ed.gov/policy/speced/guid/idea/letters2003-2/redact\\_062603assess2q2003.pdf](http://www2.ed.gov/policy/speced/guid/idea/letters2003-2/redact_062603assess2q2003.pdf)

<sup>65</sup> Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-8 and B-10; Letter to Deaton, 65 IDELR ¶ 241 (OSEP 2015).

<sup>66</sup> Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-6.

<sup>67</sup> Letter to Zirkel, 68 IDELR ¶ 142 (OSEP (2016) (interpreting 34 C.F.R. § 300.600(e)).

<sup>68</sup> This authority is derivative of the specified, broad judicial authority, which is at *id.* 300.516(a). For a comprehensive canvassing of the scope and contents of this IHO authority, Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act*, 31 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1 (2011).

<sup>69</sup> See, e.g., *Bd. of Educ. v. L.M.*, 478 F.3d 307, 318, 216 Ed.Law Rep. 354 (6th Cir. 2007); *Reid v. Dist. of Columbia*, 401 F.3d 516, 526, 196 Ed.Law Rep. 402 (D.C. Cir. 2005); *Meza v. Bd. of Educ.*, 56 IDELR ¶ 167 (D.N.M. 2011). *But see* *Mr. I. v. Maine Sch. Admin. Unit No. 55*, 480 F.3d 1, 217 Ed.Law Rep. 60 (1st Cir. 2007); *Struble v. Fallbrook Union Sch. Dist.*, 56 IDELR ¶ 4 (S.D. Cal. 2011); *cf.* *T.G. v. Midland Sch. Dist.*, 848 F. Supp. 2d 902, 282 Ed.Law Rep. 425 (C.D. Ill. 2012) (upholding IHO’s delegation to IEP team to choose reading and writing goals/materials); *A.L. v. Chicago Pub. Sch. Dist.*, 57 IDELR ¶ 215 (N.D. Ill. 2011) (finding no delegation problem with choice of reading program in prospective IEP revisions).

<sup>70</sup> See *supra* note 67.

Feature	CRP	IHO
<b>Written Decision Contents</b>	factual findings, conclusions, and reasons <sup>71</sup> <ul style="list-style-type: none"> <li>needs to be sufficiently definitive in ultimately resolving each allegation<sup>72</sup></li> <li>must be issued to complainant within the prescribed period even if the complainant or SEA accepts the district's proposed resolution<sup>73</sup></li> <li>for denial of FAPE, appropriate remedies<sup>74</sup></li> </ul>	factual "findings and decision" <sup>75</sup> <ul style="list-style-type: none"> <li>needs to be sufficiently clear to be enforceable and sufficiently justified to be upheld on review<sup>76</sup></li> <li>parties must execute a legally binding settlement agreement if resulting from the prescribed resolution session process<sup>77</sup></li> <li>for denial of FAPE, appropriate remedies<sup>78</sup></li> </ul>

<sup>71</sup> 34 C.F.R. § 300.152(a)(5).

<sup>72</sup> See, e.g., *Manalansan v. Bd. of Educ. of Baltimore Cty.*, 35 IDELR ¶ 122 (D. Md. 2001) (concluding that the failure to reach a final resolution rendered the process meaningless, characterizing as "equivocal, at best, and downright disingenuous, at worst" the ultimate conclusion whether the district had implemented the child's IEP).

<sup>73</sup> Letter to Johnson Chapman, 116 LRP 43238 (OSEP 2015); Letter to Lipsitt, 67 IDELR ¶ 126 (OSEP 2015).

<sup>74</sup> Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-30 ("if necessary to implement the SEA's final decision, the SEA's written decision must contain remedies for the denial of appropriate services, including corrective actions that are appropriate to address the needs of the child or group of children involved in the complaint").

<sup>75</sup> 34 C.F.R. § 300.512(a)(5); see also *id.* §§ 300.512(c)(3), 300.513(c), 300.514(b)-(c), and 300.516(c).

<sup>76</sup> See, e.g., *Streck v. Bd. of Educ.*, 280 F. App'x 66, 235 Ed.Law Rep. 837 (2d Cir. 2008); *Cupertino Union Sch. Dist. v. K.A.*, 75 F. Supp. 3d 1088, 319 Ed.Law Rep. 352 (N.D. Cal. 2014); *Copeland v. Dist. of Columbia*, 82 F. Supp. 3d 462, 320 Ed.Law Rep. 737 (D.D.C. 2015); *L.O. v. E. Allen Cty. Sch. Corp.*, 58 F. Supp. 3d 882, 316 Ed.Law Rep. 754 (N.D. Ind. 2014); *Dist. of Columbia v. Pearson*, 923 F. Supp. 2d 82, 295 Ed.Law Rep. 87 (D.D.C. 2013).

<sup>77</sup> 34 C.F.R. § 300.510(d).

<sup>78</sup> *Cf.* Letter to Kohn, 17 IDELR 522 (OSEP 1991) ("[a]lthough Part B does not address the specific remedies an [IHO] may order upon a finding that a child has been denied FAPE, OSEP's position is that, based upon the facts and circumstances of each individual case, an [IHO] has the authority to grant any relief he/she deems necessary").

Feature	CRP	IHO
<b>Exhaustion for Court Action</b>	does not fulfill this prerequisite <sup>79</sup>	fulfills this prerequisite <sup>80</sup>
<b>Attorneys' Fees for Prevailing Parents</b>	split authority, but minority view <sup>81</sup>	clearly yes, but by the court, not the IHO <sup>82</sup>
<b>Publication of Decisions</b>	required (to the extent of making available to the public) <sup>83</sup>	required (to the extent of making available to the public) <sup>84</sup>
<b>Reconsideration</b>	no unless specified in state law <sup>85</sup>	no unless specified in state law and within the deadline for a final decision <sup>86</sup>

<sup>79</sup> See, e.g., *Mrs. W. v. Tirozzi*, 832 F.2d 748, 42 Ed.Law Rep. 727 (2d Cir. 1987); *Pollard v. Georgetown Sch. Dist.*, 132 F. Supp. 3d 208 (D. Mass. 2015); *Southern v. Fayette Cty. Pub. Sch.*, 63 IDELR ¶ 257 (E.D. Ky. 2014); *Motyka v. Howell Pub. Sch.*, 63 IDELR ¶ 154 (E.D. Mich. 2014); *Cannaday v. Rio Rancho Sch. Dist.*, 2013 WL 5295680 (D.N.M. July 12, 2013); *Jenkins v. Butts Cty. Sch. Dist.*, 58 IDELR ¶ 282 (M.D. Ga. 2012); *Miller v. W. Feliciana Sch. Bd.*, 51 IDELR ¶ 46 (M. D. La. 2008); *Manning v. Spillane*, 21 IDELR 845 (E.D. Va. 1994). For the limited exception for challenges to policies or practices of generalized applicability contrary to the law, see *Christopher S. v. Stanislaus Cty. Office of Educ.*, 384 F.3d 1205, 192 Ed.Law Rep. 303 (9th Cir. 2004).

<sup>80</sup> See, e.g., *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 272 Ed.Law Rep. 119 (9th Cir. 2011). For a comprehensive overview, including the relatively narrow exceptions, of this exhaustion provision, see Louis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction under the Individuals with Disabilities Education Act*, 29 J. NAT'L ADMIN. L. JUDICIARY 349 (2009).

<sup>81</sup> *Compare Vultaggio v. Bd. of Educ.*, 343 F.3d 598, 180 Ed.Law Rep. 528 (2d Cir. 2003); *Johnson v. Fridley Pub. Sch.*, 36 IDELR ¶ 129 (D. Minn. 2002); *Megan C. v. Indep. Sch. Dist. No. 625*, 57 F. Supp. 2d 776, 138 Ed.Law Rep. 167 (D. Minn. 1999); *Grandview Sch. Dist. No. 200 v. Sanchez*, 66 IDELR ¶ 81 (Wash. Ct. App. 2015) (no), *with Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023, 147 Ed.Law Rep. 61 (9th Cir. 2000) (yes). In its commentary to the 2006 regulations, OSEP opined that attorney's fees are not available for CRP because a state complaint is not an "action or proceeding brought under [the adjudicatory provision] of" the IDEA. 71 Fed. Reg. 46,602 (Aug. 14, 2006).

<sup>82</sup> 34 C.F.R. § 300.517(a)(1). For the possible exception, see 64 Fed. Reg. 12615 (Mar. 12, 1999) (observing that states may authorize hearing officers to award attorney's fees).

<sup>83</sup> *Id.* § 300.513(d)(2). Quere whether a state freedom of information act that encompasses CRP decisions suffices for this purpose?

<sup>84</sup> *Id.* § 300.514(c)(2).

<sup>85</sup> 71 Fed. Reg. 46,607 (Aug. 14, 2006) ("The regulations neither prohibit nor require the establishment of procedures to permit an LEA or other party to request reconsideration of a State complaint decision").

<sup>86</sup> *C.C. v. Beaumont Indep. Sch. Dist.*, 65 IDELR ¶ 109 (E.D. Tex. 2015); Letter to Colleye, 111 LRP 45430 (OSEP 2010); 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, 198 Ed.Law 971 (Nev. 2005).

Feature	CRP	IHO
<b>Appeal of Decision</b>	not in majority of jurisdictions <sup>87</sup>	fully to state or federal court <sup>88</sup>
<b>Enforcement of Decision</b>	<i>via CRP</i> <sup>89</sup> or, in some jurisdictions, court <sup>90</sup>	<i>via CRP</i> <sup>91</sup> or, via ample alternate bases, court <sup>92</sup>

<sup>87</sup> The regulations are silent as to whether the CRP decision is appealable. Questions and Answers on IDEA Part B Dispute Resolution Procedures, 61 IDELR ¶ 232 (OSEP 2013) at B-32. The majority view is that the IDEA does not provide an implied private right of action to challenge a CRP decision **or the CRP process**. Compare *Va. Office of Protection & Advocacy v. Va. Dep't of Educ.*, 262 F. Supp. 2d 648 (E.D. Va. 2003) (no); *cf. Fairfield-Suisun Unified Sch. Dist. v. Cal. Dep't of Educ.*, 780 F.3d 968, 315 Ed.Law Rep. 39 (9th Cir. 2015); *E. Ramapo Cent. Sch. Dist. v. King*, 11 N.Y.S 3d 284, 318 Ed.Law Rep 1078 (App. Div. 2015) (not for school districts at least), **with *S.A. v. Tulare Cty. Office of Educ.*, 51 IDELR ¶ 244 (E.D. Cal. 2009) (yes)**. Otherwise, it is a matter of state law. The majority of states do not provide for appeal. See, e.g., *Bd. of Educ. of Lenape Reg'l High Sch. Dist. v. N.J. Dep't of Educ.*, 945 A.2d 125, 231 Ed.Law Rep. 331 (N.J. Super. Ct. App. Div. 2008); *Wolfe v. Lower Merion Sch. Dist.*, 801 A.2d 639, 167 Ed.Law Rep. 256 (Pa. Commw. Ct. 2002). Conversely, in the minority of states, led by Minnesota, the typical avenue for appeal to state court may be a state administrative procedures act. See, e.g., *Indep. Sch. Dist. No. 709 v. Bonney*, 705 N.W.2d 209, 202 Law Rep. 828 (Minn. Ct. App. 2005); Letter to Nann, 36 IDELR § 212 (OSEP 2001). As a variation of this avenue, an occasional state allows appeals via a different state statutory route. See, e.g., *Loudoun Cty. Sch. Bd. v. Commonwealth of Va. Bd. of Educ.*, 612 S.E.2d 210, 197 Ed.Law Rep. 900 (Va. Ct. App. 2005). Finally, a few states allow appeals via the IHO process. See, e.g., *W. Baton Rouge Parish Sch. Bd. v. Deshotel*, 63 IDELR ¶ 35 (M.D. La. 2014); *Grand Rapids Pub. Sch. v. P.C.*, 41 IDELR ¶ 7 (W.D. Mich. 2004).

<sup>88</sup> 34 C.F.R. § 300.516(a). Additionally, states that opt to have a second administrative tier provide for initial appeal to a review-officer level. *Id.* § 300.514(b).

<sup>89</sup> See, e.g., Letter to Weithers, EHLR 211:329 (BEH 1979). For the proper procedure for exercising this mechanism, see Letter to Dunn, 43 IDELR ¶ 141 (OSEP 2004). **However, it appears that the parents need not exhaust CRP if they seek to enforce the IHO decision in court.** See, e.g., *Porter v. Bd. of Tr. of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 170 Ed.Law Rep. 152 (9th Cir. 2002); *Stapleton v. Penns Valley Area Sch. Dist.*, 67 IDELR ¶ 268 (M.D. Pa. 2016).

<sup>90</sup> *Indep. Sch. Dist. No. 709 v. Bonney*, 705 N.W.2d 209, 202 Ed.Law Rep. 828 (Minn. Ct. App. 2005). For class action litigation for systemic CRP revisions, see, e.g., *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 277 Ed.Law Rep. 34 (7th Cir. 2012); *A.A. v. Bd. of Educ.*, 386 F.3d 455, 192 Ed.Law Rep. 665 (2d Cir. 2004); *Beth v. Carroll*, 87 F.3d 80, 110 Ed.Law Rep. 585 (3d Cir. 1996); *Emma C. v. Eastin*, 66 IDELR ¶ 245 (N.D. Cal. 2015).

<sup>91</sup> *Wyner v. Manhattan Beach Unified Sch. Dist.*, 223 F.3d 1026, 146 Ed.Law Rep. 1000 (9th Cir. 2000); *see also* Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at C-26. **For a recent decision that shows the prevailing but not uniform view that rejects the use of the IDEA's judicial review provision for this purpose, see *B.D. v. Dist. of Columbia*, 817 F.3d 792, 329 Ed.Law Rep. 612 (D.C. Cir. 2016).**

<sup>92</sup> *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 112 Ed.Law Rep. 70 (3d Cir. 1996); *Robinson v. Pinderhughes*, 810 F.2d 1270, 37 Ed.Law Rep. 488 (4th Cir. 1987); *Dominique L. v. Bd. of Educ. of City of Chicago*, 56 IDELR ¶ 65 (N.D. Ill. 2011); *L.J. v. Audubon Bd. of Educ.*, 47 IDELR ¶ 100 (D.N.J. 2006) (via § 1983); *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 308 Ed.Law Rep. 664 (3d Cir. 2014); *Dudley v. Lower Merion Sch. Dist.*, 768 F. Supp. 2d 779, 268 Ed.Law Rep. 117 (E.D. Pa. 2011) (via IDEA); *Stropkay v. Garden City Union Free Sch. Dist.*, 593 F. App'x 37, 314 Ed.Law Rep.

