

# A Comparison of the IDEA's Dispute Resolution Processes— Complaint Procedures and Impartial Hearings: An Update

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This updated tabular analysis canvasses the major similarities and differences between the complaint procedures (CP) and the due process hearing (DPH) decisional dispute resolution mechanisms under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup> For the sake of uniformity and because the IDEA legislation only tangentially addresses the CP,<sup>2</sup> the framework citations are to the IDEA regulations.<sup>3</sup> Causing occasional confusion due in part to their initiating reference to “complaint,” these two decisional processes are alternative avenues.<sup>4</sup>

In contrast with the DPH process,<sup>5</sup> the CP process has received insufficient attention in

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<sup>1</sup> This article was published in *West's Education Law Reporter* (Ed.Law Rep.), v. 369, pp. 550–563 (2019). The underlined information was added after the original 2016 version of this article. New information is highlighted in yellow.

<sup>2</sup> 20 U.S.C. § 1411(e)(2)(B)(i) (2017) (authorizing use of IDEA funds for CP); *id.* §§ 1412(a)(14)(E) and 1412(a)(10)(A)(v) (authorizing CP for private school consultation complaints and parental complaints re teachers meeting “highly qualified” standard); and *id.* § 1215(f)(3)(F) (providing the right to DPH does not preclude parent from accessing CP). In passing the ESSA, as the successor of the NCLB, Congress removed this “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>3</sup> 34 C.F.R. §§ 300.1–300.817 (2018).

<sup>4</sup> The occasional confusion extends to the judicial level. E.g., *I.L. v. Knox Cty. Bd. of Educ.*, 257 F. Supp. 3d 946, 954, 348 Ed.Law Rep. 651 (E.D. Tenn. 2017) (characterizing the IDEA’s “administrative grievance procedure” as a sequence of 1) a complaint, 2) a CP investigation, 3) a resolution meeting, 4) the option for mediation, and 5) the DPH process).

<sup>5</sup> *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 Ed.Law 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, *Impartial Hearings under the IDEA: Legal Issues and Answers*, 38 J. NAT’L ACAD. ADMIN. L. JUDICIARY 33

the literature to date.<sup>6</sup> These alternate avenues of IDEA dispute resolution merit a systematic and synthesizing comparison.<sup>7</sup> The table that follows provides, in general chronological sequence of processing of complaints, various features of the CP and DPH avenues, respectively, along with supporting citations. *The similarities are italicized*, whereas the differences, which predominate, are in regular font.

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(2018); Perry A. Zirkel, *Longitudinal Trends of Impartial Hearings under the IDEA: A Follow-Up Analysis*, 303 Ed.Law 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).

<sup>6</sup> E.g., *Kristin Hansen, Complaint Procedure Systems under the IDEA: A State-by-State Survey*, 31 J. SPECIAL EDUC. LEADERSHIP 108 (Sept. 2018); Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process: An Update*, 313 Ed.Law Rep. 1 (2015). For some basic CP resources on the Internet, see <http://www.advocacyinstitute.org/isrc/basics.shtml>. For a CADRE training webinar, see <https://www.dropbox.com/s/zl0nyvp4v8gqtrj/2018-12-04%2011.30%20Written%20State%20Complaint%20Forum.mp4?dl=0>

<sup>7</sup> Although some sources list mediation and resolution sessions as IDEA dispute resolution systems, the treatment here distinguishes these other steps as less formal mechanisms that leave the matter to the parties' choice and that are preliminary to these primary avenues, with mediation available for both the DPH and CP process and resolution sessions as an early step in the DPH 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	CP	DPH
<b>Overall Structure</b> <sup>8</sup>	administrative investigative— hearing as inapplicable <sup>9</sup>	administrative adjudicative—hearing as centerpiece <sup>10</sup>
<b>Overall Nature</b>	independent <sup>11</sup>	impartial <sup>12</sup>
<b>Interaction</b>	deferral <u>to</u> and precedential effect of DPH <sup>13</sup>	entirely independent from <u>and not at</u> <u>all bound by</u> CP <sup>14</sup>

<sup>8</sup> Based on a quadrant conceptualization with the dimensions of control and finality, Mayes characterized CP as low control and high finality and DPH as high control and low finality. Thomas A. Mayes, *A Brief Model for Explaining Dispute Resolution Options in Special Education*, 34 OHIO ST. J. ON DISP. RESOL. 153, 160–61 (2019).

<sup>9</sup> 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) (“[CP] does not include full procedural protections like the right to confront and cross-examine witnesses”); Letter to Reilly, 64 IDELR ¶ 219 (OSEP 2014) (“[CP] does not require parties to provide evidence, nor do they require that a State allow parties to review the submissions of the other party or to cross-examine witnesses,” citing 71 Fed. Reg. 46,450 and 46,605). State education agencies (SEAs) have broad discretion as to the methods for investigation. 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, 213 IDELR 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. 46,601–46,603 (Aug. 14, 2006) (discretionary to include interviews or on-site activity).

<sup>10</sup> E.g., 34 C.F.R. § 300.512.

<sup>11</sup> *Id.* § 300.152(a)(4). In practice, most CP investigators are full-time or part-time state employees, although some states rely on private contractors. Moreover, also unlike the DPH process, many states use multiple persons for one case, such as more than one investigator and/or at least one supervisory layer.

<sup>12</sup> *Id.* § 300.511(c).

<sup>13</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 CP 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 DPH process. 34 C.F.R. § 300.152(c)(1). Finally, if a district filed for a hearing after the completion of CP, the DPH is without authority to preempt or preclude the CP remedy at least if individualized to the student or parents. *Steven R.F. v. Harrison Sch. Dist. No. 2*, 331 F. Supp. 3d 1227, 1243, 359 Ed.Law Rep. 869 (D. Colo. 2018), *vacated on other grounds*, 924 F.3d 1309 (10th Cir. 2019).

<sup>14</sup> 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); *Blackfoot Sch. Dist. #55*, 69 IDELR ¶ 169 (Idaho SEA 2017); *cf.* Letter to Johnson, 18 IDELR 589 (OSEP 1991) (“the results of a complaint investigation may be used as evidence”).

Feature	CP	DPH
<b>Model Forms</b>	<i>required to be available, though not mandatory to be used</i> <sup>15</sup>	<i>required to be available, though not mandatory to be used</i> <sup>16</sup>
<b><u>Parental Cost</u></b>	<u>minimal</u> <sup>17</sup>	<u>extensive</u> <sup>18</sup>
<b>Filing Party</b>	any individual or organization, <sup>19</sup> with implicit exception of the school district <u>against the parent</u> <sup>20</sup>	parent or school district <sup>21</sup>

<sup>15</sup> 34 C.F.R. § 300.509(a). The Office of Special Education Programs (OSEP) has opined that states may have an alternative format. Letter to Anonymous, 103 LRP 49610 (OSEP June 26, 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).

<sup>16</sup> *Id.*

<sup>17</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. For recognition of this difference, see, e.g., Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) (“[CP has] provided a very effective and efficient means of resolving disputes between parents and public agencies, without the need to resort to more formal, adversarial, and costly due process proceedings”); *see also* *L.L. v. Knox Cty. Bd. of Educ.*, 257 F. Supp. 3d 946, 960, 348 Ed.Law Rep. 651 (E.D. Tenn. 2017) (“Due-process hearings are costlier and more time-consuming than the complaint-resolution process”).

<sup>18</sup> The reasons are generally the converse of the CP 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>19</sup> 34 C.F.R. §§ 300.151(a)(1) and 300.153(a). This breadth of complainants extends to a nonresident if the alleged violation is in the state. Letter to Barnhisser, 213 IDELR 172 (OSEP 1988). When the filing party is not the parent, the state must investigate but, absent parental consent, may not release personally identifiable information regarding the student to the filing party. Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at B-11; Letter to Tommasini, 38 IDELR ¶ 155 (FPCO 2002). Similarly, for such filings, the parent may not release the SEA from its investigation obligation. Letter to Contrucci, 211 IDELR 380 (OSEP 1986). Finally, CP 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>20</sup> This exception is inferable because CP targets the alleged violations of a “public agency.” 34 C.F.R. § 300.153(b)(1).

<sup>21</sup> *Id.* § 300.507(a)(1). This right may transfer to the child upon reaching the age of majority. *Id.* § 300.520(a).

Feature	CP	DPH
<b>State Education Agency (SEA) As a Defendant</b>	yes, in addition or alternate to the school district <sup>22</sup>	generally not unless SEA is providing direct services <sup>23</sup>
<b>Subject Matter Jurisdiction: General</b>	any requirement(s) of Part B of the IDEA <i>or its regulations</i> <sup>24</sup>	eligibility, evaluation, placement or FAPE <sup>25</sup>

<sup>22</sup> *E.g., id.* § 300.152(b)-(c) (complaints against a “public agency”); *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-12 (advising the proper procedure); 71 Fed. Reg. 46,602 (Aug. 14, 2006) (discretion to appoint outside party or use its own personnel). Complaints exclusively against the SEA extend, via the SEA’s general supervisory duties, to LEAs that are expressly or implicitly identified as engaged in violations within the scope of the complaint. Letter to Zirkel, 74 IDELR ¶ 235 (OSEP 2019) – O/A 3.

<sup>23</sup> *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 more generally, see Perry A. Zirkel, State Education Agencies as Defendants under the IDEA and Related Laws: A Compilation of the Court Decisions, 336 Ed.Law Rep. 667 (2016).

<sup>24</sup> 34 C.F.R. § 300.153(b). In an early policy letter, OSEP interpreted this broad jurisdiction to include challenges to the impartiality of DPHs. Letter to Angelo, 213 IDELR 77 (OSEP 1988). OSEP much more recently clarified that this broad jurisdiction extends to implementation, IEP inclusion, and appropriateness of BIPs. Letter to McWilliams, 66 IDELR ¶ 111 (OSEP 2015). OSEP also clarified that the specific DPH authorization for addressing issues arising from disciplinary changes in placement does not exclude these issues from CP jurisdiction. Letter to Zirkel, 74 IDELR ¶ 171 (OSEP 2019). However, CP investigators tend to be resistant to addressing substantive issues beyond procedural remedies. *E.g., Cherry Creek Sch.*, 118 LRP 43767 (Colo. SEA June 22, 2018) (limiting remedies, as a policy matter, for violative manifestation determinations to the procedural dimension).

<sup>25</sup> 34 C.F.R. § 300.507(a)(1). *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	CP	DPH
<b>Subject Matter Jurisdiction: Special Issues</b>	<ul style="list-style-type: none"> <li>• <del>including highly qualified teacher requirement</del><sup>26</sup></li> <li>• including private school consultation complaints and parental complaints for privately placed children<sup>27</sup></li> <li>• including systemic (i.e., group) complaints<sup>28</sup></li> <li>• <u>likely not for disciplinary changes in placement for dangerous students</u><sup>29</sup></li> </ul>	<ul style="list-style-type: none"> <li>• <del>not for highly qualified teacher requirement</del><sup>30</sup></li> <li>• not for private school consultation complaints and parental complaints for privately placed children other than child find<sup>31</sup></li> <li>• <u>not revocation of consent for special education services</u><sup>32</sup></li> <li>• generally not systemic (i.e., group) complaints<sup>33</sup></li> <li>• <u>expressly for disciplinary changes in placement for dangerous students</u><sup>34</sup></li> </ul>
<b>Enforcement of mediated settlement agreements (MSAs)</b>	probably permissible <sup>35</sup>	probably not permissible <sup>36</sup>

<sup>26</sup> 34 C.F.R. § 300.156(e). The post-ESSA IDEA amendments have nullified this provision.

<sup>27</sup> *Id.* §§ 300.136 and 300.140(c).

<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 B-9; *see also* *Indep. Sch. Dist. No. 281 v. Minn. Dep't of Educ.*, 48 IDELR ¶ 222 (Minn. Ct. App. 2007) (confirming authority of CRP to address systemic issues).

<sup>29</sup> The reason for this conclusion is that this authority is not premised on a violation of the IDEA.

<sup>30</sup> 34 C.F.R. § 300.156(e). *See supra* note 26.

<sup>31</sup> *Id.* § 300.140(a)-(b).

<sup>32</sup> *Id.* § 300.300(b)(4)(ii).

<sup>33</sup> *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 DPH process is “powerless” to address systematic deficiencies in a state’s education system).

<sup>34</sup> 20 U.S.C. § 1415(k)(4)(B)(ii)(II); 34 C.F.R. § 300.532(b)(2)(ii).

<sup>35</sup> The IDEA provides for enforcement of MSAs via state or federal court. 34 C.F.R. §§ 300.506(b)(7), 300.510(d)(2), and 300.510. In OSEP’s view, states may allow nonjudicial mechanisms, including CP, just as long as “voluntary” and not denying or delaying the judicial route. Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at A-27. Moreover, OSEP has taken the position that states may use CP to determine whether a settlement agreement is binding on the parties if it is specific to the child. Letter to Anderson, 56 IDELR ¶ 270 (OSEP 2010).

<sup>36</sup> Compare *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), with *Pedraza v. Alameda Unified Sch. Dist.*, 676 F. App’x 704 (9th Cir. 2017); *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 DPH’s authority to enforce mediated settlement agreement within limited circumstances). In the absence of applicable case law, OSEP’s view is that a state may have uniform rules as to the extent of an DPH’s authority, if any, but only for settlement agreements more generally (i.e., outside of the IDEA’s mediation and resolution session provisions and not specific to students with disabilities). Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at C-27.



Feature	CP	DPH
<b>Filing (i.e., Limitations) Period</b>	one year from the occurrence to the date of filing <sup>37</sup> (with the previous two exceptions or a different period only if established in state law) <sup>38</sup>	two years from the “KOSHK” to the date of filing, with exceptions (including state-established different period) and wider period for redressability <sup>39</sup>
<b>Written Complaint Contents</b>	alleged violation, facts, complainant signature and contact info, and, <i>if specific to a child, same as for DPH complaint</i> <sup>40</sup> - copy to LEA and SEA <sup>41</sup> - including alternative form for parent with disabilities <sup>42</sup>	<i>child’s name, address, school, problem including supporting facts, and proposed resolution</i> <sup>43</sup>

<sup>37</sup> 34 C.F.R. § 300.152(a)-(b). The controlling date, according to OSEP, is the occurrence. 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”). In practice, it is easiest to use a look-back approach from the date of filing for this limitations period, whereas for the DPH process it is more suitable to use a look-forward period from the KOSHK date.

<sup>38</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. *Id.* However, the 2006 regulations did not continue the explicit exception for continuing violations in the 1999 regulations, which are referenced in Letter to Anonymous, 103 LRP 49610 (OSEP June 26, 2003).

<sup>39</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 should have known” (KOSHK) 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, 322 Ed.Law Rep. 633 (3d Cir. 2015), see Perry A. Zirkel, *The Statute of Limitations for an Impartial Hearing under the IDEA: A Guiding Checklist*, 363Ed.Law Rep. 483 (2019).

<sup>40</sup> 34 C.F.R. § 300.153(b). For format and transmission, see *supra* note 15. For the procedure for oral or written information additional to the allegations in the complaint, see 71 Fed. Reg. 46,603 (Aug. 14, 2006) (amended or separate complaint depending on same or related incident). For possible dismissal, see *infra* note 46.

<sup>41</sup> 34 C.F.R. § 300.153(d); see also 71 Fed. Reg. 46,606 (Aug. 14, 2006) (“We do not believe that the complaint procedures should provide for the confidentiality of the complainant”).

<sup>42</sup> See Letter to Anonymous, 103 LRP 49610 (OSEP June 26, 2003) (reminding that § 504/ADA may warrant an auxiliary aide, interview, or audiotape with authentication).

<sup>43</sup> 34 C.F.R. § 300.508(b).

Feature	CP	DPH
<b>Response to Complaint</b>	<u>required, with specified minimum</u> <sup>44</sup>	<i>required</i> , including detailed specifications if district is respondent <sup>45</sup>
<b>Complaint Sufficiency Procedure</b>	permissible <sup>46</sup>	required <sup>47</sup>
<b>Opportunity for Mediation</b>	<i>voluntary</i> <sup>48</sup>	<i>voluntary</i> <sup>49</sup>
<b>Resolution Meeting Process</b>	unspecified	required <u>where parent is filing party</u> <sup>50</sup>
<b>Processing Period (i.e., Deadline for Decision)</b>	60 days <sup>51</sup> • with limited circumstances for extensions <sup>52</sup>	75 days <sup>53</sup> • with specific extension upon request of either party <sup>54</sup>

<sup>44</sup> *Id.* § 300.152(a)(3) (discretionary proposed resolution and mutual opportunity for mediation).

<sup>45</sup> *Id.* § 300.508(e)-(f). However, failure to respond to the complaint does not necessarily result in a default judgment. *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 DPH procedures—not the CP—would be the appropriate remedy to address a district's failure to respond.

<sup>46</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”). For the limited exception for the proposed resolution by third-party complainants, see *id.* at B-16.

<sup>47</sup> 34 C.F.R. § 300.508(d). *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>48</sup> 34 C.F.R. § 300.152(a)(3)(ii).

<sup>49</sup> *Id.* § 300.506(b).

<sup>50</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>51</sup> 34 C.F.R. § 300.152(a).

<sup>52</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); 71 Fed. Reg. 46,603 (Aug. 14, 2006) (extensions requiring agreement, not formal consent).

<sup>53</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>54</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 DPH's initiative); *Vultaggio v. Bd. of Educ.*, 343 F.3d 598, 603, 180 Ed.Law Rep. 528 (2d Cir. 2003) (“Such a streamlined, informal process would not seem to require or benefit from the participation of lawyers”).



Feature	CP	DPH
<b><u>Attorney Representation</u></b>	permissible but peripheral <sup>55</sup>	clear and central right <sup>56</sup>
<b><u>Hearing Rights (e.g., Witnesses and Record)</u></b>	<u>inapplicable</u>	<u>required</u> <sup>57</sup>
<b><u>Scope of Purview: Sua Sponte Extension</u></b>	<u>generally not only permissible but also arguably mandatory</u> <sup>58</sup>	<u>generally not permissible</u> <sup>59</sup>
<b><u>Scope of Issues: Procedural and Substantive</u></b>	<i>both</i> , but primarily procedural <sup>60</sup>	<i>both</i> , but primarily substantive <sup>61</sup>

<sup>55</sup> Letter to Rutten, 104 LRP 1287 (OSEP Oct. 9, 2003).

<sup>56</sup> 34 C.F.R. § 300.512(a)(1).

<sup>57</sup> *Id.* § 300.512.

<sup>58</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. *E.g.*, 71 Fed. Reg. 46,603 (Aug. 14, 2006) (latitude for addressing new information); *id.* at 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 Copenhagen, 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>59</sup> *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); *District 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>60</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 CP jurisdiction does not extend to appropriateness, of BIPs). *But cf. infra* note 93 and accompanying text (limited remedy for substantive eligibility violations). Finally, in *I.L. v. Knox County Board of Education*, 257 F. Supp. 3d 946, 961 (E.D. Tenn. 2017), *aff'd on other grounds*, 739 F. App'x 319, 322–23 (6th Cir. 2018), both the trial and appellate court decisions included dicta that the jurisdiction of CP includes substantive FAPE claims.

<sup>61</sup> 34 C.F.R. § 300.513(a).

Feature	CP	DPH
<b><u>Background of the Implementing Official</u></b>	<u>primarily sp. ed. but increasingly attorneys</u> <sup>62</sup>	<u>primarily and increasingly attorneys</u> <sup>63</sup>
<b><u>Decisional Basis</u></b>	<u>primarily regulations</u> <sup>64</sup>	<u>primarily court decisions</u> <sup>65</sup>
<b><u>Procedural Issues</u></b>	<u>generally strict compliance approach</u> <sup>66</sup>	<u>more district-favorable two-part test</u> <sup>67</sup>
<b><u>IEP Implementation Issue</u></b>	<u>generally strict standard: per se approach</u> <sup>68</sup>	<u>more relaxed standard: materiality or materiality/benefit</u> <sup>69</sup>
<b><u>Burden of Proof</u></b>	<u>inapplicable</u> <sup>70</sup>	<u>on the filing party, with the possible exception of state law</u> <sup>71</sup>

<sup>62</sup> *E.g.*, Hansen & Zirkel, *supra* note 6, at 111.

<sup>63</sup> *E.g.*, Zirkel & Scala, *supra* note 5, at 5.

<sup>64</sup> Perry A. Zirkel, *The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169 (2017).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*; see also 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

<sup>68</sup> *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 to at least encouraging a benefit-based approach. Compare Letter to Clarke, 48 IDELR ¶ 77 (OSEP 2007), with Letter to Balkman, 23 IDELR 646 (OSEP 1995).

<sup>69</sup> See generally Perry A. Zirkel & Eddie T. Bauer, *The Third Dimension of FAPE under the IDEA: IEP Implementation*, 36 J. NAT'L ASS'N ADMIN. L. JUDICIARY 409 (2016).

<sup>70</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 CP decision of "insufficient information" or "not substantiated" effectively puts the burden of persuasion on the complainant. Cf. Oregon. Special Education Complaint Resolution Process: Questions and Answers (Jan. 2018), <https://www.oregon.gov/ode/rules-and-policies/Documents/complaintqa-.pdf> ("If the evidence on both sides is equally persuasive, [the SEA] will not find a violation). Yet, depending on the issue, this burden arguably should be on the district (e.g., required form or documentation).

<sup>71</sup> *Schaffer v. Weast*, 564 U.S. 49 (2005); *Reyes v. N.Y.C. Dep't of Educ.*, 760 F.3d 211, 219, 308 Ed.Law Rep. 57 (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). For the latest snapshot of state laws that vary from the *Schaffer* approach, see Perry A. Zirkel, *State Laws for Due Process Hearings under the Individuals with Disabilities Education Act*, 38 J. NAT'L ASS'N ADMIN. L. JUDICIARY 3, 21 n.93 (2018) (identifying four states plus two with more limited variations).

Feature	CP	DPH
<b>Quantum of Proof</b>	<u>permissibly preponderance of the evidence</u> <sup>72</sup>	<u>clearly preponderance of the evidence</u> <sup>73</sup>
<b><u>Stay-Put</u></b>	<u>not applicable with the narrow exception of a few state laws</u> <sup>74</sup>	<u>generally applies, with limited exception for interim alternate settings</u> <sup>75</sup>
<b>Written Decision Contents</b>	<p><i>factual findings, conclusions, and reasons</i><sup>76</sup></p> <ul style="list-style-type: none"> <li>• needs to be sufficiently definitive in ultimately resolving each allegation<sup>77</sup></li> <li>• <u>must be issued to complainant within the prescribed period even if the complainant or SEA accepts the district’s proposed resolution</u><sup>78</sup></li> <li>• <u>for denial of FAPE, appropriate remedies</u><sup>79</sup></li> </ul>	<p><i>factual “findings and decision”</i><sup>80</sup></p> <ul style="list-style-type: none"> <li>• needs to be sufficiently clear to be enforceable and sufficiently justified to be upheld on review<sup>81</sup></li> <li>• <u>parties must execute a legally binding settlement agreement if resulting from the prescribed resolution session process</u><sup>82</sup></li> <li>• <u>for denial of FAPE, appropriate remedies</u><sup>83</sup></li> </ul>

<sup>72</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>73</sup> 34 C.F.R. § 300.516(c)(3) (derivative from judicial review).

<sup>74</sup> Perry A. Zirkel, *State Laws and Guidance for Complaint Procedures under the Individuals with Disabilities Education Act*, 368 Ed.Law Rep. 24, 40 (2019) (identifying Maine and Michigan).

<sup>75</sup> 20 U.S.C. § 1415(j) (2012); 34 C.F.R. § 300.518 (2013). For the related case law, see, e.g., Perry A. Zirkel, *Stay-Put Under the IDEA: An Updated Overview*, 330 Ed.Law Rep. 8 (2016).

<sup>76</sup> 34 C.F.R. § 300.152(a)(5).

<sup>77</sup> 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 the ultimate conclusion as to whether the district had implemented the child’s IEP as “equivocal, at best, and downright disingenuous, at worst”).

<sup>78</sup> Letter to Johnson Chapman, 116 LRP 43238 (OSEP Sept. 18, 2015); Letter to Lipsitt, 67 IDELR ¶ 126 (OSEP 2015).

<sup>79</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>80</sup> 34 C.F.R. §§ 300.512(a)(5); 300.512(c)(3), 300.513(d), and 300.514(b)-(c).

<sup>81</sup> 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. District 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); *District of Columbia v. Pearson*, 923 F. Supp. 2d 82, 295 Ed.Law Rep. 87 (D.D.C. 2013).

<sup>82</sup> 34 C.F.R. § 300.510(d).

<sup>83</sup> Cf. Letter to Kohn, 17 IDELR 522 (OSEP 1991) (“[a]lthough Part B does not address the specific remedies an [DPH] 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 [DPH] has the authority to grant any relief he/she deems necessary”).

Feature	CP	DPH
<b>Utilization: Filings and Decisions</b>	<ul style="list-style-type: none"> <li>• <u>much lower</u></li> <li>• <u>slightly higher</u></li> </ul>	<ul style="list-style-type: none"> <li>• <u>much higher</u></li> <li>• <u>slightly lower</u><sup>84</sup></li> </ul>
<b>Issue Categories and Outcomes</b>	<ul style="list-style-type: none"> <li>• <u>notable inter-state variance</u><sup>85</sup></li> <li>• <u>overall majority for parents</u><sup>86</sup></li> </ul>	<ul style="list-style-type: none"> <li>• <u>notable inter-state variance</u><sup>87</sup></li> <li>• <u>overall majority for districts</u><sup>88</sup></li> </ul>

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<sup>84</sup> CADRE, National Dispute Resolution Data Summary for U.S. and Outlying Areas 2004–05 to 2016–17, <https://www.cadeworks.org/sites/default/files/resources/2016-17%20DR%20Data%20Summary%20-%20National.pdf>

<sup>85</sup> Perry A. Zirkel, *The Complaint Procedures Avenue of the IDEA: Has the Road Less Traveled by Made all the Difference?* 30 J. SPECIAL EDUC. LEADERSHIP 88 (Sept. 2017).

<sup>86</sup> CADRE, *supra* note 84 (ranging from 58% in 2016–17 to 72% in 2011–12), <https://www.cadeworks.org/sites/default/files/resources/2016-17%20DR%20Data%20Summary%20-%20National.pdf>; *see also* Hansen & Zirkel, *supra* note 6 (62% for approximate year 2016–17).

<sup>87</sup> Zirkel, *supra* note 85.

<sup>88</sup> Muller & Carranza, *supra* note 5; Zirkel & Skidmore, *supra* note 5. However, as a general contributing factor, the DPH process has a higher proportion of settlements/withdrawals. CADRE *supra* note 84; *see also* Zirkel, 2014 *supra* note 5 (DPH decisions) and Hansen & Zirkel, *supra* note 6 (CP decisions).

Feature	CP	DPH
<b>Remedies</b>	<p><i>compensatory education, monetary reimbursement, and prospective services</i><sup>89</sup></p> <ul style="list-style-type: none"> <li>• as part of broad, flexible authority <u>including</u><sup>90</sup> <u>but extending beyond</u><sup>91</sup> <u>the individual child</u><sup>92</sup></li> <li>• but for eligibility – only order for district reconsideration<sup>93</sup></li> <li>• <u>applicability, with possible exceptions, of one-year timeline for corrective action</u><sup>94</sup></li> </ul>	<p><i>appropriate relief, including the same remedies listed for CP</i><sup>95</sup></p> <ul style="list-style-type: none"> <li>• with limitations, depending on the jurisdiction, for delegating compensatory education to IEP team<sup>96</sup></li> <li>• <u>inapplicability of one-year timeline for corrective action</u><sup>97</sup></li> </ul>

<sup>89</sup> *Id.* § 300.151(b) (“for denial of appropriate services”); *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 compensatory education, OSEP more recently added: “There is nothing in the IDEA or its implementing regulations that would limit an SEA’s authority in resolving a State complaint to award compensatory services, or require such an award, based on a specific set of facts and circumstances, or a particular finding of noncompliance.” Letter to Lipsitt, 72 IDELR ¶ 102 (OSEP 2018). Although it could be argued that the IDEA’s express authorization for DPHs to award tuition reimbursement is exclusive, OSEP supports the parallel approach. *Id.* at B-7 (“includes resolving a State complaint by a parent, who has unilaterally placed his or her child in a private school at her or her own expense, alleging a denial of FAPE”); *see also* Letter to Zirkel, 74 IDELR ¶ 171 (OSEP 2019).

<sup>90</sup> For the particular enforceability when individualized to the individual child and/or parents, *see Steven R.F. v. Harrison Sch. Dist. No. 2*, 331 F. Supp. 3d 1227, 359 Ed.Law Rep. 869 (D. Colo. 2018), *vacated on other grounds*, 924 F.3d 1309 (10th Cir. 2019).

<sup>91</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 and B-10; Letter to Deaton, 65 IDELR ¶ 241 (OSEP 2015). However, in exercising its aforementioned *sua sponte* authority (*supra* note 58), 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), <https://www2.ed.gov/policy/speced/guid/idea/letters/2003-2/redact062603assess2q2003.pdf>

<sup>92</sup> 34 C.F.R. § 300.151(b)(2). The regulatory authority for implementing the CP decision include not only corrective action but also, “if needed,” technical assistance and negotiations. *Id.* § 300.152(b)(2).

<sup>93</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>94</sup> Letter to Zirkel, 68 IDELR ¶ 142 (OSEP (2016) (interpreting 34 C.F.R. § 300.600(e)).

<sup>95</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 DPH authority, Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 37 J. NAT’L ASS’N ADMIN. L. JUDICIARY 505 (2018). In expedited hearings, this broad remedial authority is not limited by the two remedies specified in the IDEA regulations. Letter to Zirkel, 74 IDELR ¶ 171 (OSEP 2019).

<sup>96</sup> *E.g., Bd. of Educ. v. L.M.*, 478 F.3d 307, 318, 216 Ed.Law Rep. 354 (6th Cir. 2007); *Reid v. District 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 DPH’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>97</sup> *See supra* note 91.

Feature	CP	DPH
<b>Exhaustion for Court Action</b>	does not fulfill this prerequisite <sup>98</sup>	fulfills this prerequisite <sup>99</sup>
<b>Attorneys' Fees for Prevailing Parents</b>	split authority, <u>but minority view</u> <sup>100</sup>	clearly yes, but by the court, not the DPH <sup>101</sup>
<b>Publication of Decisions</b>	<u>not required (with the possible exception of state law)</u> <sup>102</sup>	required <u>(to the extent of making available to the public)</u> <sup>103</sup>

<sup>98</sup> *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, 328 Ed.Law Rep. 610 (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>99</sup> 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). For the standard applicable to overlapping and purportedly non-IDEA claims, see *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017).

<sup>100</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 CP 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>101</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>102</sup> Unlike the pertinent provisions for the DPH avenue, the IDEA regulations lack a corresponding public access requirement for CP decisions.

<sup>103</sup> *Id.* §§ 300.513(d)(2) and 300.514(c)(2). The means of providing the required access is left to the discretion of each state just as long as it complies with confidentiality. Letter to Von Ruden, 30 IDELR 402 (OSEP 1998). While opining that a state FOIA is not sufficient to fulfill this requirement, OSEP interpreted the relevant regulations as requiring retention for at least 5.5 years. Letter to Anonymous, 69 IDELR ¶ 253 (OSEP 2017).



Feature	CP	DPH
<b>Reconsideration</b>	<i>no, unless specified in state law</i> <sup>104</sup>	<i>no, unless specified in state law and within the deadline for a final decision</i> <sup>105</sup>
<b>Judicial Appeal of Decision</b>	not in majority of jurisdictions <sup>106</sup>	fully to state or federal court <sup>107</sup>
<b><u>OSEP Review</u></b>	<i><u>not available</u></i> <sup>108</sup>	<i><u>not available</u></i> <sup>109</sup>

<sup>104</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”). However, any such reconsideration must comply with the 60-day timeline “absent an appropriate extension,” and either party has the right to subsequently file a for a due process hearing on the same subject if within the applicable statute of limitations. *Id.*; see also Questions and Answers on IDEA Part B Dispute Resolution Procedures, 61 IDELR ¶ 232 (OSEP 2013) at B-32 (explaining appropriate extensions and adding “if the reconsideration process is completed later than 60 days after the filing of the State complaint, the public agency must implement any required corrective actions while the reconsideration process is pending”). Approximately eight state laws provide for reconsideration. See Zirkel, *supra* note 74, at 43.

<sup>105</sup> *C.C. v. Beaumont Indep. Sch. Dist.*, 65 IDELR ¶ 109 (E.D. Tex. 2015); Letter to Colleye, 111 LRP 45430 (OSEP Oct. 20, 2010); Letter to Weiner, 57 IDELR ¶ 79 (OSEP 2011). For the similar but separable issue of whether the state may clarify the DPH’s order via the complaint resolution process, see *Gumm v. Nevada Dep’t of Educ.*, 113 P.3d 853, 198 Ed.Law 971 (Nev. 2005).

<sup>106</sup> 71 Fed. Reg. 46,607 (Aug. 14, 2006) (“We have chosen to be silent in the regulations about whether a State [CP] may be appealed because we believe States are in the best position to determine what, if any, appeals process is necessary to meet each State’s needs, consistent with State law.”). For the handful of state laws that provide for a right of judicial appeal and the limited case law concerning the right of judicial appeal in other states, see Zirkel, *supra* note 74, at 43 nn.71–74.

<sup>107</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>108</sup> Letter to Anonymous, 40 IDELR ¶ 262 (2003).

<sup>109</sup> *Id.*

Feature	CP	DPH
<b>Enforcement of Decision</b>	<p>via <u>SEA generally</u>,<sup>110</sup> CP specifically,<sup>111</sup> or, in some jurisdictions, court<sup>112</sup></p> <ul style="list-style-type: none"> <li>• without delay despite any appeal<sup>113</sup></li> </ul>	<p>via <u>SEA generally</u>,<sup>114</sup> CP specifically<sup>115</sup> or, via ample alternate bases, court<sup>116</sup> <u>unless state law authorizes additional mechanism of DPH</u><sup>117</sup></p> <ul style="list-style-type: none"> <li>• within reasonable period of time, which may be less than the period for appeal<sup>118</sup></li> </ul>

<sup>110</sup> Letter to Zirkel, 74 IDELR ¶ 235 (OSEP 2019) – Q/A 2 (“[The SEA must] ensure that the corrective action is completed as soon as possible and within the timeframe specified in the SEA’s written decision, and in no case later than one year of the State’s identification of the noncompliance”).

<sup>111</sup> Questions and Answers on IDEA Part B Dispute Resolution Procedures, 61 IDELR ¶ 232 (OSEP 2013) at B-29. The ultimate option is SEA withdrawal of funding to the LEA. For the proper procedure for exercising this mechanism, see Letter to Zirkel, 74 IDELR ¶ 235 (OSEP 2019) – Q/A 1; Letter to Dunn, 43 IDELR ¶ 141 (OSEP 2004); see also 34 C.F.R. §§ 300.605–300.606. This enforcement obligation extends to DPH decisions that only order procedural compliance. Letter to Zirkel, 74 IDELR ¶ 171 (OSEP 2019). This enforcement obligation extends to CP ordered relief (e.g., compensatory education) after the family moves out of state if it “can be reasonably implemented in [the] new State and the parent does not reject [it].” Letter to Anonymous, 75 IDELR ¶ (OSEP 2019).

<sup>112</sup> E.g., *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 CP 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>113</sup> Letter to Deaton, 65 IDELR ¶ 241 (OSEP 2015).

<sup>114</sup> Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) at C-26.

<sup>115</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 B-29. The CP enforcement obligation extends to technical procedural violations, i.e., those that the IHO rules did not result in the substantive loss at step 2 of the prevailing analysis for procedural FAPE. Letter to Zirkel, 74 IDELR ¶ 171 (OSEP 2019); Letter to Copenhaver, 53 IDELR ¶ 165 (OSEP 2008). Similar to enforcement options for CP decisions, SEA withholding of funding is one alternative. E.g., *ABC Alternative Learning Ctr.*, 38 IDELR ¶ 41 (OSERS 2002). However, if the parents seek to enforce the DPH decision in court, it appears that they need not exhaust CP. 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>116</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); *K.W. v. District of Columbia*, 385 F. Supp. 3d 29, 368 Ed.Law Rep. 145 (D.D.C. 2019); *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. 130 (2d Cir. 2014); *A. v. Hartford Bd. of Educ.*, 976 F. Supp. 2d 164, 304 Ed.Law Rep. 66 (D. Conn. 2013); *T.B. v. San Diego Unified Sch. Dist.*, 56 IDELR ¶ 152 (S.D. Cal. 2008) (via § 504/ADA). But see *B.D. v. District of Columbia*, 817 F.3d 792, 329 Ed.Law Rep. 612 (D.C. Cir. 2016) (not IDEA). Filing suit in state court provides an alternative forum where authorized by state law. E.g., NEB. REV. STAT. § 79.1167(7).

<sup>117</sup> For one of the rare such laws, see 603 MASS. CODE REGS. 28.08(6)(b) (2016).

<sup>118</sup> Letter to Voigt, 64 IDELR ¶ 220 (OSEP 2014).