Impartial Hearings Under the IDEA: Legal Issues and Answers

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This updated question-and-answer document is specific to impartial hearing officers (IHOs) and the hearings that they conduct under the Individuals with Disabilities Education Act (IDEA).[1] The coverage does not extend to the alternate third-party dispute decisional mechanism under the IDEA, the complaint resolution process (CRP) except to the extent that this alternative mechanism intersects with IHO issues.[2] Similarly, the scope only extends secondarily to the IHO's remedial authority, which is the subject of separate comprehensive coverage.[3] The sources are largely limited to the pertinent IDEA legislation and regulations, court decisions, and the U.S. Department of Education's Office of Special Education's (OSEP) policy letters.[4] Thus, the answers are subject to revision or

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[1] Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400.1 *et seq*. (2017). For the IDEA regulations, see 34 C.F.R. §§ 300.1 *et seq*. Office of Special Education and Rehabilitative Services (OSERS) Assistance to States for the Education of Children with Disabilities, 34 C.F.R. §§ 300.1 *et seq*. (2018).

[2] For a legal overview of CRP, see Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process: An Update*, 313 EDUC. L. REP. 1 (2015). For a systematic comparison of the two mechanisms, see Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes: Complaint Resolution and Impartial Hearings*, 326 EDUC. L. REP. 1 (2016). For the primary features of the state CRP systems, see Kristin Hansen & Perry A. Zirkel, *Complaint Procedure Systems under the IDEA: A State-by-State Survey*, 31 J. SPECIAL EDUC. LEADERSHIP 108 (Sept. 2018).

[3] Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: The Latest Update*, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY 505 (2018); *see also* Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 EDUC. L REP. 785 (2012); Perry A. Zirkel, *Compensatory Education: The Next Annotated Update of the Law*, 336 EDUC. L. REP. 654 (2016).

[4] OSEP is the specific organizational unit within the U.S. Department of Education that administers the IDEA. Although OSEP policy letters do not have the binding effect on IHOs of either the IDEA or, within their jurisdictions, court decisions, they provide a nationally applicable interpretation that courts often find persuasive. *See, e.g.*, Perry A. Zirkel, *The Courts' Use of OSEP Policy Interpretations in IDEA Cases,* 344 EDUC. L. REP. 671 (2017). *But cf*. Seth B. v. Orleans Parish Sch. Dist., 810 F.3d 961, 968 (5th Cir. 2015) (relying on the relevant

qualification based on (1) applicable state laws;[5] (2) additional legal sources beyond those cited; and (3) independent interpretation of the cited and additional pertinent legal sources. The author welcomes corrections and additions from interested parties so that the document is as accurate, comprehensive, and current as possible.

Intended primarily for IHOs but ultimately for any interested individuals, the items are organized into various subject categories within two successive broad groups. For the specific organization, see the Table of Contents on the previous page.

I. HEARING OFFICER ISSUES

A. IHO Qualifications

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

Yes, the 2004 amendments provided, for the first time, competence standards, which are broadly focused on knowing special education law, conducting hearings, and writing decisions.[6] Specifically, the IDEA competency standards require IHOs to:

> (1) possess knowledge of, and the ability to understand, the provisions of [the IDEA], Federal and State regulations pertaining to [the IDEA], and legal interpretations of [the IDEA] by Federal and State courts; (2) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and (3) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.[7]

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regulation rather than the "questionable" OSEP interpretation). The citations for policy letters herein include the parallel ed.gov URLs when available for improved accessibility to the reader.

[5] For a systematic overview, 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 (2018).

[6] 20 U.S.C. § 1415(f)(3)(A).

[7] *Id*. In the few pertinent cases prior to these statutory standards, the courts rejected challenges to IHO competency because they were beyond the scope of the

I-2. Similarly, does the IDEA provide specific training requirements for IHOs that are enforceable in individual cases?

No, training requirements are a matter of state law.[8] Thus far, the courts have not interpreted these state law provisions as incorporated in the IDEA.[9]

I-3. What about the IDEA's impartiality requirements?

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

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IDEA. *E.g.*, Carnwath v. Grasmick, 115 F. Supp. 2d 577, 580 (D. Md. 2000); Cavanagh v. Grasmick, 75 F. Supp. 2d 446, 457 (D. Md. 1999). After enactment of this standard, the case law has been very limited and rather deferential. *E.g.*, M.V. v. Conroe Indep. Sch. Dist., 75 IDELR ¶ 134 (S.D. Tex. 2019); Renee J. v. Hous. Indep. Sch. Dist., 333 F. Supp. 3d 674, 698–99 (S.D. Tex. 2018), *aff'd on other grounds*, 913 F.3d 523 (5th Cir. 2019); Bohn *ex rel*. Cook v. Cedar Rapids Cmty. Sch. Dist., 69 IDELR ¶ 8 (N.D. Iowa 2016); *cf*. Whitaker v. bd. of Educ. for Prince George's Pub. Sch., 77 IDELR ¶ 64 (D. Md. 2020) (declining to specifically address this mattder in light of plaintff's failure to show any prejudicial effect).

[8] *E.g.*, Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,406, 12,613 (Mar. 12, 1999) (to be codified at 34 C.F.R. pt. 300). In the commentary accompanying the 2006 IDEA regulations, OSEP added that each SEA's general supervisory responsibility includes ensuring that its IHOs are sufficiently trained to meet the three newly specified qualifications. Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,705 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300). For state laws that specify training requirements for IHOs, see Zirkel, *supra* note 5, at 17.

[9] *E.g.*, C.S. *ex rel*. Struble v. Cal. Dep't of Educ., 50 IDELR ¶ 63 (S.D. Cal. 2008); Adams v. Sch. Bd. of Anoka-Hennepin Indep. Sch. Dist. No. 11, 38 IDELR ¶ 6 (D. Minn. 2002); *Carnwath v. Grasmick*, 115 F. Supp. 2d at 583; Carnwath v. Bd. of Educ., 33 F. Supp. 2d 431, 434 (D. Md. 1998); *cf*. D.A. *ex rel.* Adams v. Fairfield-Suisun Unified Sch. Dist., 58 IDELR ¶ 105 (E.D. Cal. 2012) (SEA is not responsible in California for IHO training and competence); Canton Bd. of Educ. v. N.B., 343 F. Supp. 2d 123, 127 (D. Conn. 2004) (lack of systemic violation). *But cf*. C.E. v. Chappaqua Cent. Sch. Dist., 695 F. App'x 621, 624 (2d Cir. 2017) (applying "grandfathered" state law criteria in upholding competence of IHO).

judges.[10] The leading, but still not *per se,* exception for such deference, is for *ex parte* communications.[11] The overlapping issue of recusal is largely a matter of state law,[12] although an occasional court decision has identified applicable criteria or procedures for appellate review.[13] Finally, the courts have rejected challenges of bias based on box scores of hearing or review officer decisions in favor of either party.[14]

I-4. Would a school district's notification to the IHO that final selection is contingent on the parent's approval violate the IDEA?

Not according to OSEP's interpretation, because the IDEA does not provide parents with a veto right in the appointment of IHOs.[15] However, this interpretation does not seem to take into careful consideration that only a few state laws provide for party participation in the selection process.[16]

B. IHO Immunity

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[10] *E.g.*, Peter Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers under the Individuals with Disabilities Education Act: A Checklist of Legal Boundaries,* 83 N.D. L. REV. 109, 120 n.62 (2007); Elaine Drager & Perry A. Zirkel, *Impartiality under the Individuals with Disabilities Education Act*, 86 EDUC. L. REP. 11, 12–13 (1994). For state laws that provide additional IHO impartiality requirements, including the higher standard, see Zirkel, *supra* note 5, at 17.

[11] E.g., Hollenbeck v. Bd. of Educ., 699 F. Supp. 658, 668 (N.D. Ill. 1988). *But cf*. Cmty. Consol. Sch. Dist. No. 93 v. John F. *ex rel.* James F., 33 IDELR ¶ 210 (N.D. Ill. 2000) (based on proof of lack of actual bias, rejected *ex parte* challenge).

[12] *E.g.*, Zirkel, *supra* note 5, at 14–16 (within subcategories of IHO qualifications and assignment and Party right to strike),

[13] *E.g.*, Falmouth Sch. Comm. v. Mr. & Mrs. B., 106 F. Supp. 2d 69, 73 (D. Mass. 2000).

[14] *E.g.,* R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 39 (E.D.N.Y. 2011), *rev'd on other grounds*, 694 F.3d 167 (2d Cir. 2012); C.G. v. New York City Dep't of Educ., 752 F. Supp. 2d 355, 361 (S.D.N.Y. 2010); J.N. v. Pittsburgh Sch. Dist., 536 F. Supp. 2d 564, 579 (W.D. Pa. 2008).

[15] Letter to Stadler, 24 IDELR 973 (OSEP 1996).

[16] *E.g.*, Zirkel, *supra* note 5, at 19–20. The approach in these few states is more limited than mutual selection. *E.g.*, 105 ILL. COMP. STAT. ANN. 5/14-8.02a(f)(5) (2018) (permitting each party the right to one substitution in the rotational assignment of the IHO).

I-5. Do IHOs have the same sweeping, absolute immunity that judges have?

Yes, within the scope of their authority as IHOs.[17]

II. HEARING/DECISION ISSUES

A. Resolution Sessions

II-1. Does the resolution process (in 34 C.F.R. § 300.510) apply when a local education agency (LEA) files a due process complaint?

No, OSEP has explained that this process is not required in such cases.[18] Rather, the forty-five-day period starts when the state education agency (SEA) and the parent receive the school district's complaint.[19] According to OSEP, the parent's right to a sufficiency challenge and obligation to respond to the district's complaint are the same as for the district in the reverse situation.[20] For cases in which

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[17] *E.g.*, Donohue v. Lloyd, 76 IDELR ¶ 252 (S.D.N.Y. 2020); Oskowis v. Ariz. Dep't of Educ., 72 IDELR ¶ 216 (D. Ariz. 2018); Henry *ex rel*. M.H. v. Lane, 69 IDELR ¶ 277 (W.D. Pa. 2017); T.O. *ex rel*. Hayes v. Cumberland Cnty. Bd. of Educ., 69 IDELR ¶ 182 (E.D.N.C. 2017), *aff'd on other grounds*, 696 F. App'x 640 (4th Cir. 2017); Luo v. Owen J. Roberts Sch. Dist., 68 IDELR ¶ 245 (E.D. Pa. 2016); Luo v. Baldwin Union Free Sch. Dist., 60 IDELR ¶ 281 (E.D.N.Y. 2013), *aff'd on other grounds*, 556 F. App'x 1 (2d Cir. 2013); Singletary v. Dep't of Health & Human Serv., 848 F. Supp. 2d 588, 593 (E.D.N.C. 2012), *aff'd on other grounds*, 502 F. App'x 340 (4th Cir. 2013); B.J.S. v. State Educ. Dep't, 699 F. Supp. 2d 586, 593 (W.D.N.Y 2010); Stassart v. Lakeside Joint Sch. Dist., 53 IDELR ¶ 51 (N.D. Cal. 2009); J.R. *ex rel*. W.R. v. Sylvan Union Sch. Dist., 49 IDELR ¶ 253 (E.D. Cal. 2008); DeMerchant v. Springfield Sch. Dist., 47 IDELR ¶ 94 (D. Vt. 2007); Weyrick v. New Albany-Floyd Cnty. Consol. Sch. Corp., 42 IDELR ¶ 169 (S.D. Ind. 2004); Sand v. Milwaukee Pub. Sch., 46 IDELR ¶ 161 (E.D. Wis. 2006); Walled Lake Consol. Sch. v. Doe, 42 IDELR ¶ 3 (E.D. Mich. 2004); *cf*. M.O. v. Ind. Dep't of Educ., 635 F. Supp. 2d 847, 851–54 (N.D. Ind. 2009) (IDEA review officers).

[18] Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act, 61 IDELR ¶ 232, at item D-2 (OSEP 2013) [hereinafter *Dispute Resolution Procedures*], https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf.

[19] *Id*.

[20] *Id*.

the parent raises a sufficiency challenge, OSEP added: "one way for an LEA to amend a due process complaint that is not sufficient is for the parent to agree in writing and be given an opportunity to resolve the LEA's due process complaint through a resolution meeting."[21]

II-2. Are the discussions in resolution sessions confidential?

According to OSEP's interpretation, the only confidentiality provisions that apply are the student records provisions in 34 C.F.R. § 300.610 and the Family Educational Rights and Privacy Act (FERPA).[22] Absent a voluntary agreement between the parties for confidentiality, OSEP's position is that either party may introduce evidence of these discussions at the hearing.[23] Although the admissibility and the weight of such evidence remain within the IHO's discretion, the limited case law supports the OSEP conclusion.[24] Finally, although OSEP's opinion is that "[a] State could not . . . require that the participants in a resolution meeting keep the discussions confidential,"[25] some states have adopted laws saying so.[26]

II-3. After filing for the hearing, may the parent unilaterally waive the resolution session?

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[21] *Id*.

[22] *Id*.

[23] Letter to Cohen, 67 IDELR ¶ 217 (OSEP 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/15-004400r-il-cohen-dph-9-9-15.pdf; *Dispute Resolution Procedures*, *supra* note 18, at item D-17; Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,704 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300); *see also* Letter to Baglin, 53 IDELR ¶ 164 (OSEP 2008) (LEA may not require a parent to sign a confidentiality agreement as a condition for having a resolution session, but the parties could agree to confidentiality), https://www2.ed.gov/policy/speced/guid/idea/letters/2008-4/baglin103008dueprocess4q2008.pdf.

[24] *E.g.*, Friendship Edison Pub. Charter Sch. v. Smith, 561 F. Supp. 2d 74, 83 (D.D.C. 2008).

[25] Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. at 46,704.

[26] *E.g.*, OHIO ADMIN. CODE 3301-51-05(K)(9)(a)(3).

No. Like mediation, which must be voluntary for each party,[27] waiving the resolution session must be mutual (and in writing).[28] Moreover, the regulations require delay of the due process hearing if the parent fails to participate in the resolution session in the absence of such mutual agreement, and they also authorize the IHO to dismiss the case upon the district's motion if the parent's refusal to participate persists for the thirty-day period despite the district's documented reasonable efforts to obtain parental participation.[29]

II-4. Do difficulties communicating with the parents excuse a district's delay in conducting the resolution session within the required fifteen-day period[30]?

No, according to the federal district court in the District of Columbia, at least if the parent has legal representation.[31]

II-5. After convening the resolution session, may the district refuse to discuss the issues raised in a parent's due process complaint, instead only offering to convene an IEP team meeting to address these issues?

No, according to OSEP, this position would violate the IDEA.[32]

II-6. In a case where the parent filed for the hearing and either party refused to participate in the resolution session, must the other party seek the IHO's intervention?

Yes, according to OSEP.[33]

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[27] OSERS Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.506(b)(1) (2018).

[28] *Id*. § 300.532(c)(3); *see also* Spencer v. District of Columbia, 416 F. Supp. 2d 5, 12 (D.D.C. 2006).

[29] 34 C.F.R. § 300.510(b)(3)–(4).

[30] The regulations require holding the meeting within 15 days of the filing of the complaint and completing the resolution process within 30 days of the filing. *Id*. § 300.510(a)(1), 300.510(b)(1).

[31] Massey v. District of Columbia, 400 F. Supp. 2d 66, 72 (D.D.C. 2005).

[32] Letter to Casey, 61 IDELR ¶ 203 (OSEP 2013), https://www2.ed.gov/policy/speced/guid/idea/letters/2013-1/casey03272013resolutionsession1q2013.pdf.

[33] *Dispute Resolution Procedures*, *supra* note 18, at item D-13.

II-7. Would a parent's refusal to participate in the resolution session in person justify an IHO's dismissal of her due process complaint?

No, according to OSEP, without considering whether the parent had valid reasons for refusing to physically attend the meeting.[34] Indeed, if the parent informs the district in advance of the meeting that circumstances prevent attendance in person, the district must offer the parent alternative means of participation, such as telephone or videoconferencing.[35]

II-8. Would a state law that permits postponement of the resolution timeline when the SEA or LEA receives the parent's due process complaint shortly before or during an extended holiday break be consistent with the IDEA?

No, not according to OSEP.[36] The specified period is fifteen calendar days,[37] and the only exceptions are the alternate agreements between the parent and the LEA either to waive the resolution meeting or to utilize the mediation process.[38]

II-9. May the parties mutually agree to extend the fifteen-day resolution period to resolve an expedited due process complaint?

No, according to OSEP. The agency based its conclusion that this deadline was absolute on the lack of any such waiver authority in 34

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[34] Letter to Walker, 59 IDELR ¶ 262 (OSEP 2012), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/12006705resmtgs3q2012.pdf.

[35] Letter to Savit, 64 IDELR ¶ 250 (OSEP 2014), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/savit-dcps-policies1-1-19-2016.pdf; Letter to Eig, 59 IDELR ¶ (OSEP 2012).

[36] Letter to Anderson, 110 LRP 70096 (OSEP Nov. 10, 2010), https://www2.ed.gov/policy/speced/guid/idea/letters/2010-4/anderson111010dph4q2010.pdf; *see also Dispute Resolution Procedures*, *supra* note 18, at item D-10.

[37] Individuals with Disabilities Education Act, 20 U.S.C. § 1415(f)(1)(b) (2017); OSERS Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.510(a) (2018).

[38] *See supra* text accompanying notes 29–30.

C.F.R. § 300.532(c) and the overriding purpose of promptness in the applicable disciplinary cases.[39]

II-10. If fifteen days after the parent's filing for a due process hearing, the school district fails to convene or participate in the resolution session, what may the parents do to move the matter forward?

The parent may seek the IHO's intervention to start the timeline for the hearing.[40] Additionally, a federal district court ruled that this parental right is voluntary; thus, the parent's choice not to exercise it did not excuse the district's failure.[41]

II-11. If, after the parent files for a hearing, the parties neither waive nor hold the resolution session after thirty-one days, what happens on day thirty-one?

According to OSEP, the forty-five-day timeline for conducting the hearing and issuing a decision starts on day thirty-one.[42]

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[39] *Dispute Resolution Procedures*, *supra* note 18, at item E-4; *see also* Letter to Gerl, 51 IDELR ¶ 166 (OSEP 2008), https://www2.ed.gov/policy/speced/guid/idea/letters/2008-2/gerl050108dueprocess2q2008.pdf.

[40] 34 C.F.R. § 300.510(b)(5); *see also* Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,702 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300). For varying judicial consequences, *compare* O.O. *ex rel.* Pabo v. District of Columbia, 573 F. Supp. 2d 41 (D.D.C. 2008) (concluding that LEA's failure to convene a resolution session constituted harmless error), *with* J.M.C. *ex rel.* E.G.C. v. La. Bd. of Elementary & Secondary Educ., 584 F. Supp. 894, 896 (M.D. La. 2008) (ruling that where LEA failed to convene the resolution session within fifteen days, the settlement agreement before due process hearing was not enforceable).

[41] Haw. Dep't of Educ. v. T.G. *ex rel.* Cheryl G., 56 IDELR ¶ 97 (D. Haw. 2011).

[42] Letter to Worthington, 51 IDELR ¶ 281 (OSEP 2008), https://www2.ed.gov/policy/speced/guid/idea/letters/2008-1/worthington031708dph1q2008.pdf. However, mitigating this eventuality, OSEP also stated that the SEA has the responsibility to enforce the LEA's affirmative obligation to convene the resolution meeting within fifteen days of receiving the parent's complaint. *Id*. Moreover, state regulations may contribute to the conclusion that the failure to waive or hold the resolution session precludes holding the impartial hearing. Colbert Cnty. Bd. of Educ. v. B.R.T. *ex rel.* Cagle, 51 IDELR ¶ 16 (N.D. Ala. 2008).

II-12. Does insufficiency of the complaint postpone the timeline or negate the requirement for the resolution session?

Not according to OSEP. More specifically, the commentary accompanying the regulations declared: "We agree with S. Rpt. No. 108–185, p. 38 [i.e., the IDEA's legislative history], which states that the resolution meeting should not be postponed when the LEA believes that a parent's complaint is insufficient."[43]

II-13. Does a non-attorney parent advocate's presence at the resolution session trigger the district's qualified right to attend with its attorney?

Not according to OSEP, even if the advocate is entitled under state law to represent the parent/student at a due process hearing.[44]

II-14. What is the legal result if a parent fails or refuses to participate in the resolution session upon the district's timely attempt to schedule the session within fifteen days?

According to OSEP, the district's obligation is to "continue to make diligent efforts throughout the remainder of the [thirty]-day resolution period to convince the parent to participate in a resolution meeting." Examples of such efforts include "detailed records of telephone calls made or attempted and the results of those calls and copies of correspondence sent to the parents and any responses received." Moreover, at the conclusion of this thirty-day period, the LEA "may request that a hearing officer dismiss the complaint when the LEA is unable to obtain the participation of a parent in a resolution meeting, despite making reasonable efforts to obtain the parent's participation and documenting its efforts."[45]

II-15. For violations of the resolution-session requirements, must the

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[43] Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. at 46,698.

[44] Letter to Lawson, 55 IDELR ¶ 232 (OSEP 2010), https://www2.ed.gov/policy/speced/guid/idea/letters/2010-1/lawson020210dueprocess1q2010.pdf.

[45] *Dispute Resolution Procedures*, *supra* note 18, at item D-7.

other party seek the intervention of the IHO?

Yes, according to OSEP, "[t]he appropriate party must seek the hearing officer's intervention to either dismiss the complaint or to initiate the hearing timeline, depending on the circumstances."[46]

II-16. Does a district's delay in conducting the resolution session constitute a denial of the IDEA obligation to provide a free appropriate public education (FAPE)?

Not necessarily.[47]

II-17. Must the district representative at the resolution session have final and absolute authority to resolve the complaint?

Not quite, according to an unpublished decision. In rejecting the superintendent and special education director in the circumstances of this case, the court concluded that said representative "satisfies the statutory requirement only if he or she, in fact, has the authority—by express delegation or otherwise—to make the decision about what the LEA will or will not do to resolve the issues presented in the IDEA complaint."[48]

II-18. Would the district's violation of this requirement be the basis for an IHO order based on denial of FAPE?

No, according to the same decision, without an evidentiary basis that this procedural violation impeded the child's substantive right to FAPE.[49]

II-19. Does the IDEA permit the district to unilaterally amend the IEP during the resolution session to cure the basis for a tuition reimbursement claim?

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[46] *Id*. at item D-13.

[47] *E.g.*, J.D.G. v. Colonial Sch. Dist., 748 F. Supp. 2d 361 (D. Del. 2010) (no denial of FAPE where parents contributed to the delay and no harm to child).

[48] J.Y. *ex rel.* E.Y. v. Dothan City Bd. of Educ., 63 IDELR ¶ 33 (M.D. Ala. 2014).

[49] *Id*.

No.[50]

B. Sufficiency Process

II-20. Does the IDEA require the noncomplaining party to specify the basis for its insufficiency motion?

No.[51]

II-21. What steps are available to the complaining party if an IHO rules that the due process complaint is insufficient?

Citing the pertinent IDEA regulations and the comments accompanying them, OSEP answered that 1) the IHO must identify the specific insufficiencies in the notice; 2) the filing party may amend its complaint if the other party provides written consent and has an opportunity for mediation or a resolution session; 3) the IHO may, if the filing party does not exercise this amendment option, dismiss the insufficient complaint; and 4) the party may re-file if within the two-year limitations period.[52]

II-22. If the filing party, with written consent from the other party, amends its complaint, do the fifteen-day timeline for the resolution meeting, the thirty-day resolution period and the party participation requirement re-commence?

Yes, according to OSEP.[53]

II-23. Have courts been supportive of strict IHO interpretations of the IDEA's sufficiency requirements?

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[50] The Second Circuit clarified that its previous statement to that effect was merely dicta and, upon direct consideration, is contrary to the IDEA. Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., ___ F. App'x ___ (2d Cir. 2021).

[51] OSERS Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.508(d) (2018).

[52] *Dispute Resolution Procedures*, *supra* note 18, at item C-4.

[53] *Id.*

The limited case law to date leaves the answer to this question unsettled. The Third Circuit upheld an IHO's dismissal of a case where the parent unsuccessfully argued that the Supreme Court's characterization in *Schaffer v. Weast*[54] of the IDEA's pleading requirements as "minimal" allowed less than strict compliance with all of the required elements of the complaint.[55] Yet, in another unpublished decision, the federal district court in New Hampshire reversed an IHO's dismissal for insufficiency, alternatively citing with approval this dictum in *Schaffer* and the school district's failure to contest the matter within the prescribed fifteen-day window.[56] Providing a third approach, the Eighth Circuit held, in an unpublished decision, that the IDEA does not provide for judicial review of IHO sufficiency decisions.[57]

II-24. Conversely, do courts favor a strict interpretation of the IDEA's requirements for the defendant's response to the complaint?

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

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[54] Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49 (2005).

[55] M.S.-G. v. Lenape Reg'l High Sch. Dist. Bd. of Educ., 306 F. App'x 772 (3d Cir. 2009); *cf.* D.F. v. Collingswood Borough Bd. of Educ., 596 F. App'x 49 (3d Cir. 2015) (affirming dismissal for insufficiency based on IDEA pleading standards, without specifying them); H.T. *ex rel.* V.T. v. Hopewell Valley Reg'l Bd. of Educ., 66 IDELR ¶ 48 (D.N.J. 2015) (ruling that court lack jurisdiction but upholding, based on abundance of caution due to not clearly settled issue, IHO's denial decision); Lago Vista Indep. Sch. Dist. v. S.F. *ex rel.* Steven F., 50 IDELR ¶ 104 (W.D. Tex. 2007) (ruling that IHO exceeded his authority by addressing claim not properly raised in the hearing complaint).

[56] Alexandra R. *ex rel. Burke* v. Brookline Sch. Dist., 53 IDELR ¶ 93 (D.N.H. 2009); *see also* Escambia Cnty. Bd. of Educ. v. Benton, 406 F. Supp. 2d 1248 (N.D. Ala. 2005); Anello v. Indian River Sch. Dist., 47 IDELR ¶ 104 (Del. Fam. Ct. 2007).

[57] Knight *ex rel.* J.N.K. v. Wash. Sch. Dist., 416 F. App'x 594 (8th Cir. 2011); *see also* G.R. *ex rel. Russell* v. Dall. Sch. Dist. No. 2, 823 F. Supp. 1120, 1123 (D. Or. 2011). According to *Knight*, the proper resolution for the IHO is to dismiss the case without, not with, prejudice. *Knight*, 416 F. App'x at 595.

requirement.[58]

C. Jurisdiction

II-25. Do IHOs have jurisdiction for violations of the prehearing, including sufficiency, process?

Yes, at least for a district's failure to send a prior written notice to the parent regarding the subject matter of the parent's due process complaint and the failure to provide a response to the complaint within the resulting required ten days.[59]

II-26. Other than unilateral placement (i.e., tuition reimbursement) cases, do IHOs have jurisdiction for the IDEA claims of a child who resides in, but is not enrolled, in the school district?

The issue is not clearly settled. According to a federal district court decision in the District of Columbia, the answer is yes.[60] The court based its conclusion on the language of the IDEA that triggers a school district's obligations, including Child Find, on residency, not enrollment.[61] Other courts have extended this answer even if the child's residency changes.[62] OSEP agrees with this answer.[63]

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[58] Jalloh *ex rel.* R.H. v. District of Columbia, 535 F. Supp. 2d 13, 19–20 (D.D.C. 2008); Sykes v. District of Columbia, 518 F. Supp. 2d 261, 266–67 (D.D.C. 2007).

[59] Letter to Inzelbuch, 62 IDELR ¶ 122 (OSEP 2013), https://www2.ed.gov/policy/speced/guid/idea/letters/2013-3/inzelbuch092413evaluation3q2013.pdf.

[60] D.S. v. District of Columbia, 699 F. Supp. 2d 229 (D.D.C. 2010); *see also* L.R.L. *ex rel.* Lomax v. District of Columbia, 896 F. Supp. 2d 69 (D.D.C. 2012).

[61] This obligation is different from the child find and proportional-services obligations for children voluntarily placed in private schools, which are based on the school's location, not the child's residency. *See infra* note 69 and accompanying text.

[62] *E.g.*, D.H. *ex rel*. R.H. v. Lowndes Cnty. Sch. Dist., 57 IDELR ¶ 162 (M.D. Ga. 2011); Alexis R. v. High Tech Middle Media Arts Sch., 53 IDELR ¶ 15 (S.D. Cal. 2009); Grand Rapids Pub. Sch. v. P.C., 308 F. Supp. 2d 815 (W.D. Mich. 2004).

[63] Letter to Goetz & Reilly, 57 IDELR ¶ 80 (OSEP 2010), https://www2.ed.gov/policy/speced/guid/idea/letters/2010-4/goetzreilly100410dph4q2010.pdf.

However, the Eighth Circuit answered the question no at least under a Minnesota law that requires the impartial hearing to be "'conducted by and in the school district responsible for assuring that an appropriate program is provided.'"[64] The court reasoned that such challenges were moot because the new school district is responsible for providing the hearing.[65] The federal administrative agency subsequently explained that, "absent additional legal authority," it could not take action contrary to change this jurisdictional difference.[66]

Conversely, a decision within the Eighth Circuit addressed the issue of whether the IHO has jurisdiction for the case when the parents moved their residence to outside the district and did not file for the hearing until after moving.[67]

II-27. Who has the authority to determine whether a parent's hearing request constitutes a new issue compared to the parent's previous adjudicated request?

According to OSEP commentary accompanying the 1999 IDEA regulations, this jurisdictional issue is for the IHO—not the school district (or the SEA)—to decide.[68]

II-28. Do IHOs have jurisdiction for issues raised by the non-complaining party during the pre-hearing or hearing process?

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

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[64] Thompson v. Bd. of Special Sch. Dist. No. 1, 144 F.3d 574, 578 (8th Cir. 1998) (quoting MINN. STAT. § 120.173(b)(3)(e), renumbered § 125A.50 (2018)).

[65] *Id*. at 578–79.

[66] Letter to Goetz & Reilly, 58 IDELR ¶ 230 (OSERS 2012).

[67] A.H. v. Independence Sch. Dist., 466 S.W.3d 17 (Mo. Ct. App. 2015).

[68] Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,406, 12,613 (Mar. 12, 1999) (to be codified at 34 C.F.R. pt. 300); Letter to Wilde, 113 LRP 11932 (OSEP Oct. 3, 1990); *see also Dispute Resolution Procedures*, *supra* note 18, at item C-16.

case."[69]

II-29. Do IHOs have jurisdiction for cases that the parent has previously subjected to CRP?

Yes, and they are not bound by the CRP rulings.[70] However, the IHO does not have jurisdiction in such cases as the appellate mechanism for the SEA's CRP rulings.[71]

II-30. Do IHOs have jurisdiction over FAPE issues for students whom parents have voluntarily placed in private, including parochial, schools (in contrast with those unilaterally placed for tuition reimbursement)?

No, except for the Child Find obligation of the school district where the private school is located.[72] Arguably, an additional exception is the extent that a few courts have interpreted state laws, such as those providing for dual enrollment, as extending LEA obligations for special education and related services to parentally-placed children in private schools.[73]

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[69] Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,706 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300).

[70] *E.g.*, Grand Rapids Pub. Sch. v. P.C., 308 F. Supp. 2d 815 (W.D. Mich. 2004); Lewis Cass Intermediate Sch. Dist. v. M.K., 290 F. Supp. 2d 832 (W.D. Mich. 2003); Donlan v. Wells Ogunquit Cmty. Sch. Dist., 226 F. Supp. 2d 261 (D. Me. 2002); Letter to Douglas, 35 IDELR ¶ 278 (OSEP 2001), https://www2.ed.gov/policy/speced/guid/idea/letters/2001-2/douglas041901dueprocess.pdf; Letter to Governors & Chief State Sch. Officers, 34 IDELR ¶ 264 (OSEP 2000), https://www2.ed.gov/policy/speced/guid/idea/letters/2000-3/memo82900authorizationsec.pdf; Letter to Lieberman, 23 IDELR 351 (OSEP 1995).

[71] *E.g.*, Va. Office of Protection & Advocacy v. Va., 262 F. Supp. 2d 648 (E.D. Va. 2003); *see also* Millay *ex rel.* YRM v. Surry Sch. Dep't, 707 F. Supp. 2d 56 (D. Me. 2010).

[72] OSERS Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.140 (2018). For applications of this regulation, see, for example, C.F. *ex rel.* Flick v. Del. Cnty. Intermediate Unit, 70 IDELR ¶ 250 (E.D. Pa. 2017); W. v. Sch. Bd., 307 F. Supp. 2d 1363 (S.D. Fla. 2004); Gary S. v. Manchester Sch. Dist., 241 F. Supp. 2d 111 (D.N.H. 2003)

[73] *E.g.*, Veschi v. Nw. Lehigh Sch. Dist., 772 A.2d 469 (Pa. Commw. Ct. 2001), *appeal denied*, 788 A.2d 382 (Pa. 2001); Dep't of Educ. v. Grosse Point Sch., 701

II-31. Do IHOs have jurisdiction to decide the child's residency as a threshold issue antecedent to the IDEA merits of the case?

Yes, according to limited authority to date.[74]

II-32. Do IHOs have jurisdiction for Child Find claims, although the IDEA is ambiguous or silent about this issue?

Yes, according to a Ninth Circuit decision.[75]

II-33. Do IHOs have jurisdiction for safety concerns with the child's IEP?

Yes.[76]

II-34. Do IHOs have jurisdiction for district's promotion and retention decisions?

No, according to OSEP, unless related to FAPE or placement, such as where "a student does not receive the services that are specified on his or her IEP that were designed to assist the student in meeting the promotion standards."[77] Moreover, such matters may be regarded as within the school district's exclusive authority.[78]

II-35. Do IHOs have jurisdiction for claims of systemic IDEA

N.W.2d 195 (Mich. Ct. App. 2005); R.M.M. *ex rel.* Morales v. Minneapolis Pub. Sch., 67 IDELR ¶ 65 (Minn. Ct. App. 2016). In its commentary accompanying the 2006 IDEA regulations, OSEP opined that "[w]hether dual enrollment alters the rights of parentally-placed private school children with disabilities under State law is a State matter." Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. at 46,590.

[74] *E.g.*, A.P. v. Lower Merion Sch. Dist., 294 F. Supp. 3d 406 (E.D. Pa. 2018).

[75] Compton Unified Sch. Dist. v. Addison, 598 F.3d 1191 (9th Cir. 2010).

[76] Lillbask *ex rel.* R.H. v. Conn. Dep't of Educ., 397 F.3d 77 (2d Cir. 2005).

[77] Letter to Anonymous, 35 IDELR ¶ 35 (OSEP 2000), https://www2.ed.gov/policy/speced/guid/idea/letters/2000-4/redact110900promotion.4q2000.pdf.

[78] *Cf*. Saucon Valley Sch. Dist. v. Robert O., 785 A.2d 1069 (Pa. Commw. Ct. 2001) (ruling the IHO's remedy was ultra vires for gifted student).

violations?

Although there may be exceptions where the issue is relatively limited, and a single plaintiff is bringing the claim, the IHO generally does not have jurisdiction for class-action type claims.[79]

II-36. Do IHOs have jurisdiction for SEAs as defendants?

No, except for cases in which the SEA is providing direct services to the child.[80]

II-37. Do IHOs have jurisdiction to determine and order the stay-put for a child with disabilities?

Yes.[81]

II-38. Do IHOs have jurisdiction for parental challenges to an IEP that the parent agreed to or an IEP that is not the most recent one?

Yes, according to OSEP, provided that the filing is within the prescribed statute of limitations.[82]

II-39. Do IHOs have jurisdiction to override a parent's refusal to provide consent for initial services or for a parent's subsequent revocation of consent for continued services?

No, the regulations are rather clear that these matters are no longer

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[79] *E.g.*, N.J. Protection & Advocacy v. N.J. Dep't of Educ., 563 F. Supp. 2d 474 (D.N.J. 2008).

[80] *E.g.*, Chavez v. N.M. Pub. Educ. Dep't, 621 F.3d 1275 (10th Cir. 2010); Coningsby v. Or. Dep't of Educ., 68 IDELR ¶ 159 (D. Or. 2016).

[81] *E.g.*, Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,704 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300); *see also* Letter to Stohrer, 17 IDELR 55 (OSEP 1990); Letter to Chassy, 30 IDELR ¶ 51 (OSEP 1997). For stay-put generally, see Perry A. Zirkel, *"Stay-Put" under the IDEA: An Updated Annotated Overview*, 330 EDUC. L. REP. 8 (2016). For the strong status of the IHO's stay-put order upon a party's challenge to it in court, see Abington Heights Sch. Dist. v. A.C., 63 IDELR ¶ 97 (E.D. Pa. 2014).

[82] Letter to Lipsitt, 52 IDELR ¶ 47 (OSEP 2008).

within the IHO's jurisdiction.[83] However, on the opposite side, the commentary to the amended IDEA regulations add this clarification for selective refusals:

> If, however, the parent and the [district] disagree about whether the child would be provided with FAPE if the child did not receive a particular special education or related service, the parent may use the due process procedures in subpart E of these regulations to obtain a ruling that the service with which the parent disagrees is not appropriate for their child.[84]

II-40. What if the parent's refusal is for consent for an initial evaluation and the child is either parentally placed in a private school or is home-schooled?

Similarly, the IHO does not have jurisdiction to override the parent's refusal.[85]

II-41. Do IHOs have jurisdiction in disputes between two parents, who both have legal authority to make educational decisions for the child, with regard to consent or revocation of consent for special education services?

No, according to OSEP's interpretation. IHOs do not have jurisdiction for any disputes between parents as compared to disputes between parents and "public agencies."[86] In such cases, the IDEA allows either parent to provide or revoke consent, with their disagreements being subject exclusively (i.e., not under the IDEA) to

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[83] OSERS Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.300(b)(3)(i), (4)(ii) (2018).

[84] Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 73 Fed. Reg. 73,006, 73,011 (Dec. 1, 2008) (to be codified at 34 C.F.R. pt. 300), https://www.govinfo.gov/content/pkg/FR-2008-12-01/pdf/FR-2008-12-01.pdf.

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

[86] 34 C.F.R. § 300.507(a).

the resolution mechanisms available "based on State or local law."[87] Such consent disputes when concerned with evaluation, rather than services, may be another matter.[88]

II-42. Do IHOs have jurisdiction for issues arising concerning the education records of the child?

Although various hearing and review officers have broadly answered this question with a "no," often based on the coverage of FERPA,[89] the more defensible answer would appear to be "it depends" in light of the overlapping coverage of the IDEA. More specifically, if the student records issue concerns the identification, evaluation, FAPE, or placement of the child, it would appear to be within the concurrent jurisdiction of the IHO,[90] with one possible exception—if the issue concerns amending the child's records (based, for example, on inaccurate or misleading information), the IDEA regulations may be interpreted as reserving the matter exclusively for the FERPA hearing procedure.[91]

II-43. Do IHOs have jurisdiction where the district offered, and the

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[87] Letter to Cox, 54 IDELR ¶ 60 (OSEP 2009), https://www2.ed.gov/policy/speced/guid/idea/letters/2009-3/cox082109revocationofconsent3q2009.pdf; *see also* Letter to Ward, 56 IDELR ¶ 237 (OSEP 2010), https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/letters/2010-3/ward083110revocofconsent3q2010.pdf.

[88] *E.g.*, J.H. v. Northfield Pub. Sch. Dist., 52 IDELR ¶ 165 (D. Minn. 2009); Zeichner v. Mamaroneck Union Free Sch. Dist., 881 N.Y.S.2d 883 (Sup. Ct. 2009).

[89] *E.g.*, Nw. R-1 Sch. Dist., 40 IDELR ¶ 221 (Mo. SEA 2004); Fairfax Cnty. Pub. Sch., 38 IDELR ¶ 275 (Va. SEA 2003); Bourne Pub. Sch., 37 IDELR ¶ 261 (Mass. SEA 2002).

[90] 34 C.F.R. §§ 300.507(a), 300.613–21. Additionally, a federal court concluded that the IDEA reference (at Individuals with Disabilities Education Act, 20 U.S.C. § 1415(b)(1) (2017)) to "all records" is more expansive than "education records" under FERPA. Pollack *ex rel*. B.P. v. Reg'l Sch. Unit 75, 65 IDELR ¶ 206 (D. Me. 2015).

[91] 34 C.F.R. §§ 300.619-.621. The additional scope of education records that, alternatively, "are otherwise in violation of the privacy or other rights of the child" extends the boundaries of the exception potentially to swallow the rule. *Id*. § 300.619. The opposing interpretation is that these regulations require, exhaustion-like, resort to the FERPA hearing procedure as a prerequisite for IHO jurisdiction.

parent refused, a settlement prior to the hearing that offered all the relief that the parents sought?

Yes, according to an unpublished Fifth Circuit decision that reasoned, apparently properly, that the effect under the IDEA may be to preclude attorneys' fees recovery but not subject matter jurisdiction.[92]

II-44. Do IHOs have jurisdiction for enforcement of private settlement agreements?

The limited case law is unsettled on this question. Some jurisdictions support an affirmative answer,[93] but other courts say no.[94] OSEP has stated that 1) the IDEA only provides for judicial enforcement of settlement agreements as part of mediation or the resolution process, and 2) a state may have uniform rules specific to an IHO's authority or lack of authority to review and enforce settlement agreements

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[92] A.O. v. El Paso Indep. Sch. Dist., 368 F. App'x 539 (5th Cir. 2010).

[93] *E.g.*, Mr. J. v. Bd. of Educ., 32 IDELR ¶ 202 (D. Conn. 2000); State v. v. Mo. Dep't of Elementary & Secondary Educ., 307 S.W.2d 209 (Mo. Ct. App. 2010); *cf*. Springfield Local Sch. Dist. Bd. of Educ. v. Jeffrey B., 55 IDELR ¶ 158 (N.D. Ohio 2010); D.B.A. *ex rel.* Snerlling v. Special Sch. Dist. No. 1, Civ. No. 10-1045 (PAM/FLN), 2010 WL 5300946 (D. Minn. Dec. 20, 2010) (upholding IHO's authority to enforce mediated settlement agreement within limited circumstances); State *ex rel.* St. Joseph Sch. v. Mo. Dep't of Elementary & Secondary Educ., 307 S.W.3d 209 (Mo. Ct. App. 2010) (ruling that IHO had jurisdiction to decide whether settlement agreement existed and, if so, whether either party failed to comply with it); I.K. v. Sch. Dist. of Haverford Twp., 961 F. Supp. 2d 674 (E.D. Pa. 2013), *aff'd*, 567 F. App'x 135 (3d Cir. 2014); A.S. v. Office for Dispute Resolution, 88 A.3d 256 (Pa. Commw. Ct. 2014) (ruling that IHO had jurisdiction to decide whether settlement agreement existed); Smith v. Quakertown Cmty. Sch. Dist., 65 IDELR ¶ 180 (Pa. Commw. Ct. 2015) (ruling that IHO had jurisdiction for interrelated claim for additional compensatory education).

[94] *E.g.*, H.C. v. Colton-Pierrepont Cent. Sch. Dist., 341 F. App'x 687 (2d Cir. 2009); W. Chester Area Sch. Dist. v. A.M., 164 A.3d 620 (Pa. Commw. Ct. 2017); J.K. v. Council Rock Sch. Dist., 833 F. Supp. 2d 436, 450 (E.D. Pa. 2011); Sch. Bd. of Lee Cnty. v. M.C. *ex rel*. B.C., 35 IDELR ¶ 273 (Fla. Dist. Ct. App. 2001). The *West Chester Area School District* decision also addressed whether the IHO had jurisdiction to address the parent's duress claim for the settlement agreement, concluding that such jurisdiction existed under Pennsylvania law. *W. Chester Area Sch. Dist.*, 164 A.3d at 627.

reached outside of the mediation or resolution processes.[95] Whether exhaustion applies to judicial enforcement of settlement agreements is a separate issue, which depends in part on the terms of the settlement agreement.[96]

II-45. Do IHOs have jurisdiction for homeschooled students under the IDEA?

Generally not, because although not directly on point the limited OSEP and the court interpretations appear to consider homeschooled students as beyond the IDEA entitlement with a limited exception.[97] The exception, which is for state laws that treat home schools as private schools,[98] would trigger IHO jurisdiction only for the child find obligations of the district of location.[99]

II-46. Do IHOs have jurisdiction to enforce a previous IHO decision, an issue typically arising when the parent claims that the school district failed to implement the order(s) of the previous decision?

No. The prevailing view is that the two appropriate forums are the state CRP under the IDEA[100] and, alternatively via various legal bases,

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[95] Letter to Shaw, 50 IDELR ¶ 78 (OSEP 2007), https://www2.ed.gov/policy/speced/guid/idea/letters/2007-4/shaw121207dph4q2007.pdf. For an example of a state law that expressly provides for this broad, albeit not exclusive, enforcement authority, see 7-1 VT. CODE R. § 2365.1.6.14(c).

[96] F.H. v. Memphis City Sch., 64 F.3d 638 (6th Cir. 2014).

[97] *E.g.*, Letter to Sarzynski, 29 IDELR 904 (OSEP 1997); Letter to Williams, 18 IDELR 742 (1992); Letter to Farris, 213 IDELR 142 (OSEP 1988); Letter to Wierda, 213 IDELR 148 (OSEP 1988) (seeming to suggest that the IDEA rights of homeschoolers does not extend beyond the equitable services obligation); *cf*. Bd. of Educ. of Harford Cnty., 205 F.3d 1332 (4th Cir. 2000) (ruling that parents' initiation of homeschooling during judicial review mooted their request for attorneys' fees under the IDEA); Durkee v. Livonia Cent. Sch. Dist., 487 F. Supp. 2d 313 (W.D.N.Y. 2007) (ruling that district may not, via a due process hearing, override homeschooling parents' refusal to consent to an evaluation).

[98] *E.g.*, Hooks v. Clark Cnty. Sch. Dist., 228 F.3d 1036 (9th Cir. 2000); M.C.G. v. Hillsborough County Sch. Bd., 927 So.2d 224 (Fla. Dist. Ct. App. 2006).

[99] 34 C.F.R. § 300.140(a)–(b) (2018).

[100] *E.g.*, Wyner v. Manhattan Beach Unified Sch. Dist., 223 F.3d 1026, 1028-29 (9th Cir. 2000); B.D. v. District of Columbia, 75 F. Supp. 3d 225 (D.D.C. 2014); Bd.

the courts,[101] rather than the IHO process.[102]

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of Educ. of Wappingers Cent. Sch. Dist., 47 IDELR ¶ 115 (N.Y. SEA 2006); Crown Point Cent. Sch. Dist., 46 IDELR ¶ 269 (N.Y. SEA 2006); Newtown Bd. of Educ., 41 IDELR ¶ 201 (Conn. SEA 2004); *see also Dispute Resolution Procedures*, *supra* note 18, at item C-26. *But cf*. Lake Travis Indep. Sch. Dist. v. M.L. *ex rel*. D.L., 50 IDELR ¶ 105 (W.D. Tex. 2007) (allowing IHO enforcement based on state law). However, parents need not exhaust the state's CRP before seeking judicial enforcement of an IHO order. Porter v. Bd. of Trustees, 307 F.3d 1064, 1074 (9th Cir. 2002). Moreover, CRP—in contrast to a court—does not have jurisdiction for an IHO's refusal to hear or decide an issue. Letter to Hathcock, 19 IDELR 631 (OSEP 1993); *cf*. Letter to Jacobs, 48 IDELR ¶ 287 (OSEP 2007) (interpreting the IDEA to allow appeals of IHO decisions to court—or. presumably, to the second tier in the two-tier states—but not to the SEA where the IHO does not work under the auspices of a "public agency," such as when a separate state office of administrative law conducts the hearing), https://www2.ed.gov/policy/speced/guid/idea/letters/2007-4/jacobs102507dph4q2007.pdf.

[101] The usual procedure is a § 1983 action. *E.g.*, Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 279 (3d Cir. 1996); Robinson v. Pinderhughes, 810 F.2d 1270, 1274-75 (4th Cir. 1987); K.W. v. District of Columbia, 385 F. Supp. 3d 29 (D.D.C. 2019); Dominique L. v. Bd. of Educ. of City of Chi., 56 IDELR ¶ 65 (N.D. Ill. 2011); L.J. *ex rel*. V.J. v. Audubon Bd. of Educ., 47 IDELR ¶ 100 (D.N.J. 2006). However, the § 1983 avenue may be open only to parents, not districts. *E.g.*, Metro. Sch. Dist. v. Buskirk, 950 F. Supp. 899, 903 (S.D. Ind. 1997). Another alternative is under Section 504 and the ADA. *E.g.*, Stropkay v. Garden City Union Free Sch. Dist., 593 F. App'x 37 (2d Cir. 2014); A. v. Hartford Bd. of Educ., 976 F. Supp. 2d 164 (D. Conn. 2013); T.B. *ex rel*. Brenneise v. San Diego Unified Sch. Dist., 56 IDELR ¶ 152 (S.D. Cal. 2011). Where the district belatedly implemented the IHOs orders, a federal court ruled that the parents lacked standing for such an enforcement action. A.S. v. Harrison Twp. Bd. of Educ., 66 F. Supp. 3d 539, 550 (D.N.J. 2014). Finally, the courts are split as to whether the IDEA is a viable avenue for judicial enforcement. *E.g.*, B.D. v. District of Columbia, 817 F.3d 792 (D.C. Cir. 2016) (discussing the case law to date and rejecting the view that a particular provision of the IDEA provides such a cause of action).

[102] However, the concurring judge in a recent federal appeals court decision pointed to the U.S. Department of Education's brief in a previous case to conclude that the IHO route "might" be viable. B.D. v. District of Columbia, 817 F.3d 792, 803–04 (D.C. Cir. 2016). Moreover, where the district is the initiating party, the answer may vary. *Compare* Fresno Unified Sch. Dist. v. K.U., 63 IDELR ¶ 250 (E.D. Cal. 2014), *with* Bd. of Educ. v. Ill. State Bd. of Educ., 741 F. Supp. 2d 920 (N.D. Ill. 2010). For the related issue of whether the IHO has the jurisdiction to reopen the case upon the request of either party for enforcement purposes, see Bd. of Educ. of Ellenville Cent. Sch. Dist., 28 IDELR 337 (N.Y. SEA 1998). For the applicable time period for implementation, see Letter to Voigt, 64 IDELR ¶ 220 (OSEP 2014), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acc-11-020700r-pa-voigt-dueprocesshearingdecisions.pdf.

II-47. Do IHOs have the authority—whether viewed as a matter of jurisdiction or remedies—to raise and resolve an issue *sua sponte*, i.e., on their own without either party raising it?

This issue is unsettled. An OSEP policy interpretation seems to suggest a "yes" answer for the particular issue of the child's "stay-put."[103] On the other hand, the limited case law arguably answers "no" to this question more generally whether viewed as a matter of the underlying issue or the predicate remedy, whether for declaratory[104] or injunctive[105] relief. Moreover, whether the complaint sufficiently raised the issue depends on various factors, at least in the Second Circuit.[106]

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[103] Letter to Armstrong, 28 IDELR 303 (OSEP 1997). The question to OSEP contained the at least partial *sua sponte* condition that "stay put is not raised as an issue during the pre-hearing stages," but the answer did not specifically differentiate this contingency.

[104] *E.g.*, C.W.L. v. Pelham Union Free Sch. Dist., 149 F. Supp. 3d 451 (S.D.N.Y. 2015); Saki *ex rel*. Saki v. Haw. Dep't of Educ., 50 IDELR ¶ 103 (D. Haw. 2008); Mifflin Cnty. Sch. Dist. v. Special Educ. Due Process Appeals Bd., 800 A.2d 1010 (Pa. Commw. Ct. 2002); Bd. of Educ. v. Redovian, 18 IDELR 1092 (N.D. Ohio 1992). The third case provides only limited authority, because the court was addressing the authority of the second-tier review panel, not the IHO, and its rationale included that doing so "without the benefit of a full factual record and adjudication on the issue [would result in] in a premature interruption of the administrative process." *Mifflin Cnty. Sch. Dist. v. Special Educ. Due Process Appeals Bd.,* 800 A.2d at 1014.

[105] *E.g.*, Dep't of Educ., Haw. v. Leo W., 226 F. Supp. 3d 1081 (D. Haw. 2015); District of Columbia v. Walker, 109 F. Supp. 3d 58 (D.D.C. 2015); Lofisa S. *ex rel*. S.S. v. Haw. Dep't of Educ., 60 IDELR ¶ 191 (D. Haw. 2013), *aff'd mem*., 692 F. App'x 842 (9th Cir. 2017); Sch. Bd. of Martin Cnty. v. A.S., 727 So.2d 1071 (Fla. Ct. App. 1999); Slack v. Del. Dep't of Educ., 826 F. Supp. 115 (D. Del. 1993); *cf.* Neshaminy Sch. Dist. v. Karla B. *ex rel*. Blake B., 26 IDELR 827 (E.D. Pa. 1997) (exhaustion rationale); Mars Area Sch. Dist. v. Laurie L., 827 A.2d 1249 (Pa. Commw. Ct. 2003) (review officer level). *But cf*. Albuquerque Pub. Sch. v. Sledge, 74 IDELR ¶ 290 (D.N.M. 2019) (affirming a placement remedy that the parent "did not know to propose" in the complaint). The first decision was the only one specific to IHOs, and it is ambiguous as to whether the basis was *functus officio* rather than *sua sponte*.

[106] *E.g.,* H.W. v. N.Y.S. Educ. Dep't, 65 IDELR ¶ 136 (E.D.N.Y. 2015) (citing C.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 78 (2d Cit. 2014)).

II-48. Does expiration of the forty-five-day period prior to the start of the hearing, including any extensions, deprive the IHO of jurisdiction for the case?

No, according to a federal district court decision in Hawaii. Contrary to the IHO's interpretation, the court concluded that this automatic divestiture of jurisdiction would "fl[y] in the face of the very spirit of the IDEA" and could result in a "serious injustice" to the rights of the parent and child with a disability.[107]

II-49. In a disciplinary hearing, where manifestation determination is at issue, does the IHO have jurisdiction to determine whether the student violated the school's code of conduct?

Yes. More specifically, according to OSEP, "there may be instances where a hearing officer, in his discretion, would address whether such a violation has occurred."[108]

II-50. Do IHOs have the authority to dispose of a case on the grounds of mootness?

Yes, but they should make sure that the case meets the applicable relatively narrow standard for mootness.[109]

II-51. Do IHOs have jurisdiction when the parent names a SEA as a defendant?

According to OSEP, this issue is within the IHO's discretionary authority. More specifically, the IHO "has the authority to determine, based on the individual facts and circumstances in the case, whether the SEA is a proper party to the due process hearing."[110] The limited

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[107] Paul K. *ex rel*. Joshua K. v. Haw., 567 F. Supp. 2d 1231, 1236 (D. Haw. 2008).

[108] Letter to Ramirez, 60 IDELR ¶ 230 (OSEP 2012); *cf*. District of Columbia v. Doe, 611 F.3d 888 (D.C. Cir. 2010) (ruling that this issue is within IHO's authority if matter of FAPE).

[109] *E.g.*, Morris v. District of Columbia, 38 F. Supp. 3d 57 (D.D.C. 2014).

[110] Letter to Anonymous, 69 IDELR ¶ 189 (OSEP 2017), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/dcl-anonymous-due-

case law establishes at least that SEAs are not necessary parties at due process hearings.[111]

II-52. May a state, through its procedures, or the IHO limit the issues to those previously raised at the IEP team level?

Not according to OSEP, because such limits "would impose additional procedural hurdles on the right to a due process hearing that are not contemplated by the IDEA."[112]

II-53. Do IHOs have remedial authority for the extent of related services determined by another agency via an interagency agreement under state law?

Yes, according to a Ninth Circuit decision. However, the answer ultimately depends not only on the IDEA but also the state (which, in this case, was California) law.[113]

II-54. Do IHOs have jurisdiction for claims under Section 504 of the Rehabilitation Act (§ 504) or the Americans with Disabilities Act (ADA)?

In most states, the IHO, if within the system under the IDEA, does not have jurisdiction for § 504/ADA claims regardless of whether they are on behalf of a child with an IEP or a child who is only covered by §

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process-01-02-2017.pdf. For the overlapping case law, including the aforementioned *Chavez* decision that OSEP indirectly cited, see Perry A. Zirkel, *State Education Agencies as Defendants under the IDEA and Related Federal Laws: A Compilation of the Court Decisions*, 336 EDUC. L. REP. 667 (2016).

[111] *E.g.*, Wachlarowicz v. Sch. Bd. of Indep. Sch. Dist. No. 832, 40 IDELR ¶ 209 (D. Minn. 2003) (collected cases).

[112] Letter to Lenz, 37 IDELR ¶ 95 (OSEP 2002), https://www2.ed.gov/policy/speced/guid/idea/letters/2002-1/lenz030602notice.pdf; *see also* Letter to Dowaliby, 38 IDELR ¶ 14 (OSEP 2002), https://www2.ed.gov/policy/speced/guid/idea/letters/2002-2/dowaliby062602-2q2002.pdf; Letter to Zimberlin, 34 IDELR ¶ 150 (OSEP 2000), https://www2.ed.gov/policy/speced/guid/idea/letters/2000-4/zimberlin101900dueprocess.4q2000.pdf.

[113] Douglas v. Cal. Office of Admin. Hearings, 650 F. App'x 312 (9th Cir. 2016).

504/ADA; however, a few states (e.g., Massachusetts, New Jersey, and Pennsylvania) are full exceptions, and others provide for jurisdiction in certain specialized situations (e.g., if the § 504 or ADA issue is intertwined with the IDEA issue(s) or if the school district makes special contractual arrangements with the state IDEA IHO system).[114]

D. Timelines in General

II-55. If the district allegedly failed to respond to the parents' due process complaint within the required ten-day period, what is the appropriate avenue of relief?

According to OSEP, the appropriate recourse is for the parents to proceed with the hearing, with the IHO having the discretion to identify and resolve this issue.[115]

II-56. What is the statute of limitations for filing for a due process hearing under the IDEA?

In short, two years unless state law prescribes a different period.[116] However, the interpretation and application of the statutory language, which the regulations repeat without elaboration, are complicated. The complications include (1) determination of the triggering point of when the parent or district had actual or constructive notice of the alleged action; (2) the scope of the two specified exceptions; and (3) the potentially broadening effect of the alleged action and its

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[114] *E.g.,* Perry A. Zirkel, *Impartial Hearings under Section 504: A State-by-State Survey*, 279 EDUC. L. REP. 1 (2012); Perry A. Zirkel, *The Public Schools' Obligation for Impartial Hearings under Section 504*, 22 WIDENER L.J. 135 (2012). For a recent interpretation that Tennessee's ambiguous law provides IHOs with jurisdiction for § 504 claims of IDEA-eligible students, see P.G. v. Genesis Learning Ctrs., 74 IDELR ¶ 223 (M.D. Tenn. 2019).

[115] Letter to Inzelbuch, *supra* note 59. Given its overlapping subject matter and breadth, this OSEP letter is also included in the Jurisdiction section. *Id.*

[116] Individuals with Disabilities Education Act, 20 U.S.C. § 1415(b)(6)(B), (f)(3)(C)-(D) (2017).

redressability. [117]

II-57. Does the IDEA's statute of limitations for an impartial hearing call for a "look back" approach from the filing date?

No, the starting point is the date that the filing party "knew of should have known" of the alleged violation.[118]

II-58. Have courts generally interpreted the exceptions for the limitations period broadly or narrowly?

Although the case law is limited and not uniform, the majority of courts have taken a rather narrow view.[119]

II-59. If the IHO exceeds the forty-five-day regulatory deadline, is a reviewing court likely to provide the challenging party with remedial relief?

Not in the majority of the cases, because the courts treat it as a procedural violation, which often does not result in harm to the student. For example, in a Seventh Circuit case where the court upheld the IHO's decision that the district had provided an appropriate program for the child, the parent's claim was to no avail.[120] Conversely, in the minority of cases where the court either uses a per se approach or the court concludes that this procedural violation is prejudicial, the result may be tuition reimbursement or compensatory

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[117] For a systematic synthesis of the case law, see Perry A. Zirkel, *The Statute of Limitations for an Impartial Hearing Under the IDEA: A Guiding Checklist*, 363 EDUC. L. REP. 483 (2019).

[118] 20 U.S.C. § 1415(f)(3)(C).

[119] *E.g.*, Zirkel, *supra* note 117, at 487 nn.34 & 36.

[120] Heather S. v. Wis., 125 F.3d 1045 (7th Cir. 1995); *see also* Pangerl v. Peoria Unified Sch. Dist., 780 F. App'x 505 (9th Cir. 2019); C.W. v. Rose Tree Media Sch. Dist., 395 F. App'x 824 (3d Cir. 2010); J.D. v. Pawlet Sch. Dist., 224 F.3d 60 (2d Cir. 2000); Amann v. Stow, 982 F.3d 644 (1st Cir. 1992); Oskowis v. Ariz. Dep't of Educ., 76 IDELR ¶ 292 (D. Ariz. 2020); Wilkins v. District of Columbia, 571 F. Supp. 2d 163 (D.D.C. 2008); E.M. v. Pajaro Valley Sch. Dist., 48 IDELR ¶ 39 (E.D. Cal. 2007); G.W. v. New Haven Unified Sch. Dist., 46 IDELR ¶ 103 (N.D. Cal. 2006); Grant *ex rel*. Sunderlin v. Indep. Sch. Dist. No. 11, 43 IDELR ¶ 219 (D. Minn. 2005).

education.[121] Other consequences to the defendant may be attorneys' fees,[122] an exception to the exhaustion doctrine,[123] or possibly compensatory damages under § 504.[124] Regardless of the judicial consequences, OSEP continues to emphasize the SEA's responsibility to monitor compliance with this timeline, with the limited exception being for allowable extensions.[125]

II-60. Do the IDEA regulations' allowance for extensions excuse any such alleged delay?

Yes, but 1) the extensions must be requested by a party (not unilaterally by the IHO) and for specific periods of time;[126] and 2) the defendant agency—whether the LEA or the SEA—ultimately must

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[121] Miller v. Monroe Sch. Dist., 131 F. Supp. 3d 1107 (W.D. Wash. 2015); Blackman v. District of Columbia, 277 F. Supp. 71 (D.D.C. 2003) (awarding tuition reimbursement); Haw. Dep't of Educ. v. T.G. *ex rel*. Cheryl G., 56 IDELR ¶ 97 (D. Haw. 2011) (adopting per se denial of FAPE approach for outright denial to provide a hearing but remanding reimbursement issue for determination of appropriateness of unilateral placement); *cf.* Rose *ex rel*. Rose v. Chester Cnty. Intermediate Unit, 24 IDELR 61 (E.D. Pa. 1996), *aff'd mem*., 114 F.3d 1173 (3d Cir. 1997) (finding violation but unclear to what extent, if any, it was the basis for the denial of FAPE and reimbursement).

[122] *E.g.*, Engwiller v. Pine Plains Cent. Sch. Dist., 110 F. Supp. 2d 236 (S.D.N.Y. 2000); *cf*. Scorah v. District of Columbia, 322 F. Supp. 2d 12 (D.D.C. 2004) (unclear extent as the basis for the attorneys' fees award); Bd. of Educ. of Green Local Sch. Dist. v. Redovian, 18 IDELR 1092 (N.D. Ohio 1992) (suggesting possible attorneys' fees where no denial of FAPE).

[123] *E.g.*, McAdams v. Bd. of Educ., 216 F. Supp. 2d 86 (E.D.N.Y. 2002); *cf*. M.G. v. N.Y.C. Dep't of Educ., 15 F. Supp. 3d 296 (S.D.N.Y. 2014) (theoretically but not established in this case).

[124] K.J. *ex rel*. K.J., Jr. v. Greater Egg Harbor Reg'l High Sch. Bd. of Educ., 65 IDELR ¶ 179 (D.N.J. 2015) (suggesting possible § 504 liability).

[125] *Dispute Resolution Procedures*, *supra* note 18, at item C-21.

[126] OSERS Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.515(c) (2018). According to OSEP, the IHO need not grant the request for an extension, and where the IHO does grant it, the IHO must provide the parties with notice of not only this ruling but also the specific date for the final decision. More recently, OSEP emphasized that the extension must be for a specific period even if the requesting party does not specify a time period. *Dispute Resolution Procedures*, *supra* note 18, at item C-22.

show the documentation and justification for the extensions.[127]

II-61. Does the IHO have discretion to deny such requests?

Yes, subject to state law,[128] denying continuances is within an IHO's good faith discretion with due consideration to unrepresented parents.[129]

II-62. May states specify timelines that differ from those that the IDEA specifies for situations not expressly authorized in the IDEA?

Not, under the preemption doctrine,[130] if they provide less protection to the child, unless the IDEA expressly provides for state variation, as it does for the limitations periods[131] or for evaluation.[132]

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[127] *E.g.*, Lillbask *ex rel*. Mauclaire v. Sergi, 117 F. Supp. 2d 182, 189 (D. Conn. 2000); *cf.* L.C. v. Utah State Bd. of Educ., 125 F. App'x 252, 261 (10th Cir. 2005) (considering circumstances in determining whether the length was reasonable). For related dicta as to the possible consequences of abusing the extension exception, see *Doe v. East Greenwich School Department*, 899 A.2d 1258 (R.I. 2006). For an overview of the various state laws with specific provisions for extensions, including required reasons, see Zirkel, *supra* note 5, at 21–22.

[128] *E.g.*, Lake Washington Sch. Dist. No. 414 v. Office of Superintendent of Pub. Instruction, 51 IDELR ¶ 278 (D. Wash. 2009), *aff'd*, 634 F.3d 1065 (9th Cir. 2011); J.S. *ex rel*. John S. v. N.Y.C. Dep't of Educ., 69 IDELR ¶ 153 (S.D.N.Y. 2017) (upholding IHO's discretion to refuse postponement under applicable N.Y. regulation); J.R. *ex rel*. W.R. v. Sylvan Union Sch. Dist., 49 IDELR ¶ 253 (E.D. Cal. 2008) (refusing district's request to enjoin IHO's extension to parent under state "good cause" standard).

[129] *E.g.*, P.J. v. Pomona Unified Sch. Dist. 248 F. App'x 775 (9th Cir. 2007); A.S. v. William Penn Sch. Dist., 63 IDELR ¶ 62 (E.D. Pa. 2014); J.D. *ex rel.* Davis v. Kanawha Cnty. Bd. of Educ., 53 IDELR ¶ 225 (S.D. W. Va. 2009), *aff'd mem*., 357 F. App'x 515 (4th Cir. 2009); Lessard v. Wilton-Lyndborough Cooperative Sch. Dist., 47 IDELR ¶ 299 (D.N.H. 2007); D.Z v. Bethlehem Area Sch. Dist., 2 A.3d 712 (Pa. Commw. Ct. 2010); O'Neil v. Shamokin Area Sch. Dist., 41 IDELR ¶ 154 (Pa. Commw. Ct. 2004); *cf.* Horen v. Bd. of Educ. of Toledo Pub. Sch. Dist., 655 F. Supp. 2d 794 (N.D. Ohio 2009) (rejecting 14th Amendment procedural due process claim).

[130] The doctrine, which is based on the supremacy clause in the Constitution, applies at least if the conflict, and Congressional intent for supplanting state law, is "clear and manifest." *E.g.*, N.Y. State Conference of Blue Cross & Blue Shield Plans *v.* Travelers Ins. Co*.,* 514 U. S. 645, 655 (1995).

[131] 34 C.F.R. §§ 300.507(a)(2), 300.516(b).

[132] *Id*. § 300.301(c).

II-63. Does the SEA's monitoring responsibility to assure correction of noncompliance within one year limit the IHO's remedial order for compensatory education to one year?

No, not in light of the statute of limitations and broad IHO remedial authority under the IDEA. OSEP recently appeared to agree with the inapplicability or at least relaxed applicability of the regulation requiring the state to correct noncompliance "as soon as possible, and in no case later than one year"[133] by opining that "hearing decisions must be implemented within the timeframe prescribed by the [IHO] or, if there is no timeframe prescribed by the [IHO], within a reasonable timeframe set by the State as required by 34 CFR §§ 500.111–300.514."[134] Nevertheless, it is effective practice for IHOs write their remedial orders in such a way that the state can verify the district's initiation of implementation and plan for completion of the award.

E. Expedited Hearings

II-64. Under what circumstances is the parent entitled to an expedited hearing?

The IDEA regulations require the opportunity for an expedited hearing when the parent challenges a manifestation determination or any other aspect of a district-imposed disciplinary change in placement or interim alternate educational setting.[135]

II-65. Under what circumstances are school districts entitled to an expedited hearing?

The school district must have the opportunity for such a hearing upon requesting an interim alternate educational setting based on substantial likelihood of the current placement resulting in injury to the child or

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[133] *Id*. § 300.600(e).
[134] Letter to Zirkel, 68 IDELR ¶ 142 (OSEP 2016).
[135] 34 C.F.R. § 300.532(c)(1).

others.[136]

II-66. What is the timeline for an expedited hearing?

Unless the state has adopted different procedural rules, the deadlines are as follows, starting with the receipt of the complaint: resolution session – within seven days; hearing – within twenty school days; decision – within ten school days of the hearing.[137] According to OSEP, the reference to "school days" for the second and third parts of this specified schedule includes days during the summer period for school districts that "operate summer school programs for both students with, and students without, disabilities," but not when the summer programming is only ESY.[138] Moreover, OSEP clarified that the overall forty-five-day deadline, upon completion of the resolution period, applies regardless of whether the summer days count for these two steps.[139] Finally, OSEP's interpretation seems, on balance, to limit the hearing to one day, concluding that the hearing be "completed" within twenty school days of the filing date.[140]

II-67. Do the IDEA provisions for specific IHO extensions apply, whether directly upon the request of one or both parties or via state law, to expedited hearings?

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[136] *Id.*; *see also* Letter to Huefner, 47 IDELR ¶ 228 (OSEP 2007), https://www2.ed.gov/policy/speced/guid/idea/letters/2007-1/huefner030807stayput1q2007.pdf.

[137] 34 C.F.R. § 300.532(c)(2)-(4). The references to school days would seem to conflict during the summer months with the general requirement for issuance of the decision within forty-five calendar days after completion of the resolution-session period. *Id.* § 300.515(a). However, the absence of extensions, or postponements, in the regulations for expedited hearings potentially mitigates this possible conflict.

[138] Letter to Fletcher, 72 IDELR ¶ 275 (OSEP 2018), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep-letter-to-fletcher-08-23-2018.pdf;; *see also Dispute Resolution Procedures*, *supra* note 18, at item E-5.

[139] Letter to Cox, 59 IDELR ¶ 140 (OSEP 2012), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/06-22-12expdph3q2012.pdf.

[140] Letter to Fletcher, 72 IDELR ¶ 275 (OSEP 2018), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep-letter-to-fletcher-08-23-2018.pdf.

Apparently not, because—as summarized in the previous item—the IDEA regulation for expedited hearings provides its own timeline and the express allowance for state law variations preserves these deadlines.[141] OSEP recently reached this conclusion, reasoning that "[t]here is no provision in the Part B regulations that would give a hearing officer conducting an expedited due process hearing the authority to extend the timeline for issuing this determination at the request of a party to the expedited due process hearing."[142] More recently, OSEP reaffirmed this conclusion, emphasizing that waiver of the IDEA timeline for expedited hearings is not permissible.[143]

II-68. In expedited hearings, does the usual five-day disclosure rule apply or does a special two-day rule replace it?

Although the proposed IDEA regulations contained a two-day exception for expedited hearings, the final version retained the five-day rule without exception.[144] The Agency's stated reasoning was that "limiting the disclosure time to two days would significantly impair the ability of the parties to prepare for the hearing, since one purpose of the expedited hearing is to provide protection to the child."[145] In an analogous case under state law, a federal court in New Jersey remanded the case back to the IHO for a new hearing based on the prejudicial effect of not providing the requisite five-day notice.[146]

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[141] 34 C.F.R. § 300.532(c)(4). However, the accompanying preserved cross-referenced regulations for non-expedited hearings do not include the one concerning extensions. *Id*. § 300.515(c).

[142] Letter to Snyder, 67 IDELR ¶ 96 (OSEP 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/15-012744-ca-snyder-exdueprocess-clearance.pdf; *see also Dispute Resolution Procedures*, *supra* note 18, at item E-4.

[143] Letter to Zirkel, 68 IDELR ¶ 142 (OSEP 2016), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/oseplettertozirkel8-22-16.pdf.

[144] 34 C.F.R. § 300.532(c)(1) (incorporating *id*. § 300.512(a)(3) without exception).

[145] Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,726 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300).

[146] B.G. v. Ocean City Bd. of Educ., 64 IDELR ¶ 105 (D.N.J. 2014).

II-69. For expedited hearings, may a party challenge the sufficiency of the complaint or may an IHO otherwise extend the timeline for completion?

No, according to OSEP.[147]

II-70. Do the requirements for expedited hearings apply if the hearing request encompasses both the requisite disciplinary circumstances and one or more other issues?

In light of the qualified discretion accorded to IHOs, OSEP opines that in such cases "a hearing officer could decide that it is prudent to bifurcate the hearing, thus allowing for an expedited hearing on the discipline and removal issues, and a separate hearing on any other issues."[148]

II-71. Do the two remedies that the IDEA regulations specify for expedited hearings limit the IHO from other relief?

No, not according to OSEP. The regulations authorize the IHO to restore the student's placement or order a 45-day interim alternate educational setting agency.[149] The agency issued guidance concluding that these two remedies do not preclude an IHO from "ordering relief that is appropriate to remedy the alleged violations based on the facts and circumstances of each individual complaint."[150]

F. Prehearing and Hearing Procedures, Including Evidentiary Matters

II-72. Does a school district practice of providing the IHO with a copy of the student's records immediately upon receiving notice of the IHO's appointment violate the IDEA, including its incorporated FERPA requirements?

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[147] *Dispute Resolution Procedures*, *supra* note 18, at item E-6.
[148] Letter to Snyder, *supra* note 142.
[149] 34 C.F.R. § 300.532(b).
[150] Letter to Zirkel, 74 IDELR ¶ 171 (OSEP 2019).

Not according to OSEP, regardless of whether the parent or the district was the filing party.[151]

II-73. Are discovery procedures available in IDEA due process hearings?

The IDEA does not provide for discovery (beyond the five-day rule),[152] and only a minority of state laws provide for it in IDEA hearings.[153] If state law is silent in this matter, OSEP has stated that whether discovery procedures are available and, if so, their nature and extent are within the discretion of the IHO.[154] In a Florida case, the appellate court held that in the absence of state law the IHO lacked authority to order discovery.[155] However, a year later the Florida's legislature repealed the exemption of IDEA hearings from the statute providing such authority.[156] In the minority of jurisdictions that allow for discovery in IDEA cases, such as Florida and Massachusetts, related legal issues come to the fore.[157]

II-74. Does the IDEA require a prehearing conference?

No, although it is generally regarded as best practice for IHOs, and some state laws require it.[158]

II-75. Does the IDEA specify the time or place for the hearing?

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[151] Letter to Stadler, 24 IDELR 973 (OSEP 1996).

[152] *E.g.*, B.H. *ex rel*. S.H. v. Joliet Sch. Dist. No. 86, 54 IDELR ¶ 121 (N.D. Ill. 2010) (distinguishing the five-day disclosure provision of the IDEA); Horen v. Bd. of Educ. of Toledo Pub. Sch. Dist., 655 F. Supp. 2d 794, 806 (N.D. Ohio 2009) (observing that discovery is counter to the timeline for IHOs).

[153] Zirkel, *supra* note 5, at 14–16 (identifying 19 states that have some form of discovery though not necessarily the full procedures of civil courts).

[154] Letter to Stadler, 24 IDELR 973 (OSEP 1996).

[155] S.T. *ex rel.* S.F. v. Sch. Bd. of Seminole Cnty., 783 So. 2d 1231 (Fla. Dist. Ct. App. 2001).

[156] FLA. STAT. § 120.569(2)(f) (2018).

[157] *E.g.*, Andover Pub. Sch., 68 IDELR ¶ 208 (Mass. SEA 2016) (partially granting parent's discovery request, specifically allowing for the redacted IEPs and 504 plans, but not the other specified information, for other students in the child's proposed placement).

[158] *E.g.*, 105 ILL. COMP. STAT. ANN. 5/14-8.02a(g)(40) (2018).

No, except that the time and place be reasonably convenient to the parents and the child.[159]

II-76. Must the IHO enter a default judgment against the district for failing to file a sufficient response to the parents' complaint within ten days of service?

No, as the Ninth Circuit explained, the IDEA only requires the district to "send to the parent a response" to the complaint and, thus, "[a] due process hearing is the redress for an unsatisfactory response."[160]

II-77. What is the proper procedure if the district fails to file any response at all to the complaint?

According to the Ninth Circuit, rather than go forward with the hearing, the IHO "must order a response and shift the cost of the delay to the school district, regardless of who is ultimately the prevailing party."[161] Moreover, the Ninth Circuit advised that the IHO should raise the issue sua sponte even if the parent does not make a motion on this matter.[162]

II-78. Does the IDEA allow the filing party to amend the complaint?

Yes, but only if (a) the other party consents in writing to the amendment and has the opportunity to resolve the due process complaint through the resolution meeting; or (b) the IHO grants permission no later than five calendar days before the first hearing session.[163]

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[159] OSERS Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.515(d) (2018).

[160] G.M. *ex rel*. Marchese v. Dry Creek Joint Elementary Sch. Dist., 595 F. App'x 698, 699 (9th Cir. 2014).

[161] M.C. *ex rel*. M.N. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1199–1200 (9th Cir. 2017).

[162] *Id*. at 1200 n.6.

[163] 34 C.F.R. § 300.508(d)(3). However, in the comments accompanying the 2006 regulations, OSEP suggested that IHOs exercise "appropriate discretion" for pro se parents or minor revisions. Assistance to States for the Education of Children

II-79. Do IHOs have authority to dismiss a case and, if so, with prejudice?

IHOs certainly have the authority for dismissal in certain circumstances.[164] First, the IDEA regulations supply some of these circumstances, such as explicitly authorizing dismissals with regard to parents' failure to participate in resolution sessions[165] and implicitly authorizing dismissals with regard to complaints that the hearing officer deems to be insufficient.[166]

Second, some state laws provide IHOs with authority for dismissals with or without prejudice.[167] For example, Georgia authorizes the IHO to write a decision for dismissal with prejudice when the party with the burden of production does not meet its burden of persuasion[168] and to issue a dismissal without prejudice upon a party's motion for voluntary dismissal for cause.[169]

Third, courts have delineated other circumstances, such as a federal court decision upholding dismissal with prejudice where the parents repeatedly violated the IHO's hearing orders[170] and another federal

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With Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,691 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300).

[164] *E.g.*, Timothy E. Gilsbach, *Special Education Due Process Hearing Requests under the IDEA: A Hearing Should Not Always Be Required*, 2015 B.Y.U. EDUC. & L.J. 187 (2015).

[165] 34 C.F.R. § 300.510(b)(4).

[166] *Id.* § 300.508(c). As a general matter, OSEP has opined that "apart from the hearing rights set out at § 300.308, decisions regarding the conduct of Part B due process hearings are left to the discretion of hearing officers." Letter to Anonymous, 23 IDELR 1073, 1075 (OSEP 1995).

[167] *E.g.*, Edward S. *ex rel.* T.S. v. W. Noble Sch. Corp., 63 IDELR ¶ 34 (N.D. Ind. 2014); Stancourt v. Worthington City Sch. Dist. Bd. of Educ., 44 IDELR ¶ 166 (Ohio Ct. App. 2005) (upholding dismissal with prejudice under state law); *cf.* T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438 (W.D.N.Y. 2012) (review officer dismissal with prejudice under state law standards).

[168] *E.g.*, GA. COMP. R. & REGS. 616-1-2.35 (2010).

[169] *Id.* 160-4-7-.12(3)(m).

[170] *Edward S.*, 63 IDELR ¶ 34; *cf.* Oskowis v. Sedona-Oak Creek Unified Sch. Dist., 73 IDELR ¶ 226 (D. Ariz. 2019 (upholding dismissal without a hearing for

court decision ruling that dismissal with prejudice should be reserved for extreme cases, with close calls—especially for *pro se* parents—being against this sanction.[171]

In general, as a matter of best practice, it would appear to be advisable to 1) hold a hearing where the basis is a factual matter of material dispute;[172] 2) limit dismissals with prejudice to cases of rather egregious conduct by the filing party, whether separately sanctionable or not;[173] and 3) issue a written opinion with factual findings and legal conclusions sufficient to withstand judicial review.[174] Finally, for the variation of a contingent order of dismissal with prejudice, a federal district court upheld the authority under an IHO's equitable powers when state law does not expressly prohibit such an order, with the possible abuse of discretion based on the circumstances.[175]

II-80. Does the same answer apply to motions for summary judgment?

Basically yes. First, the use of these terms in the context of IDEA hearings is often without the same relatively clear distinction that applies in the judicial context, especially because discovery often does

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repeated baseless claims). For further examples under the rubric of the HO's sanctioning authority, see *infra* note 195.

[171] Nickerson-Reti v. Lexington Pub. Sch., 893 F. Supp. 2d 276 (D. Mass. 2012); *cf*. Mylo v. Bd. of Educ. of Balt. Cnty., 948 F.2d 1282 (4th Cir. 1991) (ruling, specific to judicial action, that the sanction for the parent should not generally extend to dismissal for the student).

[172] *E.g.*, Hazelton Area Sch. Dist., 36 IDELR ¶ 30 (Pa. SEA 2001).

[173] *E.g.*, Bd. of Educ. of Hillsdale Cmty. Sch., 32 IDELR ¶ 62 (Mich. SEA 1999).

[174] For examples of IHO decisions that did not meet this sufficiency test, see Wehrspann v. Dubuque Cmty Sch. Dist., 118 LRP 33775, *adopted*, 72 IDELR ¶ 212 (N.D. Iowa 2018); A.B. v. Clarke Cnty. Sch. Dist., 52 IDELR ¶ 259 (M.D. Ga. 2009). Of course, even where the decision is sufficiently specific, it is subject to being reversed on appeal to court. *E.g.*, Alexandra R. *ex rel.* Burke v. Brookline Sch. Dist., 53 IDELR ¶ 93 (D.N.H. 2009).

[175] Silva v. District of Columbia, 57 F. Supp. 3d 62 (D.D.C. 2014). In this case, the court concluded that the contingent order of dismissal with prejudice was not an abuse of discretion where the filing party withdrew her complaint one week before the hearing and the IHO allowed thirty days for either refilling or requesting recusal. However, the court recommended that additional findings of facts and statements of appeals rights "might have been helpful to all parties." *Id*. at 68.

not apply in the same full sense.[176] Second, several state laws, especially those where IHOs are central panel ALJs, expressly provide for summary judgments as part of their standard civil procedure practice.[177]

II-81. Do IHOs have wide discretion with regard in conducting the hearing, including determining the scope of evidence?

Yes.[178] For example, the weighing of testimony, even in the absence of rebuttal or objection, is within the IHO's authority.[179] The generally applicable judicial standard of review is abuse of discretion, which usually favors the IHO.[180] However, the federal district court

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[176] *E.g.*, Andrew Lee & Perry A. Zirkel, *State Laws for Pre-Hearing Phase of Due Process Hearings under the Individuals with Disabilities Education Act*, __ J. NAT'L ASS'N ADMIN. L. JUDICIARY __, __ (in press).

[177] *Id*. at __.

[178] In the commentary accompanying the IDEA regulations, OSEP's illustrations of IHO's broad procedural discretion include 1) determining appropriate expert witness testimony (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,691 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300)); 2) ruling upon compliance with timelines and the statute of limitations (*id*. at 46,705-46,706); 3) determining whether the non-complaining party may raise other issues at the hearing not specified in the complaint (*id*. at 46706); and 4) providing proper latitude for pro se parties (*id*. at 46,699).

[179] McAllister v. District of Columbia, 53 F. Supp. 3d 55 (D.D.C. 2014).

[180] *E.g.*, O'Toole v. Olathe Unified Sch. Dist. No. 233, 144 F.3d 692, 709 (10th Cir. 1998); Price v. Upper Darby Sch. Dist., 68 IDELR ¶ 214 (E.D. Pa. 2016); D.Z. v. Bethlehem Area Sch. Dist., 2 A.3d 712, 721 (Pa. Commw. Ct. 2010); *cf.* Sch. Bd. of Norfolk v. Brown, 769 F. Supp. 2d 928 (E.D. Va. 2010) (upholding time limits and extensions favoring parents); Jalloh *ex rel.* R.H. v. District of Columbia, 535 F. Supp. 2d 13 (D.D.C. 2008) (upholding IHO's exclusion of evidence); Renollett v. Indep. Sch. Dist. No. 11, 42 IDELR ¶ 201 (D. Minn. 2005), *aff'd on other grounds*, 440 F.3d 1007 (8th Cir. 2006) (upholding IHO's limiting the issues, per state law for timely hearings). *But cf*. J.C. *ex rel*. J.R. v. N.Y.C. Dep't of Educ., 66 IDELR ¶ 239 (S.D.N.Y. 2015); S.W. *ex rel*. W.W. v. Florham Park Bd. of Educ., 70 IDELR ¶ 46 (D.N.J. 2017) (prejudicial exclusion). For further support of the prevailing view, see the commentary accompanying the regulations. 71 Fed. Reg. 46,706 (Aug. 14, 2006) ("The specific application of those [general regulatory] procedures to particular cases generally should be left to the discretion of hearing officers who have the knowledge and ability to conduct hearings in accordance with standard legal practice. There is nothing in the Act or these regulations that would prohibit a

for the District of Columbia has required IHOs to provide parents with a flexible opportunity for providing evidence to support the remedies of tuition reimbursement and compensatory education where the parents prove the requisite entitlement for such relief.[181] Similarly, courts have provided ample latitude to IHOs in maintaining an efficient completion of the case, keeping the parties focused on the issues.[182]

II-82. Do IHOs have the authority to determine procedural issues that the IDEA does not address?

Yes, according to OSEP, just as long as "such determinations are made in a manner that is consistent with a parent's or a public agency's right to a timely due process hearing."[183]

II-83. What are the key factors that IHOs should carefully consider and reasonably explain in their credibility determinations?

Although various factors may apply depending on the circumstances, they include the extent of the witness's pertinent experience with the child[184] and the witness's relevant expertise.[185]

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hearing officer from making determinations on procedural matters not addressed in the Act so long as such determinations are made in a manner that is consistent with a parent's or a public agency's right to a timely due process hearing").

[181] A.G. v. District of Columbia, 794 F. Supp. 2d 133 (D.D.C. 2011); Gill *ex rel*. W.G. v. District of Columbia, 751 F. Supp. 2d 104 (D.D.C. 2010), *further proceedings*, 770 F. Supp. 2d 112 (D.D.C. 2011); Henry v. District of Columbia, 750 F. Supp. 2d 94 (D.D.C. 2010).

[182] *E.g.*, A.M. v. District of Columbia, 933 F. Supp. 2d 193 (D.D.C. 2013).

[183] Letter to Cohen, *supra* note 23 (citing Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. at 46,704).

[184] *E.g.*, Sebastian M. v. King Philip Reg'l Sch. Dist., 685 F.3d 79 (1st Cir. 2012); Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Michael R. *ex rel*. Lindsey R., 44 IDELR ¶ 36 (N.D. Ill. 2005), *aff'd*, 486 F.3d 267 (7th Cir. 2007); *cf*. W. Windsor-Plainsboro Reg'l Sch. Dist. Bd. of Educ. v. J.S. *ex rel*. M.S., 44 IDELR ¶ 159 (D.N.J. 2005) (ruling that exclusive reliance on parents' experts as "utterly persuasive" was unsupported in the record and, thus, not entitled to any deference). The child's teachers and other regular service providers merit special attention in this regard. *E.g.*, Heather S. v. Wis., 125 F.3d 1045, 1057 (7th Cir. 1997); Arlington Cnty. Sch. Bd. v. Smith, 230 F. Supp. 2d 704, 730 (E.D. Va. 2002).

II-84. Do the Federal Rules of Evidence, such as Rule 702 concerning the standard for expert witnesses, apply to IDEA impartial hearings?

Not directly, because they apply to federal courts; state courts may follow a different standard.[186] If state law does not specify the applicable procedural rules for IHOs, the Federal Rules would appear to provide guidance by analogy within the broad discretion of IHOs.[187] In general, the IDEA does not require detailed procedures and formal rules evidence.[188]

II-85. May an IHO limit the number of days for the hearing?

However, this factor is not without limits and is partly jurisdictional. K.S. *ex rel.* P.S. v. Fremont Unified Sch. Dist., 545 F. Supp. 2d 995, 1004–1005 (N.D. Cal. 2008). For example, in the Ninth Circuit, the view was that according deference to the testimony of school personnel based on the child-experience factor, without careful consideration of the parents' witnesses, would not only create a discriminatory standard but also obviate the need for an impartial hearing. *Id.* For another example of the non-bright limits, compare the majority and minority (and lower court) opinions in the Fourth Circuit's 2-to-1 decision in *County School Board of Henrico County v. Z.P.*, 399 F.3d 298 (4th Cir. 2005).

[185] This overlapping factor often extends to the child's teachers and other district professional personnel, but not exclusively or arbitrarily. *E.g.*, K.S. *ex rel.* P.S. v. Fremont Unified Sch. Dist., 679 F. Supp. 2d 1046 (N.D. Cal. 2009), *aff'd*, 426 F. App'x 536 (9th Cir. 2011); *see also* Marshall Joint Sch. Dist. No. 2 v. C.D. *ex rel.* Brian D., 616 F.3d 632, 641 (7th Cir. 2010) (distinction between medical and educational professionals).

[186] *E.g.*, People v. Basler, 710 N.E.2d 431 (Ill. Ct. App. 1999) (ruling that Illinois state courts follow the *Frye*, not *Daubert*, standard for expert witnesses).

[187] *E.g.*, Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. at 46,691. For a more complete analysis, see Perry A. Zirkel, *Expert Witnesses in Impartial Hearings under the IDEA*, 298 EDUC. L. REP. 648 (2014).

[188] *E.g.*, Lillbask *ex rel.* Mauclaire v. Sergi, 117 F. Supp. 2d 182, 192 (D. Conn. 2000), *aff'd*, 397 F.3d 77 (2d Cir. 2005):

> Due process does not require formal rules of evidence and procedure. Detailed rules of procedure are no panacea against lengthy, contentious, wasteful, divisive, or delay-causing arguments. Indeed, highly formalized systems of legal procedure can be fodder for delay. Due process is not always served by bringing every dispute into a mini-courtroom where only lawyers can navigate the myriad rules. A formalized system could serve to disenfranchise and exclude the very people meant to be served, namely the parents and the educators.

Yes, according to OSEP, just as long as the IHO provides the parties with the hearing rights that the regulations prescribe.[189] Although OSEP has referred to the IHO's responsibility "to accord each party a meaningful opportunity to exercise these rights during the course of the hearing,"[190] the courts' aforementioned abuse of discretion standard provides ample latitude to the IHO to rule in favor of efficiency, particularly in light of the forty-five day regulatory deadline.[191] More recently, OSEP has opined that a state best-practice guideline limiting a hearing to three sessions of six hours per session does not violate the IDEA just as long as it allows the IHO to make an exception. [192]

II-86. In a case that has more than one hearing session, does the five-day disclosure rule apply as of the first session or may the IHO extend it to a subsequent session in which the evidence may be proffered?

Although the case law is slim, the more flexible interpretation would appear to be within the IHO's discretion.[193]

II-87. Do IHOs have the discretion to determine the consequences of

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[189] Letter to Kerr, 22 IDELR 364 (OSEP 1994). For the prescribed hearing rights, see 34 C.F.R. § 300.512. OSERS Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.512 (2018).

[190] Letter to Anonymous, 23 IDELR 1073 (OSEP 1995).

[191] *E.g.*, B.S. *ex rel.* K.S. v. Anoka Hennepin Pub. Sch., 799 F.3d 1217 (8th Cir. 2015) (upholding prehearing order of 9 hours per party based on circumstances of the case, including state law); T.M. v. District of Columbia, 75 F. Supp. 3d 233 (D.D.C. 2014) (viewing limitation on cross-examination as reasonable in the context of hearing specified in prehearing order as maximum of four days); A.M. v. District of Columbia, 933 F. Supp. 2d 193, 207 (D.D.C. 2013) (viewing the IHO's reduction of repetitive testimony and *sua sponte* questions in completing hearing in one day as efficiency rather than incompetence or bias); *cf.* L.S. v. Bd. of Educ. of Lansing Sch. Dist. 158, 65 IDELR ¶ 225 (N.D. Ill. 2015); Sch. Bd. of Norfolk v. Brown, 769 F. Supp. 2d 928, 938 (E.D. Va. 2010) (upholding IHO's enforcement of time limits set with parties' agreement).

[192] Letter to Kane, 65 IDELR ¶ 20 (OSEP 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acc-13-017562r-mn-kane-dph.pdf.

[193] *See e.g.*, C.P. *ex rel.* F.P. v. Clifton Bd. of Educ., 77 IDELR ¶ 46 (D.N.J. 2020).

not meeting the five-day disclosure deadline?

A literal reading of the regulation would suggest an answer of No.[194] However, the authority to date supports an answer of Yes, including, but not limited, to prohibiting the introduction of the evidence or allowing the rescheduling of the hearing.[195]

II-88. Do state rules that provide specific procedures (e.g., numbered and redacted exhibits) or consequences (e.g., dismissal upon re-filing after fatally failing to meet the deadline in the first hearing) in relation to the IDEA disclosure requirement permissible?

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[194] OSERS Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.512(a)(3) (2018) ("Any party to a hearing . . . has the right to . . . [p]rohibit the introduction of any evidence . . . that has not been disclosed to that party at least five business days before the hearing.). *But cf*. "The [IHO] may bar [evaluations not meeting five-day deadline]. *Id*. § 300.512(b)(2).

[195] *E.g.*, Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,406, 12,614 (Mar. 12, 1999) (to be codified at 34 C.F.R. pt. 300); Letter to Steinke, 18 IDELR 739 (OSEP 1992); *see also* Pottsgrove Sch. Dist. v. D.H., 72 IDELR ¶ 271 (E.D. Pa. 2018); E.P. *ex rel*. J.P. v. Howard Cnty. Pub. Sch. Sys., 70 IDELR ¶ 176 (D. Md. 2017), *aff'd mem*., 727 F. App'x 55 (4th Cir. 2018); L.B. v. Kyrene Elementary Sch. Dist., 72 IDELR ¶ 150 (D. Ariz. 2018); J.H. *ex rel*. L.H. v. Rose Tree Media Sch. Dist., 72 IDELR ¶ 123 (E.D. Pa. 2018); Jason O. v. Manhattan Sch. Dist. No. 41, 173 F. Supp. 3d 744 (N.D. Ill. 2016); Avila v. Spokane Sch. Dist. No. 81, 64 IDELR ¶ 171 (E.D. Wash. 2014); L.J. *ex rel.* V.J. v. Audubon Bd. of Educ., 51 IDELR ¶ 37 (D.N.J. 2008); Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261 (D. Conn. 2002). There are no "tests" for the IHO to follow in making such determinations, but the purpose of the rule is, in OSEP's view, "to allow all parties the opportunity to adequately respond to the impact of the evidence presented, and to eliminate the element of surprise as a strategy a party may employ to influence the outcome of the hearing decision." Letter to Steinke, 18 IDELR 739 (OSEP 1992); *cf*. Letter to Bell, 211 IDELR 166 (OSEP 1979) ("It is not interpreted to mean that everything that will be used by either party must be revealed. It does mean that names of witnesses to be called and the general thrush of their testimony should be disclosed"). In the commentary accompanying the most recent IDEA regulations, OSEP added that nothing prevents parties from agreeing to a shorter period of time. Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,706 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300). For a decision in which the failure to follow the five-day rule contributed to a judicial remand to re-do the hearing, see B.G. v. Ocean City Bd. of Educ., 64 IDELR ¶ 105 (D.N.J. 2014).

Yes, according to OSEP, just as long as they fit within the considerable latitude of states for such rules and the broad discretion of IHOs for their application.[196]

II-89. Does the IHO have the authority to allow testimony by telephone or television?

According to OSEP, this matter is within the IHO's discretion, subject to judicial review in terms of whether the parties had meaningful opportunity to exercise the rights specified in the IDEA regulations, including the right to "present evidence and confront, cross-examine and compel the attendance of witnesses."[197] However, except where the parties jointly agree or where state law provides such authority,[198] the applicable case law is inconclusive.[199]

II-90. Do IHOs have the authority to compel the appearance of witness, including those who are not district employees?

According to OSEP, yes.[200]

II-91. May an IHO order the LEA to provide the parent with e-mails from or to school district personnel?

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[196] Letter to Philpot, 60 IDELR ¶ 140 (OSEP 2012), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/11-007614r-tx-philpot-txrules-11-7-2012.pdf.

[197] *E.g.*, Letter to Anonymous, 23 IDELR 1073 (OSEP 1995) (citing 34 C.F.R. § 300.512(a)(2)).

[198] *E.g.*, E.D. v. Enterprise City Bd. of Educ., 213 F. Supp. 2d 1252 (N.D. Ala. 2003).

[199] *Compare* Greenwich Bd. of Educ. v. G.M. *ex rel*. K.M., 66 IDELR ¶ 128 (D. Conn. 2016) (ruling against such IHO authority), *and* Genn v. New Haven Bd. of Educ., 65 IDELR ¶ 73 (D. Conn. 2015) (ruling against IHO authority), *and* Walled Lake Consol. Sch. v. Jones *ex rel*. Thomas, 24 IDELR 738 (E.D. Mich. 1996) (ruling against IHO authority), *with* Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331 (N.D. Ga. 2007) (ruling in favor of such IHO authority), *aff'd on other grounds*, 518 F. 3d 1275 (11th Cir. 2008); *cf.* Hampton Sch. Dist. v. Dobrowolski, 17 IDELR 518 (D.N.H. 1991) (at the judicial level) (ruling in favor of IHO authority where sufficient justification).

[200] Letter to Steinke, 28 IDELR 305 (OSEP 1997).

Presumably this discretion is within the IHO's subpoena power,[201] even though the e-mails may not be student records under FERPA.[202]

II-92. Do IHOs have authority to order the district to provide the parent with access to the records of one or more other students as part of an impartial hearing?

Not without the consent of the parents of the other students, according to the Family Policy Compliance Office (FPCO), which is responsible for administering FERPA. For the hearing in question, which concerned a disciplinary record that included identifiable information about not only the student with disabilities whose parent initiated the hearing but also other students, FPCO provided this guidance:

> [A] school district should redact the names of, or information which would be directly related to, any other students mentioned in another student's education records before providing a parent access to the student's education records. In instances where joint records cannot be easily redacted or the information segregated out, the school district may satisfy a request for access by informing the parent about the contents of the record which relate to his or her child.[203]

Adding support for this answer, a federal district court recently upheld an IHO's refusal to allow the parents, via their expert, to access the records of other students. The court reasoned that even if the parents had obtained a court order to compel the district to produce redacted copies, the IHO would not have erred in denying their request in light

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[201] In addition to any implied subpoena power of IHOs under the IDEA, approximately 40 states laws expressly provide IHOs with this power. Zirkel, *supra* note 5, at 14–16.

[202] Burnett v. San Mateo Foster City Sch. Dist., 739 F. App'x 870 (9th Cir. 2018); S.A. *ex rel*. L.A. v. Tulare Cnty. Office of Educ., 53 IDELR ¶ 111 (E.D. Cal. 2009) (ruling that only those e-mails that not only personally identify the student but also are in the student's permanent file qualify as education records under FERPA); *see also* E.D. *ex rel*. T.D. v. Colonial Sch. Dist., 69 IDELR ¶ 245 (E.D. Pa. 2017) (ruling that parent was not entitled to access to e-mails not maintained by district).

[203] Letter to Anonymous, 113 LRP 14615 (FPCO Feb. 13, 2013).

of the overriding individualized nature of FAPE.[204]

II-93. Do IHOs have contempt powers?

No, unless state law provides such authority.[205]

II-94. Do IHOs have the authority to issue disciplinary sanctions against a party or the party's attorney for what the IHO regards as hearing misconduct?

Again, the answer is a matter of state law, according to OSEP.[206] The published case law is limited and largely supportive.[207]

II-95. May an IHO dismiss a hearing after multiple postponements?

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[204] M.A. *ex rel*. A.A. v. Jersey City Bd. of Educ., 69 IDELR ¶ 57 (D.N.J. 2016).

[205] *E.g.*, E.D. v. Enterprise City Bd. of Educ., 213 F. Supp. 2d 1252 (N.D. Ala. 2003).

[206] Letter to Armstrong, 28 IDELR 303 (OSEP 1997).

[207] *E.g.*, Edward S. *ex rel*. T.S. v. W. Noble Sch. Corp. 63 IDELR ¶ 34 (N.D. Ind. 2014) (upholding IHO's dismissal with prejudice where parents repeatedly violated IHO's hearing orders); G.M. *ex rel*. Marchese v. Dry Creek Joint Elementary Sch. Dist., 59 IDELR ¶ 223 (E.D. Cal. 2012), *aff'd*, 595 F. App'x 698 (9th Cir. 2014) (upholding IHO's decision to partially award attorneys' fees of $3880 to district for frivolous claim of parent's attorney); Silva v. District of Columbia, 57 F. Supp. 3d 62 (D.D.C. 2014) (upholding conditional dismissal with prejudice if not refiled within 30 days after withdrawal one week before hearing); Nicholas W. v Nw. Indep. Sch. Dist., 53 IDELR ¶ 43 (E.D. Tex. 2009) (upholding dismissal without prejudice where an alternative sanction was not available due to in forma pauperis status of complainant); K.S. *ex rel.* P.S. v. Fremont Unified Sch. Dist., 545 F. Supp. 2d 995 (N.D. Cal. 2008) (upholding IHO's decision to grant sanctions against parent's attorney); Poway Unified Sch. Dist. v. Stewart, 2008 WL 607530 (Cal. Ct. App. Mar. 6, 2008) (upholding ALJ sanction of $3091 for parent's withdrawal on morning before the hearing); Stancourt v. Worthington City Sch. Dist., 841 N.E.2d 812 (Ohio Ct. App. 2005) (ruling that IHO has implied powers similar to those of a court but in this case the sanction of dismissal with prejudice was too harsh); Moubry v. Indep. Sch. Dist. No. 696, 32 IDELR ¶ 90 (D. Minn. 2000) (upholding IHO's order for parent's attorney to pay $2,432 as a sanction for filing a frivolous fourth hearing request–based on Minnesota statute repealed in 2004. The majority of these cases arose in states with laws providing express grant to HO for sanctioning authority, but some viewed this authority as inherent. For a comprehensive analysis, see Salma A. Khaleq, *The Sanctioning Authority of Hearing Officers in Special Education*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2012).

It depends on state law. In a Massachusetts case, the court reversed such a dismissal where the hearing officer did so after granting the latest postponement request, but state law required the hearing officer to either 1) deny the motion for postponement or 2) grant it and set a new hearing date.[208]

II-96. May the school district or its attorney provide the IHO with the student's education records without prior consent of the parent?

Yes, according to OSEP, if the parent filed for the hearing. Conversely, according to OSEP, if the district filed for a hearing, the school district may do so but only after providing due disclosure to the parent and via witnesses, not on an *ex parte* basis..[209]

II-97. Does the IDEA entitle the parent to a choice between a written or electronic (e.g., audio-taped) transcript of the hearing?

Yes. Although the IDEA previously did not offer the parent a choice,[210] the 1997 amendments revised the language to provide parents with "the right to a written, or, at the option of the parents, electronic verbatim record of such hearing."[211] The 2004 amendments have retained this choice-providing language. However, the choice is for one or the other, not both. [212]

II-98. Does this right to a transcript extend to prehearing sessions?

No, according to an unpublished Eleventh Circuit decision, unless state law expressly provides otherwise.[213]

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[208] Philbin *ex rel*. S.P. v. Bureau of Special Educ. Appeals, 54 IDELR ¶ 96 (D. Mass. 2010).

[209] Letter to Stadler, 24 IDELR 973 (OSEP 1996).

[210] *E.g.*, Edward B. v. Paul, 814 F.2d 52, 54 (1st Cir. 1987).

[211] Individuals with Disabilities Education Act, 20 U.S.C. § 1415(h)(3) (2017). Thus, the First Circuit's aforementioned *Edward B.* decision is no longer good law. *E.g.*, Stringer v. St. James Sch. Dist., 446 F.3d 799 (8th Cir. 2006).

[212] Letter to Maldonado, 49 IDELR ¶ 257 (OSEP 2007), https://www2.ed.gov/policy/speced/guid/idea/letters/2007-3/maldonado091107dueprocess3q2007.pdf.

[213] A.L. v. Jackson Cnty. Sch. Bd., 635 F. App'x 774 (11th Cir. 2015).

II-99. Does this right to a transcript continue after the applicable period for filing for judicial review?

Yes, according to OSEP.[214]

II-100. Is the parent entitled to a translation of the hearing transcript into his or her native language?

Not in the absence of a state law according to a Pennsylvania appellate court in a gifted education case.[215]

II-101. Does the failure to provide the parent with the complete transcript or recording amount to a denial of FAPE?

It depends on whether the missing testimony is significant in terms of affecting the child's substantive right to FAPE.[216]

II-102. May IHOs take official notice of a fact or standard akin to a court's power of judicial notice?

The pertinent case law is insufficient to provide a clear answer where state law does not expressly provide this power.[217]

II-103. May an IHO admit hearsay evidence?

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[214] Letter to Connelly, 49 IDELR ¶ 135 (OSEP 2007), https://www2.ed.gov/policy/speced/guid/idea/letters/2007-3/connelly081507dueprocess3q2007.pdf.

[215] Zhou v. Bethlehem Area Sch. Dist., 976 A.2d 1284 (Pa. Commw. Ct. 2009).

[216] *E.g.*, Kingsmore v. District of Columbia, 466 F.3d 118 (D.C. Cir. 2006); J.R. *ex rel*. W.R. v. Sylvan Union Sch. Dist., 50 IDELR ¶ 130 (E.D. Cal. 2008).

[217] *E.g.*, J.W. v. Fresno Unified Sch. Dist., 626 F.3d 431 (9th Cir. 2010) (rejecting challenge to non-use in connection with applicable state law); Ross v. Framingham Sch. Comm., 44 F. Supp. 2d 104 (D. Mass. 1999), *aff'd mem.*, 229 F.3d 1133 (1st Cir. 2000) (rejecting challenge to use but not addressing this issue squarely); *cf*. Brandon H. v. Kennewick Sch. Dist., 82 F. Supp. 2d 1174 (E.D. Wash. 2000) (citing Washington law specifying said authority); C.S. v. N.Y.C. Dep't of Educ., 67 IDELR ¶ 87 (S.D.N.Y. 2016) (sidestepping the challenge where the IHO's use of judicial notice was not essential to his ruling).

Generally, yes unless state law dictates otherwise,[218] but relying on it in the IHO's decision without corroborative proof may be problematic.[219]

II-104. May an IHO admit evidence from the period prior to the applicable statute of limitations?

Yes. This determination is within the IHO's broad discretion,[220] although the results typically only are usable as background information and to determine the issue that is within the limitations period.[221]

II-105. Does the "snapshot" rule, or evidentiary standard, apply for IHO's assessment of the appropriateness of IEPs?

It depends on the jurisdiction. For example, the First, Second, Third, Fourth, Ninth, and D.C. Circuits have adopted this standard,[222]

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[218] *E.g.*, Jalloh *ex rel.* R.H. v. District of Columbia, 535 F. Supp. 2d 13 (D.D.C. 2008); Sykes v. District of Columbia, 581 F. Supp. 2d 261 (D.D.C. 2007); Glendale Unified Sch. Dist. v. Almasi, 122 F. Supp. 1093 (C.D. Cal. 2000).

[219] *E.g.*, Speight v. Dep't of Corrections, 989 A.2d 77 (Pa. Commw. Ct. 2010) (ruling in context of administrative hearings generally, rather than IDEA IHO hearings specifically, in Pennsylvania).

[220] *E.g.*, Phyllene W. v. Huntsville City Bd. of Educ., 630 F. App'x 917 (11th Cir. 2015); M.S. v. Randolph Bd. of Educ., 75 IDELR ¶ 103 (D.N.J. 2019); Indep. Sch. Dist. No. 413 v. H.M.J., 123 F. Supp. 3d 1100 (D. Minn. 2015); *cf.* Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,706 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300) (listing compliance with the statute of limitations as one of the examples of the IHO's broad discretion).

[221] *E.g.*, J.Y. *ex rel.* E.Y. v. Dothan City Bd. of Educ., 63 IDELR ¶ 33 (M.D. Ala. 2014); Pangerl v. Peoria Unified Sch. Dist., 67 IDELR ¶ 36 (D. Ariz. 2016); Haw. Dep't of Educ. v. E.B. *ex rel.* J.B., 45 IDELR ¶ 249 (D. Haw. 2006).

[222] *E.g.*, R.F. v. Cecil Cnty. Pub. Sch., 919 F.3d 237, 250 (4th Cir. 2019); Z.B. v. District of Columbia, 888 F.3d 515, 524 (D.C. Cir. 2018); R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 186 (2d Cir. 2012); Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 29 (1st Cir. 2008); Adams v. Or., 195 F.3d 1141, 1149 (9th Cir. 1999); Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3d Cir. 1993) (Mansmann, J., concurring)

whereas the Tenth Circuit partially disagreed[223] previous to the seeming endorsement of the snapshot approach in *Endrew F.*[224] This approach considers the time of the educational decision, not the adjudicator's deliberations, as controlling to determine appropriateness.

II-106. On the other hand, what is the "four corners" evidentiary rule in relation to FAPE determinations?

This standard, which originates in contract law, exclusively restricts consideration to the final version of the IEP that the school system offered during the IEP process.[225] Various circuits have adopted it but typically only in limited circumstances or with exceptions.[226] However, on occasion it is fused or confused with the above-mentioned snapshot approach, which is overlapping but separable.[227]

II-107. May the party that requested the hearing generally raise issues not in the complaint?

No,[228] unless the other either party agrees[229] or—at least in the Second

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[223] *E.g.*, M.S. *ex rel.* Simchick v. Fairfax Cnty. Sch. Bd., 553 F.3d 315, 326—27 (4th Cir. 2009); O'Toole v. Olathe Dist. Sch. Unified Sch. Dist., 144 F.3d 692, 702-03 (10th Cir. 1998).

[224] Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017) ("recognition that crafting an appropriate program of education requires a prospective judgment by school official.").

[225] *E.g.*, C.G. v. Five Town Cmty. Sch. Dist., 513 F.3d 279, 285 (2d Cir. 2008) (explaining but not either adopting or rejecting this standard).

[226] *E.g.*, R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2d Cir. 2012); D.S. v. Bayonne Bd. of Educ., 602 F.3d 503 (3d Cir. 2010); Sytsema v. Acad. Sch. Dist., 538 F.3d 1306 (10th Cir. 2008); A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 (4th Cir. 2007); Knable v. Bexley City. Sch. Dist., 238 F.3d 755 (6th Cir. 2001); Union Sch. Dist. v. Smith, 15 F.3d 1519 (9th Cir. 1994). For a more recent, state appellate court decision, see Jenna R.P. v. City of Chi. Sch. Dist. No. 229, 3 N.E.3d 921 (Ill. Ct. App. 2013).

[227] *E.g.*, Montgomery Cnty. Intermediate Unit 23 v. A.F., __ F. Supp. 3d ___, ___ (E.D. Pa. 2020).

[228] *E.g.*, R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 187–88 (2d Cir. 2012); Cnty. of San Diego v. Cal. Special Educ. Hearing Office, 93 F.2d 1458 (9th Cir. 1996). For examples of enforcement of this stricture, see McAllister v. District of Columbia, 53 F. Supp. 3d 55 (D.D.C. 2014); T.G. *ex rel.* R.P. v. N.Y.C. Dep't of

Circuit—"open[s] the door" (e.g., via its opening statement or via its questioning of witnesses).[230] Clarifying that "the waiver rule is not to be mechanically applied," the Second Circuit has explained that "[t]he key … is fair notice and preventing parents from 'sandbag[ging] the school district' by raising claims after the expiration of the resolution period."[231] In a subsequent decision, a federal district court in New York concluded that the parent had provided fair notice of the issue of methodology via a general reference in the complaint to the lack of sufficient progress in a similar program.[232] Reaching a similar result as the Second Circuit's exceptions, the Ninth Circuit found applicable to IDEA hearings the federal evidentiary rule that treats issues as raised in the complaint if tried by express or implied consent.[233]

II-108. May the complaining party raise additional issues specifically via a reservation of rights provision in their complaint?

No, according to a published federal court decision in New York.[234]

II-109. May the other (i.e., noncomplaining) party raise issues not in the complaint?

The regulations do not address this question, but the accompanying

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Educ., 973 F. Supp. 2d 320 (S.D.N.Y. 2013); Saki *ex rel.* Saki v. Haw. Dep't of Educ., 50 IDELR ¶ 103 (D. Haw. 2008).

[229] Individuals with Disabilities Education Act, 20 U.S.C. § 1415(f)(3)(B) (2017); OSERS Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.511(d) (2018). For application of this general requirement to the levels beyond the IHO, see, e.g., R.C. *ex rel.* M.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 268-69 (S.D.N.Y. 2012);

[230] M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217, 250 (2d Cir. 2012); Y.S. v. N.Y.C. Dep't of Educ., 62 IDELR ¶ 56 (S.D.N.Y. 2013) (via its witnesses and via cross examination of the other side's witnesses). This exception is narrowly limited. *E.g.*, B.P. v. N.Y.C. Dep't of Educ., 634 F. App'x 845, 849–50 (2d Cir. 2015).

[231] A.S. *ex rel*. Mr. S. v. N.Y.C. Dep't of Educ., 573 F. App'x 63, 65 (2d Cir. 2014) (citing C.F. *ex rel*. R.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 78 (2d Cir. 2014)).

[232] J.W. *ex rel*. Jake W. v. N.Y.C. Dep't of Educ., 95 F. Supp. 3d 592, 603 (S.D.N.Y. 2015).

[233] M.C. *ex rel*. M.N. v. Antelope Union High Sch. Dist., 858 F.3d 1159, 1196 (9th Cir. 2017).

[234] B.P. v. N.Y.C. Dep't of Educ., 841 F. Supp. 2d 605, 611 (E.D.N.Y. 2012).

commentary takes the position that the answer is a matter of state procedures and, in their absence, the IHO's discretion.[235]

11-110. Does an IHO have authority to proceed with the hearing in the absence of a party?

In general, courts review such matters on an abuse of discretion standard, which makes it advisable for the IHO to provide and document due notice to the non-appearing party and ample opportunity for rescheduling participation. Thus, it would appear to be in effect a last resort within the need for a prompt decision. In applying these limited circumstances, courts have upheld the IHO in the clear majority of cases. [236]

II-111. May an IHO order the independent evaluation of the child? If so, who is responsible for payment of the evaluator, and are there any limits to the cost and qualifications?

The IDEA regulations make clear that if the IHO orders the evaluation it is at public expense (i.e., the district is responsible for payment).[237] The courts have recognized that this regulation provides the underlying authority for such an order,[238] including its use for providing an expert assessment for determining a compensatory education award per the qualitative approach.[239] The cost and

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[235] Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,706 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300); *see also* Letter to Cohen, *supra* note 23.

[236] *Compare* J.D. *ex rel.* Davis v. Kanawha Cnty. Bd. of Educ., Civ. A. No. 2:09-cv-00139, 2009 WL 4730804 (S.D. W. Va. Dec. 4, 2009), *aff'd mem.*, 357 F. App'x 515 (4th Cir. 2009); A.S. v. William Penn Sch. Dist., 63 IDELR ¶ 62 (E.D. Pa. 2014); Horen v. Bd. of Educ. of Toledo Pub. Sch. Dist., 655 F. Supp. 2d 794 (N.D. Ohio 2009); *cf.* Doe v. E. Greenwich Sch. Dep't, 89 A.2d 1258 (R.I. 2006) (upholding dismissal via exhaustion analysis); Cnty. of Tolumne v. Special Educ. Hearing Office, No. F046485, 2006 WL 165045 (Cal. Ct. App. Jan. 14, 2006), *with* Millay *ex rel.* YRM v. Surry Sch. Dep't, 707 F. Supp. 2d 56 (D. Me. 2010).

[237] OSERS Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.502(d) (2018).

[238] *E.g.*, B.D. v. District of Columbia, 817 F.3d 792 (D.C. Cir. 2016); Lopez-Young v. District of Columbia, 211 F. Supp. 3d 42 (D.D.C. 2016).

[239] *E.g.*, Luo v. Council Rock Sch. Dist., 68 IDELR ¶ 245 (E.D. Pa. 2016);

qualifications limits are those that apply to the district's use of evaluators.[240] However, an order for a trial period as the evaluation poses other limits,[241] and the issue of an IEE at public expense is also distinguishable.[242]

II-112. Does the school system have the legal right to object to the parent's choice to have the hearing open or closed to the public?

Not according to OSEP.[243]

II-113. What is the outer boundary of a parent's right in terms of having individuals, including members of the press, attend hearing that they have chosen to be closed?

According to OSEP, the outer limit is for "individuals who have some direct relationship to the parties and/or a personal need to understand the conduct of proceedings generally," thus not extending to members of the press.[244] OSEP also added the reminder that an IHO may "remove any individual in attendance whose behavior is disruptive or

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Lyons v. Lower Merion Sch. Dist., 56 IDELR ¶ 169 (E.D. Pa. 2010); Manchester-Essex Reg'l Sch. Dist. Comm. v. Bureau of Special Educ. Appeals, 490 F. Supp. 2d 49, 54 (D. Mass. 2007). Indeed, it is reversible error for an IHO not to issue such an order in certain circumstances. *E.g.*, M.Z. *ex rel.* D.Z. v. Bethlehem Area Sch. Dist., 521 F. App'x 74, 77 (3d Cir. 2013) (ruling that the IHO erred by not ordering an IEE at public expense upon finding the district's evaluation to be inappropriate).

[240] 34 C.F.R. § 300.502(e). Limitations of an evaluator's implementation of the IHO's order is a separable issue. *E.g.,* Luo v. Council Rock Sch. Dist., 68 IDELR ¶ 245 (E.D. Pa. 2016) (recognizing a constitutional privacy claim upon private psychologist's access to student's records in the absence of parental consent).

[241] *E.g.,* Manchester-Essex Reg'l Sch. Dist. Comm. v. Bureau of Special Educ. Appeals, 490 F. Supp. 2d 49, 54 (D. Mass. 2007). Indeed, it is reversible error for an IHO not to issue such an order in certain circumstances.

[242] *E.g.*, M.Z., 521 F. App'x at 77 (ruling that the IHO erred by not ordering an IEE at public expense upon finding the district's evaluation to be inappropriate); Lyons v. Lower Merion Sch. Dist., 56 IDELR ¶ 169 (E.D. Pa. 2010) (ruling that the regulation authorizing an IHO to order an IEE "'as part of' a larger process" does not deprive an IHO of jurisdiction of a request for an IEE at public expense).

[243] Letter to Eig, 68 IDELR ¶ 109 (OSEP 2016), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep-letter-fg-8-04-16.pdf.

[244] *Id*.

otherwise interferes with conducting a fair and impartial hearing."[245]

II-114. Do school employees, whom the parent has not invited, have the right to attend a closed hearing?

No, according to OSEP, unless (1) the parents have provided consent, (2) the IDEA regulations authorize their attendance, or they meet the FERPA exception for "legitimate educational interests."[246] OSEP also emphasized that in such matters, the IHO "is in the best position to ensure that the confidentiality of personally identifiable information is properly protected and that standard legal practice is followed in the due process hearing."[247]

II-115. Is opposing counsel entitled to a copy of an expert's notes for cross-examination if the expert uses the notes on direct examination?

Yes, according to an unpublished decision in New Hampshire, but the court relied in part on the state-adopted Federal Rules of Evidence.[248]

II-116. Does attorney-client privilege apply to lay advocates in impartial hearings under the IDEA?

It depends on state law. For example, a federal magistrate concluded that New Jersey law implied an affirmative answer for impartial hearings under the IDEA.[249]

II-117. In a compensatory education or tuition reimbursement case, does the IHO have the discretionary authority to bifurcate the hearing so that the remedial issue is reserved for a second stage depending on the outcome of the FAPE issue?

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[245] *Id*.

[246] Letter to Reisman, 60 IDELR ¶ 293 (OSEP 2012) (citing 34 C.F.R. § 99.31(a)(1)), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/12-015702r-pa-gran-dph-11-30-12.pdf.

[247] *Id*.

[248] I.D. *ex rel*. W.D. v. Westmoreland Sch. Dist., 17 IDELR 684 (D.N.H. 1991).

[249] Woods *ex rel.* T.W. v. N.J. Dep't of Educ., 858 F. Supp. 51 (D.N.J. 1993).

This matter is largely unsettled. With very limited exception,[250] state laws do not address this question. Similarly, the directly applicable case law provides qualified but limited support.[251] Arguably, this procedure, if exercised prudently, fulfills the IDEA purpose of efficient hearings. Moreover, if the parties agree to the procedure and cooperate in its prompt completion, its practical utility and legal defensibility would seem to be high.

II-118. May an IHO (a) rely in part on unsworn statements of a party during the prehearing conference and (b) consider sworn testimony of the parent showing a bias for parochial schools?

According to a recent First Circuit Court of Appeals decision, the answers are (a) yes, and (b) maybe. More specifically, the court respectively (a) rejected the application of the Federal Rules of Evidence regarding settlement and other such statements, and (b) concluded that this considered preference was relevant to the FAPE issue but not the ultimate foundation for the IHO's decision.[252]

III. DECISION ISSUES

A. Decisional Factors

III-1. What is the role of medical, psychological, and educational diagnoses that are not listed in the IDEA classifications for eligibility?

Such diagnoses may provide a supplementary role, but they are not generally necessary; in cases of conflict in definitions or criteria, the

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[250] CONN. AGENCIES REGS. § 10-76h-14(b) (authorizing IHOs to bifurcate the hearing in tuition reimbursement cases); *cf*. N.J. ADMIN. CODE § 1:1-14.6(e) (providing more general and qualified authority for HO bifurcation of the hearing).

[251] L.J. v. Fair Lawn Bd. of Educ., 486 F. App'x 967 (3d Cir. 2012) (upholding the IHO's bifurcation of the hearing in a tuition reimbursement case based on state law as applied to the particular circumstances); Maple Heights City Sch. Dist. v. A.C. *ex rel*. A.W., 68 IDELR ¶ 5 (N.D. Ohio 2016) (concluding that the IHO implicitly has bifurcation authority in a compensatory education case and any delay affects both parties equally).

[252] Johnson v. Bos. Pub. Sch., 906 F.3d 182 (1st Cir. 2018). This question- and-answer item overlaps with the Impartiality and Decisional Issues sections of this document.

IDEA specifications are controlling.[253]

III-2. Is the "educational performance" component of the eligibility definition limited to the academic, as compared with the social, dimension?

The two major appellate decisions are split on this interpretational issue.[254]

III-3. Are any of the procedural violations of the IDEA a per se denial of FAPE?

The only seeming possibility, depending on the interpretation of the relevant IDEA language, is where the proof is preponderant that the district "[s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child."[255]

III-4. Has the *Rowley* floor-based substantive standard for denial of FAPE changed?

Yes.[256]

III-5. What is the prevailing standard for FAPE implementation cases?

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[253] *E.g.*, Perry A. Zirkel, *The Role of the DSM in IDEA Case Law*, 39 COMMUNIQUÉ 30 (Jan. 2011). For illustrative policy interpretations specific to dyslexia, see, for example, Letter to Unnerstall, 68 IDELR ¶ 22 (OSEP 2016), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/oseplettertounnerstall4-25-16dyslexia.pdf; Dear Colleague Letter, 66 IDELR ¶ 188 (OSERS 2015).

[254] *Compare* C.B. *ex rel.* Z.G. v. Dep't of Educ., 322 F. App'x 20 (2d Cir. 2009) (academic only), *with* Mr. I. v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1 (1st Cir. 2007) (extends to social dimension).

[255] Individuals with Disabilities Education Act, 20 U.S.C. § 1415(f)(3)(E) (2017); OSERS Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.513(a)(2) (2018).

[256] In *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. at 999, the Supreme Court held, based on the confined facts and conclusions in *Rowley*, that the substantive standard is whether the IEP "is reasonably calculated to enable a child to make progress in light of the child's circumstances."

Rather than 100% compliance, the leading judicial standards are (1) failure to implement a material, i.e., substantial or significant, portion of the IEP, and (2) the same material failure plus the lack of benefit.[257]

III-6. Do an IHO's minor corrections of the transcript constitute per se reversible error with respect to his or her decision?

No.[258]

III-7. Would the verbatim adoption of all of either party's proposed findings of facts undermine the traditional deference to the IHO's findings and presumption of impartiality?

It certainly could do so.[259]

III-8. Who has the burden of persuasion at the hearing stage?

For FAPE cases, the Supreme Court held that under the IDEA, which is silent on this point, the burden of persuasion is on the challenging party, i.e., the parent.[260] However, some state laws have put the burden of proof in such cases on the district.[261] Conversely, lower courts have extended the Supreme Court's ruling to other issues, such as whether the child is eligible[262] and whether the child's placement is

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[257] *Compare* Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 (9th Cir. 2007) (materiality alone), *with* Hous. Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000) (materiality/benefit). For a detailed analysis, see Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE under the IDEA: IEP Implementation*, 36 J. NAT'L ASS'N ADMIN. L. JUDICIARY 409 (2016).

[258] *E.g.*, Paschl v. Sch. Bd., 453 F.3d 1064 (8th Cir. 2008) (ruling that IHO's corrections to the transcript were, if error, harmless).

[259] *E.g.*, Larson v. Indep. Sch. Dist. No. 316, 39 IDELR ¶ 66 (D. Minn. 2004).

[260] Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49 (2005).

[261] N.Y. EDUC. LAW § 4404(1)(c). The limited exception in New York is for the second step in tuition reimbursement cases, which is whether the parent's unilateral placement is appropriate. *Id*. Other state laws put the burden of production in FAPE cases on the district without making clear the possible distinction from the burden of persuasion. 105 ILL. COMP. STAT. 5/14-8.02a(g-55) (2018).

[262] Antoine M. v. Chester Upland Sch. Dist., 420 F. Supp. 2d 396 (E.D. Pa. 2006).

in the least restrictive environment (LRE).[263]

III-9. What is the standard, or quantum, of proof at the hearing stage?

Presumably it is the general civil standard of preponderance of the evidence, as derived from the judicial review stage.[264]

III-10. Does an IHO have authority to grant res judicata or collateral estoppel effect to a previous IHO decision?

Yes.[265]

III-11. Does an IHO's FAPE or placement decision for one academic year have a binding effect, via res judicata or collateral estoppel, on FAPE or placement for the next academic year?

No, according to the Ninth Circuit; each school year represents a separate issue.[266]

III-12. May an IHO remand a case to the district for further action or information rather than deciding the case?

No, such action would violate the IDEA's imperative for a timely final decision.[267]

B. Writing Features

III-13. Does the IHO have the discretion to restate the issue(s) of the

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[263] L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 (3d Cir. 2006).

[264] OSERS Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.516(c)(3) (2018).

[265] *E.g.*, Lillbask *ex rel.* Mauclaire v. Conn. Dep't of Educ., 397 F.3d 77 (2d Cir. 2005); Horen v. Bd. of Educ. of Toledo Pub. Sch. Dist., 950 F. Supp. 2d 946 (N.D. Ohio 2013); IDEA Pub. Charter Sch. v. Belton *ex rel*. C.M., 48 IDELR ¶ 90 (D.D.C. 2007).

[266] T.G. *ex rel.* Gutierrez v. Baldwin Park Unified Sch. Dist., 443 F. App'x 273, 276 (9th Cir. 2011).

[267] *E.g.*, Muth *ex rel.* Muth v. Cent. Bucks Sch. Dist., 839 F.2d 113, 124–25 (3d Cir. 1988), *rev'd on other grounds,* Dellmuth v. Muth, 491 U.S. 223 (1989).

case?

Yes, within reasonable limits, based on the IHO's consideration of the parties' arguments.[268]

III-14. May IHOs comment in the written decision about attorney conduct at the hearing?

OSEP has indirectly addressed this issue by opining that a state law that expressly allows such comments is not contrary to the IDEA provided that the comment is 1) linked to a relevant issue (e.g., a complaint perceived to be frivolous, unreasonable, or without foundation) and 2) does not preclude a party's ability to address such comments in court or in any application for attorneys' fees.[269]

III-15. Do the IHO's legal findings need support in the record?

Yes; without such support, a court may conclude that the findings were arbitrary and capricious.[270] Conversely, where the IHO's legal

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[268] *E.g.*, M.M. v. Lafayette Sch. Dist., 767 F.3d 842 (9th Cir. 2014); J.W. v. Fresno Unified Sch. Dist., 626 F.3d 431 (9th Cir. 2010); Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1096 (9th Cir. 2002); M.M. v. Lafayette Sch. Dist., 58 IDELR ¶ 132 (N.D. Cal. 2012); K.E. *ex rel*. K.E. v. Indep. Sch. Dist. No. 15, 54 IDELR ¶ 215 (D. Minn. 2010), *aff'd on other grounds*, 747 F.3d 795 (8th Cir. 2011); W.H. *ex rel*. B.H. v. Clovis Unified Sch. Dist., 52 IDELR ¶ 258 (E.D. Cal. 2009); *cf*. Adam Wayne D. v. Beechwood Indep. Sch. Dist., 482 F. App'x 52 (6th Cir. 2012) (implicit notice to defendant-district); Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804 (5th Cir. 2003) (impartiality challenge); Renollett v. Indep. Sch. Dist. No. 11, 42 IDELR ¶ 201 (D. Minn. 2005), *aff'd on other grounds*, 440 F.3d 1007 (8th Cir. 2006) (limiting the issues). *But cf*. M.C. *ex rel.* M.N. v. Antelope Union High Sch. Dist., 852 F.3d 840 (9th Cir. 2017) (questioning wisdom of IHO reframing issues where the complainant has legal representation).

[269] Letter to Zimberlin, *supra* note 112.

[270] *E.g.*, J.G. *ex rel.* Jimenez v. Baldwin Park Unified Sch. Dist., 78 F. Supp. 3d 1268 (C.D. Cal. 2015); M.O. v. District of Columbia, 20 F. Supp. 3d 31 (D.D.C. 2013); S.G. v. District of Columbia, 498 F. Supp. 2d 304 (D.D.C. 2007); *cf.* Haw. Dep't of Educ. v. Ria L. *ex rel*. Rita L., 64 IDELR ¶ 236 (D. Haw. 2014) (remand for failure to explain credibility findings); J.M. *ex rel*. L.M. v. N.Y.C. Dep't of Educ., 62 IDELR ¶ 120 (S.D.N.Y. 2013) (where extensive attention to facts not directly related to the core issue of the case and contradictory findings on this issue); R.C. *ex rel*. X.C. v. Great Meadows Reg'l Bd. of Educ., 62 IDELR ¶ 61 (D.N.J. 2013) (in the absence of an evidentiary hearing); Stanton v. District of Columbia,

findings are supported in the record, courts generally afford them notable deference.[271] In general, the deference increases where the IHO's factual findings are careful and thorough.[272] Moreover, given the grey area of mixed questions of fact and law, the boundary between factual findings and legal conclusions under the IDEA does not amount to a bright line. For example, in the Fourth Circuit at least, the appropriateness of an IEP is a question of fact.[273] Finally, some state laws expressly require cited support from the record.[274]

III-16. Does the IHO have to limit the factual findings in the written decision to those essential for the legal conclusions?

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680 F. Supp. 2d 201 (D.D.C. 2010) (failure to include sufficient findings and reasoning for calculation of compensatory education); Options Pub. Charter Sch. v. Howe, 512 F. Supp. 2d 55 (D.D.C. 2007) (entire lack of factual findings nullified IHO's decision). *But cf*. J.P. v. Cnty. Sch. Bd., 516 F.3d 254, 263 (4th Cir. 2008) (credibility-based determinations need not be detailed in light of the forty-five-day deadline); *see also* B.E.L. v. Haw. Dep't of Educ., 63 F. Supp. 3d 1215 (D. Haw. 2014); S.A. v. Weast, 898 F. Supp. 2d 869 (D. Md. 2012).

[271] *E.g.*, Lathrop R-II Sch. Dist. v. Gray, 611 F.3d 419 (8th Cir. 2010); D.B. *ex rel*. Brinson v. Craven Cnty. Bd. of Educ., 32 IDELR ¶ 86 (4th Cir. 2000); Doyle v. Arlington Cnty. Sch. Bd., 953 F.2d 100 (4th Cir. 1991); *cf*. Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520 (3d Cir. 1995) (credibility-based factual findings). However, the Seventh Circuit has made an ambiguous distinction between the "evidence" and IHO's "decision." Heather S. v. Wis., 125 F.3d 1045, 1053 (7th Cir. 1995).

[272] *E.g.*, Pointe Educ. Serv. v. A.T., 610 F. App'x 702 (9th Cir. 2015); J.W. v. Fresno Unified Sch. Dist., 626 F.3d 431 (9th Cir. 2010); Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186 (2d Cir. 2005); Capistrano Unified Sch. Dist. v. Wartenburg, 59 F.3d 884 (9th Cir. 1995); Doyle v. Arlington Sch. Dist., 953 F.2d 100 (4th Cir. 1991); Kerkam v. Superintendent, D.C. Sch., 931 F.2d 84 (D.C. Cir. 1991); Anchorage Sch. Dist. v. D.S., 688 F. Supp. 2d 883 (D. Alaska 2010). Interestingly, the Ninth Circuit has counted the IHO's participation in the questioning of witnesses as part, although not necessarily the controlling part, of the "thorough and careful" calculus for according deference. R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 942 (9th Cir. 2007); Park v. Anaheim High Sch. Dist., 464 F.3d 1025, 1029 (9th Cir. 2006). Conversely, a court exhibited disappointment and aversion to a case where the hearing officer adopted verbatim the 480 factual findings and 79 legal conclusions proposed by one of the parties. B.H. *ex rel*. T.H. v. Johnston Cnty. Bd. of Educ., 65 IDELR ¶ 66 (E.D.N.C. 2015).

[273] *E.g.*, G. v. Fort Bragg Dependent Sch., 343 F.3d 295, 303 (4th Cir. 2003).

[274] Perry A. Zirkel, *State Laws for Due Process Hearings Under the Individuals with Disabilities Education Act II: The Post-Hearing Stage*, 40 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 9–14 (2020).

Although it may be appropriate practice, as a matter of efficiency, to do so, there is no such legal requirement; i.e., it is not reversible error to include additional facts.[275]

III-17. Do IHOs have similar qualified discretion with regard to their legal conclusions?

Yes, except to the extent that some state laws have specified requirements for the legal conclusions.[276] For example, writing shortcuts, such as cutting and pasting a selected group of conclusions from another decision, are not legal error if well founded.[277] Conversely, however, an IHO's legal conclusion that fails to reference the supporting facts may not receive judicial deference.[278] For example, a federal court vacated and remanded a hearing officer's decision that "lack[ed] sufficiently detailed reasoning" (which in this case overlapped with insufficiently explained fact-finding).[279]

III-18. Is it appropriate for an IHO to use the term "mental retardation" in a written decision referring to a child with this classification?

No. On October 5, 2010, the President Obama signed legislation that changes the use of "mental retardation" in the IDEA and other federal legislation and regulations to "intellectual disability."[280]

III-19. Do IHO remedial orders need to have a specific evidentiary foundation?

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[275] *E.g.*, B.E.L. v. Haw. Dep't of Educ., 63 F. Supp. 3d 1215 (D. Haw. 2014).

[276] Zirkel, *supra* note 274, at 8–14.

[277] Joshua A. *ex rel.* Jorge A. v. Rocklin Unified Sch. Dist., 49 IDELR ¶ 249 (E.D. Cal. 2008), *aff'd*, 391 F. App'x 692 (9th Cir. 2009).

[278] *E.g.*, Marc M. v. Dep't of Educ., Haw., 762 F. Supp. 2d 1235 (D. Haw. 2011).

[279] M.O. v. District of Columbia, 20 F. Supp. 3d 31 (D.D.C. 2013); *see also* T.S. v. Utica Cmty. Sch., 69 IDELR ¶ 95 (E.D. Mich. 2017); J.M. v. N.Y.C. Dep't of Educ., 62 IDELR ¶ 120 (S.D.N.Y. 2013) (unduly short analysis of the case issues).

[280] Rosa's Law, 124 STAT. 2643 (2010).

Yes, but the reversals on this basis are relatively infrequent and more a matter of the underlying substance than the quality of the writing.[281]

III-20. Are IHOs allowed to amend their decisions for technical errors?

Yes, within the boundaries specified in some state laws[282] and to the extent that OSEP leaves the matter to the discretion of SEAs and IHOs, provided that both parties receive proper notice.[283] Such corrections may be either *sua sponte* or, when it does not change the substance or outcome of the decision, at the request of either party.[284]

III-21. Must IHOs redact their written decisions to avoid information that is not personally identifiable to the student(s)?

This issue is reserved to state law and policy, but OSEP has clarified that the SEA is ultimately responsible for redacting, before public dissemination of the decision, "any personal characteristics or other information that would make it possible to identify the student who is the subject of the written decision with reasonable certainty or make the student's identity easily traceable."[285] This redaction does not extend to the IHO's name, the district's name, or the case number unless it would result in personally identifiable information to the

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[281] *E.g.*, Somberg v. Utica Cmty. Sch., 67 IDELR ¶ 139 (E.D. Mich. 2016) (viewing IHO's denial of compensatory education as not entitled to deference due to lack of explanation and justification); L.O. v. E. Allen Cnty. Sch. Corp., 58 F. Supp. 3d 882 (N.D. Ind. 2014) (invalidating various IHO orders in the absence of sufficient factual foundation or legal violations); District of Columbia, v. Pearson, 923 F. Supp. 2d 82 (D.D.C. 2013) (ruling that any FAPE-related remedial relief requires not only ruling that district denied FAPE but also reasonably specific evidentiary basis); *cf.* Cupertino Union Sch. Dist. v. K.A., 75 F. Supp. 3d 1088 (N.D. Cal. 2014) (vacating and remanding IHO compensatory education award for lack of evidentiary support).

[282] Zirkel, *supra* note 274, at 15.

[283] Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,406, 12,614 (Mar. 12, 1999) (to be codified at 34 C.F.R. pt. 300).

[284] *Dispute Resolution Procedures*, *supra* note 18, at item C-25.

[285] Letter to Anderson, 48 IDELR ¶ 105 (OSEP 2006), https://www2.ed.gov/policy/speced/guid/idea/letters/2006-4/anderson101306confident4q2006.pdf.

student(s).[286]

III-22. Do IHO decisions have a precedential effect on other IHO decisions within the state?

No, not as binding authority. However, as California law makes explicit,[287] it is generally understood that IHOs have the discretion to cite these decisions as persuasive.

IV. MISCELLANEOUS

IV-1. Does a noncustodial parent have standing to file for a due process hearing?

Yes, according to the Seventh Circuit, unless (a) unless the divorce decree expressly eliminates all rights in educational matters or (b) the custodial parent's exercise of the decreed rights trumps this right.[288] However, the hearing right is limited to the noncustodial parent's rights, such as records access and meeting notices, not the child's rights, such as FAPE.[289]

IV-2. What is the standard of judicial review for an IHO's decision?

The lower courts have varied in their interpretation and application of the Supreme Court's "due weight"[290] standard.[291] However, the

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[286] Letter to Anonymous, 67 IDELR ¶ 188 (OSEP 2016), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/16-000584-iepdevelopmentandimplementation-acc.pdf.

[287] CAL. CODE REGS. tit. 5, § 3085 (2017).

[288] Navin v. Park Ridge Sch. Dist., 270 F.3d 1147 (7th Cir. 2001), *after remand*, 49 F. App'x 69 (7th Cir. 2003).

[289] Smith v. Meeks, 225 F. Supp. 3d 696 (N.D. Ill. 2016).

[290] Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982).

[291] *See generally* Perry A. Zirkel & Cathy Skidmore, *Judicial Appeal of Due Process Rulings*, 29 J. DISABILITY POL'Y STUD. 22 (2018); Perry A. Zirkel, *Judicial Appeals of Hearing/Review Officer Decisions under the IDEA*, 78 EXCEPTIONAL CHILD. 375 (2012); James Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469 (1999); *cf.*

general theme is to provide (1) presumptive deference to the IHO's factual findings, particularly for the credibility of witnesses, and (2) de novo review for the IHO's legal conclusions.[292] The deference for factual findings tends to be less for those that are based on additional evidence[293] and more for those that are careful and thorough.[294]

Overall, the party challenging an IHO's decision faces a steep "uphill climb."[295]

IV-3. Does an IHO have authority to confer consent decree status on a settlement agreement?

The likely answer is "in limited circumstances," although the case law is not sufficiently on point for a more definitive answer. More specifically, the court decisions concerning whether the parent is entitled to attorneys' fees as the prevailing party of a consent decree are indirectly applicable and have varying limits.[296]

IV-4. May lay advocates represent parents at due process hearings?

Perry A. Zirkel, *The Standard of Review Applicable to Pennsylvania's Special Education Appeals Panel*, 3 WIDENER J. PUB. L. 871 (1994) (proposing the analogous standard for IDEA review officers).

[292] *E.g.*, Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 200 (3d Cir. 2004); Amanda J. *ex rel.* Annette J. v. Clark Cnty. Sch. Dist., 267 F.3d 877, 887 (9th Cir. 2001); Doyle v. Arlington Cnty. Sch. Bd., 953 F.2d 100, 103 (4th Cir. 1991).

[293] *E.g.*, Alex R., *ex rel.* Beth R. v. Forrestville Cmty. Unit Sch. Dist., 375 F.3d 603, 612 (7th Cir. 2004).

[294] *E.g.*, Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 891 (9th Cir. 1995). *See supra* notes 271–72 and accompanying text. Moreover, the Ninth Circuit recently clarified that this deference does not apply for a lengthy IHO decision that failed to address all the issues and evidence. M.C. *ex rel.* M.N. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1194 (9th Cir. 2017).

[295] *E.g.*, James S. *ex rel*. J.S. v. Town of Lincoln, 59 IDELR ¶ 191 (D.R.I. 2012). For an empirical analysis that shows the high correlation in outcomes upon judicial review, see Zirkel & Skidmore, *Judicial Appeal of Due Process Rulings*, *supra* note 291.

[296] *E.g.*, Justin R. v. Matayoshi, 561 F. App'x 619, 620 (9th Cir. 2014); Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ., 615 F.3d 622, 626-31 (4th Cir. 2010); Maria C. *ex rel.* Camacho v. Sch. Dist., 142 F. App'x 78, 81–82 (3d Cir. 2005); V.G. v. Auburn Enlarged Cent. Sch. Dist., 349 F. App'x 582, 584 (2d Cir. 2009).

It depends primarily on state law. In survey data published in 2007, 10 states prohibited their representation, and 12 permitted it.[297] A more recent and direct canvassing of state laws found 7 states that expressly permitted it.[298] In other states, the decision is within the IHO's discretion, with some IHOs not allowing it as the unauthorized practice of law.[299]

IV-5. When lay advocates represent parents at due process hearings, are their communications privileged at subsequent judicial proceedings to the same extent as under the attorney-client privilege?

Yes, according to a published federal magistrate's decision in New Jersey.[300]

IV-6. May an IHO reconsider a decision upon the request of either party or both parties?

Only if (1) the state's applicable procedures allow it,[301] and (2) the reconsideration is before the final decision and is issued within the forty-five-day, or properly extended timeline.[302]

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[297] Perry A. Zirkel, *Lay Advocates and Parent Experts under the IDEA*, 217 EDUC. L. REP. 19, 21 (2007).

[298] Zirkel, *supra* note 5, at 19.

[299] Zirkel, *supra* note 297, at 22–24. *But cf.* Kay Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow?*, 9 GEORGETOWN J. ON POVERTY L. & POL'Y 193 (2002) (criticizing the Delaware decision, which ruled that the lay advocate who represented the parents had engaged in unauthorized practice of law).

[300] Woods v. N.J. Dep't of Educ., 858 F. Supp. 51, 55 (D.N.J. 1993). The court did not definitively rule on the related question of work-product protection, although seeming to lean in the same direction for that answer. *Id.*

[301] Zirkel, *supra* note 274, at 15.

[302] C.C. v. Beaumont Indep. Sch. Dist., 65 IDELR ¶ 109 (E.D. Tex. 2015); *Dispute Resolution Procedures*, *supra* note 18, at item C-25; Letter to Colleye, 111 LRP 45430 (OSEP Oct. 20, 2010), https://www2.ed.gov/policy/speced/guid/idea/letters/2010-4/colleye102010dph4q2010.pdf; Letter to Weiner, 57 IDELR ¶ 79 (OSEP 2011). For the similar but separable issue of whether the state may clarify the IHO's order via CRP, see Gumm *ex rel.* Gumm v. Nev. Dep't of Educ., 113 P.3d 853, 858 (Nev. 2005).

IV-7. May an IHO clarify the decision upon the request of either or both parties?

Only if the state procedures allow it[303] and within a limited time.[304]

IV-8. Does an IHO have the authority to retain jurisdiction *sua sponte*?

No, according to the limited case law due to the finality requirement for IHO decisions.[305]

IV-9. Do parents have the right to place under seal the transcript and exhibits of an open due process hearing for which the redacted IHO decision is available on the SEA website?

Yes, according to an unpublished decision in Ohio, in which the court relied on FERPA and the child's right to privacy.[306]

IV-10. Does the IDEA permit interlocutory appeals of IHO prehearing orders or interim rulings (e.g., partial dismissal) to court?

No, according to various courts.[307]

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[303] Zirkel, *supra* note 274, at 15.

[304] *E.g.*, T.G. *ex rel.* T.G. v. Midland Sch. Dist. 7, 848 F. Supp. 2d 902, 931–32 (C.D. Ill. 2012); *see also* Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,406, 12,613 (Mar. 12, 1999) (to be codified at 34 C.F.R. pt. 300). For a review officer decision that vacated an IHO's clarified decision as not meeting these criteria, see *In re* Student with a Disability, No. 17-021, 117 LRP 25324 (N.Y. SEA May 22, 2017).

[305] *E.g.*, Indep. Sch. Dist. No. 283 v. S.D. *ex rel.* J.D., 948 F. Supp. 860, 889–90 (D. Minn. 1995).

[306] Oakstone Cmty. Sch. v. Williams, 58 IDELR ¶ 256 (S.D. Ohio 2012), *rev'd on other grounds*, 615 F. App'x 284 (6th Cir. 2015).

[307] J.G. *ex rel.* Greenberg v. Haw. Dep't of Educ., 728 F. App'x 764, 765 (9th Cir. 2018); M.M. v. Lafayette Sch. Dist., 681 F.3d 1082, 1088–90 (9th Cir. 2012); Hopewell Valley Reg'l Bd. of Educ. v. J.R. *ex rel.* S.R., 67 IDELR ¶ 202 (D.N.J. 2016); I.K. *ex rel.* B.K. v. Sch. Dist. of Haverford Twp., 961 F. Supp. 2d 674, 688 (E.D. Pa. 2013), *rev'd on other grounds*, 567 F. App'x 135 (3d Cir. 2014). Stay-put

IV-11. In a tuition reimbursement case, does the IDEA require payment during the stay-put period?

Not necessarily, according to OSEP. It is a state law matter, subject to IHO and court interpretation.[308] However, various courts have interpreted stay-put to apply to an IHO's—or, in a two-tier state, a review officer's—decision that orders tuition reimbursement.[309]

IV-12. May a school district delay in implementing an IHO's remedial order in favor of the parent prior to expiration of the period for appeal?

It depends, according to OSEP. The threshold criteria are whether (1) state law allows it, and (2) the state's appeal period is reasonable.[310] However, the ultimate criterion is what is a "reasonable period of time" in the particular case, which is a factual matter based on various factors that include the timing of the district's appeal and the nature of the IHO-ordered relief.[311]

IV-13. Do IHOs have authority to enter a contingent final order?

Yes, in limited circumstances, according to a federal district court case.[312] As the second step of its analysis, the court concluded that the IHO did not abuse her discretion in conditionally dismissing the parent's case with prejudice if she did not file a new complaint within

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is a possible exception. *E.g.,* Hous. Indep. Sch. Dist. v. V.P., 582 F.3d 576, 592 (5th Cir. 2009).

[308] Letter to Philpot, 60 IDELR ¶ 140 (OSEP 2012), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/11-007614r-tx-philpot-txrules-11-7-2012.pdf.

[309] *E.g.*, Joshua A. *ex rel.* Jorge A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036, 1040 (9th Cir. 2009); Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 487 (2d Cir. 2002); St. Tammany Parish Sch. Bd. v. Louisiana, 142 F.3d 776, 789–91 (5th Cir. 1998); Susquenita Sch. Dist. v. Raelee S. *ex rel.* Heidi S., 96 F.3d 78, 83–85 (3d Cir. 1996).

[310] Letter to Anonymous, 29 IDELR 179 (OSEP 1993).

[311] Letter to Voigt, *supra* note 102.

[312] Silva v. District of Columbia, 57 F. Supp. 3d 62, 67–68 (D.D.C. 2014).

thirty days.[313]

IV-14. Do IHOs have a constitutional right to a hearing upon their termination?

No, according to the limited case law authority where the IHO received notice of the findings and an opportunity to reply in writing under the applicable state law.[314]

IV-15. Is an IHO's prehearing order appealable to court?

No, according to the Ninth Circuit.[315] The court reasoned that the principles underlying the "final judgment rule"—the promotion of judicial efficiency and the avoidance of multiple lawsuits—also applied to reviews of IHO decisions under the IDEA.[316]

IV-16. Do the two specifically authorized IHO remedies for disciplinary changes in placement at 34 C.F.R. § 300.432(b)(2) preclude additional or alternative remedies in such cases?

No, according to OSEP.[317] In some of these expedited cases, OSEP offered compensatory education as an example of a permissible remedy.[318]

IV-17. Does an IHO have authority to order a district to comply with a violated procedural requirement even if the violation does not amount to a denial of FAPE?

Yes, just as long the order is limited to ordering prospective procedural compliance.[319]

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[313] *Id*.

[314] Tyk v. N.Y. State Educ. Dep't, 796 N.Y.S.2d 405, 428–29 (App. Div. 2005).

[315] *M.M. v. Lafayette Sch. Dist*., 681 F.3d at 1088–90.

[316] *Id.*

[317] Letter to Zirkel, 119 LRP 19543 (OSEP May 13, 2019).

[318] *Id*.

[319] Individuals with Disabilities Education Act, 20 U.S.C. § 1415(f)(3)(E)(iii) (2017). *See, e.g.*, Dawn G. *ex rel*. D.B. v. Mabank Indep. Sch. Dist., 63 IDELR ¶ 63 (N.D. Tex. 2014).

IV-18. To resolve the issue of res judicata or collateral estoppel, may a SEA assign a case to the same IHO who adjudicated a prior case with the same parties?

Yes, according to OSEP.[320]

IV-19. Must the SEA make IHO decisions available to the public? If so, for how long?

Yes.[321] OSEP has added that this availability should be FERPA-required redaction.[322] The agency clarified that the required redaction includes information that (a) would make the student identifiable with reasonable certainty, or (b) would "make the student's identity easily traceable if disclosed to the school's community or the community at large."[323]

For the period, OSEP stated: "We view [a] five and a half year[] time period as the most reasonable *minimum* time period during which States must make due process and State-level review findings and decisions available to the public under [the IDEA regulations]."[324]

IV-20. Do the provisions of a state hearing officer manual have the force of law?

Generally not, unless the state has issued it via the applicable rule-making process.[325]

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[320] Letter to McDowell, 213 IDELR 162 (OSEP 1988).

[321] OSERS Assistance to States for the Education of Children with Disabilities, 34 C.F.R. §§ 300.513(d)(2), 300.514(c)(2) (2018).

[322] *Dispute Resolution Procedures*, *supra* note 18, at item C-27.

[323] Letter to Anonymous, 67 IDELR ¶ 188 (OSEP 2016), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/16-000584-iepdevelopmentandimplementation-acc.pdf.

[324] Letter to Anonymous, 69 IDELR ¶ 253 (OSEP 2017), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep-letter-to-anonymous-2-27-17-recordretention.pdf.

[325] *E.g.*, Bethlehem Area Sch. Dist. v. Zhou, 976 A.2d 1284, 1287–88 (Pa. Commw. Ct. 2009).

IV-21. After a parent files a complaint for investigation under the SEA's complaint procedures process, may a district file for a due process hearing on the same issue(s) so as to trigger the IDEA regulations' mandatory deferral?

Yes, although OSEP strongly encouraged districts not to do so, instead recommending mediation or other informal dispute resolution procedures.[326] OSEP's rationale was as follows:

> Public agencies that seek to force parents who have already exercised their right to file a State complaint into a potentially more adversarial due process hearing harm the "cooperative process" that should be the goal of all stakeholders. Moreover, diverting resources into adversarial processes between parents and public agencies is contrary to Congressional intent in the 2004 amendments to IDEA's dispute resolution procedures to give parents and schools expanded opportunities to resolve their disagreements in positive and constructive ways.[327]

IV-22. What should the IHO do if the parents file for a hearing after closure of the charter school that their child attended?

First, the answer depends on the status of the charter school under state law, with the two primary but not exclusive categories being the charter school as a LEA or being part of an LEA.[328] If the charter school is part of an LEA, the LEA is the proper party (unless state law assigns responsibility to another public entity).[329] However, if the school is an LEA, the SEA would appear to have the ultimate

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[326] Dear Colleague Letter, 65 IDELR ¶ 151 (OSEP 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/dcl04152015disputeresolution2q2015.pdf.

[327] *Id*. For a proposed interpretation that would disallow such district tactics, see Perry A. Zirkel, *Questionable Initiation of Both Decisional Dispute resolution Processes under the IDEA: Proposed Regulatory Interpretations*, 49 J.L. & EDUC. 99 (2020).

[328] Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools under the IDEA, 69 IDELR ¶ 78 (OSERS 2016), at item 6.

[329] *Id*. at items 7 and 49.

obligation in the matter,[330] and the IHO's actions will depend on whether the parents file against the SEA as an additional or alternative party.[331] If not, the IHO faces the difficulty of a charter school defendant who may not appear or, upon appearing, may claim insolvency.[332]

IV-23. Do IHOs have the authority to award attorneys' fees?

No. Neither the IDEA nor any corollary state law provides for this authority, although two states require IHOs to designate the prevailing party on an issue-by-issue basis.[333] In the absence of the requisite statutory basis, IHOs lack this authority.[334]

IV-24. Is there any case law about the employment security of IHOs?

The case law is limited, and although the expectation of continued employment varies widely per individual contract arrangements and applicable state law, the outcomes trend thus far has not been favorable to IHOs.[335]

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[330] *Id*. at item 9. *See, e.g.*, Charlene R. v. Solomon Charter Sch., 63 F. Supp. 3d 510, 519–20 (E.D. Pa. 2014).

[331] *E.g.*, Rodriguez v. Creative Educ. Preparatory Inst., No. DPH 1516-28, 117 LRP 4367 (N.M. SEA Jan. 12, 2017).

[332] *E.g.*, Mr. B. v. E. Granby Bd. of Educ., 201 F. App'x 834, 837 (2d Cir. 2006); Mathern v. Campbell Cnty. Children's Ctr., 674 F. Supp. 816, 818 (D. Wyo. 1987).

[333] Zirkel, *supra* note 5, at 14–16 (identifying California and Tennessee as the only states with this requirement).

[334] *E.g.,* Sch. Bd. of Broward Cnty. v. C.B., 315 F. Supp. 3d 1312, 1319 (S.D. Fla. 2018); A.L. v. Jackson Cnty. Sch. Bd., 127 So. 3d 758, 759 (Fla. Dist. Ct. App. 2013).

[335] *E.g.,* Doyle v. Ark. Dep't of Educ., 2020 WL 7249295 (E.D. Ark. Dec. 9, 2020) (dismissing § 1983 due process, breach of contract, and § 504 retaliation challenges to termination of IHO); Stengle v. Office of Dispute Resolution, 631 F. Supp. 2d 564, 577–84 (M.D. Pa. 2009) (rejecting First Amendment, Rehabilitation Act, and state whistleblower law claims of IHO whose nonrenewal was based on her blog of IDEA advocacy); *Tyk v. N.Y.S. Educ. Dep't*, 796 N.Y.S.2d at 406–07 (upholding revocation of IHO's certification based on "misconduct or incompetence," including failing to issue a decision in a timely manner, according to statutory due process, which included an opportunity to respond in writing to the notice of proposed revocation).

IV-25. Is it permissible to use IDEA funds for due process hearings?

Yes, according to OSEP within applicable limits.[336]

[336] Letter to Anonymous, 76 IDELR ¶ 262 (OSEP 2020).