

**413 Ed. Law Rep. 535**

West's Education Law Reporter

September 14, 2023

Education Law into Practice

Perry A. **Zirkel**, Ph.D., J.D., LL.M.<sup>aa1</sup>

Copyright © 2023 by Thomson Reuters/West - No Claim to Original U.S. Government Works; Perry A. Zirkel, Ph.D., J.D., LL.M.

**OSEP POLICY GUIDANCE FOR IDEA IMPARTIAL HEARING OFFICERS<sup>a1</sup>**

This annotated overview of the policy letters of the Office of Special Education Programs (OSEP), which administers the Individuals with Disabilities Education Act (IDEA), is limited first to those available on the OSEP website, which covers the period 2001 to the present.<sup>1</sup>

Second, among these policy interpretations, the selection is largely limited to those within (a) the basic building blocks of the IDEA, such as identification (consisting of child find, evaluation, and eligibility), free appropriate public education, least restrictive environment, and remedies,<sup>2</sup> and (b) the added category of due process hearings under the IDEA,<sup>3</sup> because hearing officers are the primary, although not at all exclusive, intended recipients for this information.

Thus, the exclusions are for OSEP policy interpretations that (a) are comprehensively covered elsewhere for more specialized IDEA issues, such as evaluation/reevaluation,<sup>4</sup> independent educational evaluations at public expense,<sup>5</sup> response to intervention/multi-tiered systems of support,<sup>6</sup> speech-language therapy,<sup>7</sup> the state complaint process,<sup>8</sup> and stay-put;<sup>9</sup> (b) deal with broad systemic IDEA issues, such as use of funds, maintenance of efforts, school \*536 choice/vouchers, and general state education agency supervision;<sup>10</sup> (c) conversely concern very narrow IDEA issues, such as adaptive physical education, disproportionality, students with hearing or vision impairments, and surrogate parents,<sup>11</sup> or the temporary issues of the pandemic;<sup>12</sup> and (d) are at the same website but focus on other laws, such as Section 504 of the Rehabilitation Act.<sup>13</sup> Moreover, although perhaps not as obvious, the focus is limited to Part B of the IDEA, which covers preschool through grade 12, thus excluding OSEP policy interpretations for Part C, which is for children with disabilities aged 0 to 3.

In reviewing the summary blurbs herein, readers are warned that (1) the wording, unless quoted, is the author's brief paraphrasing, thus warranting careful examination of the specific language in the cited OSEP letter; and (2) such agency guidance is not binding,<sup>14</sup> with the legal weight subject, upon challenge,<sup>15</sup> to the adjudicator's application of the relevant standard for persuasiveness.<sup>16</sup>

Based on the balancing concerns of brevity and coherence, the acronyms used in this document are limited to the following relatively frequent entries:

BIP = behavior intervention plan

DPH = due process hearing

ESY = extended school year

FAPE = free appropriate public education

FBA = functional behavioral assessment

IEP = individualized education program

IHO = impartial hearing officer

LRE = least restrictive environment

\*537 PWN = prior written notice

Additionally, this document generically uses “school district” or just “district” rather than “local education agency” without differentiating the nuances of charter schools and intermediate units, which vary according to the jurisdiction and the particular circumstances.

Finally, although the selection and placement of the items in this overview are inevitably imprecise and partially subjective due to the blurred and overlapping boundaries, the organization consists of the following successive categories: (1) identification, (2) FAPE, (3) LRE, (4) discipline, (5) remedies, and (6) DPHs. Due to their high frequency of entries, the categories of identification, FAPE, and DPH have subcategories.<sup>17</sup> The entries within each category and subcategory are in inverse chronological order.

## **Identification**

### **Child Find**

The school district of location and the school district of residence, if they are different for a private school child regardless of whether FAPE is at issue, have independent child find responsibilities. *Letter to Wayne*, Jan. 29, 2019.

For a public virtual school, child find warrants additional ways to identify children who might need an evaluation, such as special screenings and questionnaires for teachers, rather than relying primarily on parental referrals. *Dear Colleague Letter*, Aug. 5, 2016.

Absent any other applicable law, states (and, thus, school districts) do not have child find obligations under the IDEA for children residing in Immigration and Customs Enforcement residential facilities. *Letter to Anderson*, Dec. 21, 2007.

### **Evaluations/Reevaluations**

“Highly mobile children should have ... expedited evaluations and eligibility determinations.”

*Letter to State Directors* ..., Nov. 10, 2022.

“While States may require that a parent submit their request for an IDEA evaluation in writing, because some parents may be unaware of how or when to submit such requests, additional actions may be necessary to effectively carry out its child find obligations.” *Letter to Sharpless*, Nov. 1, 2022.

The timing for sharing the evaluation or reevaluation report with the child's parents is within the discretion of the school district just as long as it complies with the obligations for (a) ensuring the parents' opportunity for meaningful participation, and (b) timely responding if the parents request to review the child's educational records before the IEP meeting. *Letter to Anonymous*, Sept. 9, 2019.

When a child with an IEP transfers into the school district from a district in another state, the requirements for an initial evaluation, not a reevaluation, apply. *Letter to Anonymous*, Apr. 9, 2012.

**\*538** For reevaluation, the determination of “existing evaluation data” is left to the IEP team, but it may not exclude recorded information on the child simply because it is not stored in a location not readily available to the IEP Team. *Letter to Mintz*, Feb. 10, 2011.

“[I]n general, it would be appropriate for the evaluation team to consider information about outside or extra learning support provided to the child to determine whether the child's current academic achievement reflects the service augmentation, and not what the child's achievement would be without such help.” *Letter to Anonymous*, Jan. 13, 2010.

The IDEA does not require a school district to conduct a reevaluation or additional testing of a child with a disability solely to satisfy the eligibility criteria established by the College Board or other testing programs. *Letter to Moffett*, Aug. 24, 2009.

Although not encouraged to do so, parents of parentally placed private school students may request an evaluation from both the district of location (based on child find for equitable services) and the district of residence (based on the obligation for an offer of FAPE). *Letter to Eig*, Jan. 28, 2009.

If the IEP team decides to complete an FBA to determine the effectiveness of the teaching methods and positive behavioral supports for the individual child's goals/objectives, it constitutes an evaluation or reevaluation, thus requiring parental consent. *Letter to Christiansen*, Feb. 9, 2007.

The IDEA does not require consent for review of existing data, and the parties may waive reevaluation before or after review of existing data. *Letter to Anonymous*, Feb. 6, 2007.

### **Eligibility**

Students with long COVID may qualify under the IDEA if they meet its eligibility standards for a child with disabilities. *Long COVID under Section 504 and the IDEA*, July 26, 2021.

“School districts in States that have adopted academic achievement standards must ensure that *all* children with disabilities, including those with high cognition, have available to them FAPE that ... meet[s] their unique needs .... even if that child meets the State's academic achievement standards.” *Letter to Anonymous*, Feb. 29, 2012.

In proposing to identify a child as eligible, the PWN should include the specific proposed classification of eligibility if applicable, along with the proposal to initiate services or placement in special education. *Letter to Atkins-Lieberman*, Aug. 5, 2010.

Even if a child is advancing from grade to grade or in the regular educational environment for all of the school day, the child may qualify for special education services if the child cannot progress satisfactorily in the absence of specific instructional adaptations or supportive services, including modifications to the general education curriculum. *Letter to Anonymous*, Nov. 28, 2007.

### **Miscellaneous - Identification**

Aside from child find, school districts are not required to provide information about the IDEA to all parents, regardless of whether their child is suspected of having a disability. *Letter to Siegel*, Aug. 2, 2018.

If the IEP team determines, after a reevaluation, that the child is no longer eligible under the IDEA and the parents, to challenge the determination, request an independent educational evaluation at public expense, regardless of whether the district agrees to the request, it does not have to continue to provide the child's IEP services unless the parents file for a DPH and invoke stay-put. *Letter to Anonymous*, June 28, 2018.

**\*539** The IDEA does not prohibit the use of the terms *dyslexia*, *dyscalculia*, and *dysgraphia* in IDEA evaluation, eligibility determinations, or IEP documents, but the controlling criteria for eligibility are those of the classification, which in such cases is usually specific learning disability, and for FAPE are the individual needs of the child. *Dear Colleague Letter*, Oct. 23, 2015.

A State is not required to use the precise terminology of the classifications in the federal definition of “child with a disability,” provided that all children eligible under that definition receive FAPE. *E.g., Letter to Anonymous*, July 11, 2006.

### **FAPE**

#### **IEP Process**

For English learners, “the IEP Team must consider how the child's level of English language proficiency affects the special education and related services, supplementary aids and services, program modifications, and supports for school personnel that the child needs in order to be involved in and make progress in the general education curriculum.” *Letter to Boals*, Nov. 15, 2021.

Districts must include the parents in determining the specific location of the child's placement at least to the extent that the proximity of the appropriate locations to the child's home is at issue. *Letter to Breeskin*, Nov. 22, 2019.

Invited members of the IEP team should be limited to individuals who will attend to contribute to the team's decisions, not to be passive observers. *Letter to Haller*, May 2, 2019.

The IDEA does not address how the [school district] should handle dissenting opinions within the IEP Team in circumstances outside of an evaluation of a child suspected of having a learning disability.” *Letter to Zirkel*, Apr. 19, 2018.

A state law requiring the school board to approve the IEP does not violate that IDEA provided that, upon nonapproval, the board is limited to prompt remand for the IEP team's final determination. *Letter to Anonymous*, Mar. 3, 2016.

“States may permit the use of electronic mail to distribute IEPs and related documents, such as progress reports, to parents, provided that the parents and the school district agree to use the electronic mail option, and the States take the necessary steps to ensure that there are appropriate safeguards to protect the integrity of the process.” *Letter to Breton*, Mar. 21, 2014.

During a short-term teachers' strike, the district is not required to provide services to children with disabilities if the delivery of educational services is significantly disrupted for all or nearly all students, but the parents may pursue compensatory services via the IEP team or, if not satisfied, by filing for a DPH. *Letter to Pergament*, Dec. 20, 2013.

A school district's blanket policy requiring parents to provide a written copy of their concerns to the IEP team a specified number of days before an IEP meeting in order to have their concerns addressed at that meeting is inconsistent with the IDEA. *Letter to Breton*, Sept. 24, 2013.

Although school districts may offer mediation before receiving the parents' notice revoking consent for special education services, after receiving this notice the district may not offer mediation and may request, but not require, the parents' reasons for revocation. *Letter to Gerl*, June 6, 2012.

**\*540** PWN is generally not required upon the normal progression from elementary to middle to high school unless the program is not substantially similar, or the circumstances were specific to other regulatory requirements. *Letter to Chandler*, Apr. 26, 2012.

The state and local educational agency or public agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP team meetings. *Letter to Anonymous*, Mar. 7, 2012.

The parents of a child with a disability have the right to request an IEP team meeting at any time and the district must provide the requisite PWN if it decides to refuse the request, including a reasonable explanation. *Letter to Anonymous*, Mar. 7, 2012.

Speech therapists are a mandated member of the IEP team if speech-language pathology is considered special education in that state and it is the only service that the child receives. *Letter to Rangel-Diaz*, Apr. 25, 2011.

Although the IDEA regulations' excusal provisions are not applicable to individuals invited to attend IEP Team meetings at the discretion of the parent or the public agency, the parents do not have a legal right to require a district employee to attend their child's IEP Team meeting. *Letter to Rangel-Diaz*, Apr. 25, 2011.

If the parents both have legal authority to make educational decisions for the child but disagree on revocation of consent, the school district must accept either parent's revocation as effective regardless of which parent(s) provided the initial IEP consent. *Letter to Ward*, Aug. 31, 2010.

"It is not appropriate to make IEP decisions based on a majority 'vote.'" In cases of disagreement, the district's representatives must determine the appropriate services and provide the parents with PWN of the determination and procedural safeguards notice. *Letter to Richards*, Jan. 7, 2010.

If the parents withdrew a child with an IEP from a school district for enrollment in a private school or for homeschooling and subsequently return the child to a public school setting in the same state, the enrolling school district may not require the child to repeat the eligibility process. *Letter to Goldman*, Mar. 26, 2009.

The requirement for consent for the "initial" IEP refers to the first time the parents receive an offer of the proposed IEP. Thus, the parents' consent remains effective if they provided it for an IEP at the preschool level in a state that allows agencies other than the school district to provide such services. *Letter to Champagne*, Nov. 17, 2008.

The PWN requirement applies when the school district, instead of proposing or refusing a change, is agreeing with a change that the parents proposed. *Letter to Atkins-Lieberman*, Aug. 15, 2008.

School districts may schedule IEP meetings only during regular school or district hours just as long as they are flexible to reasonably accommodate parents whose employment situation restricts their availability during these hours and to provide alternative means of participation, such as videoconferencing. *Letter to Thomas*, June 3, 2008.

If the district arranges for its attorney to attend the IEP meeting without informing the parents in advance, the attorney must have the requisite special expertise or knowledge of the child, and the parents may request that the meeting be rescheduled until the district provides them with the required notice of “who [at least by position, if not name] will be in attendance.” *Letter to Anonymous*, Mar. 31, 2008.

**\*541** The IDEA does not require written translation of all IEP documents for non-English-speaking parents, although such translation may be one way of achieving the IDEA's informed consent and opportunity for meaningful participation requirements. *Letter to Boswell*, Sept. 4, 2007.

The stay-put provision does not relieve a school district of its obligation to convene the IEP team at least annually to review and, if appropriate, revise the child's IEP. *Letter to Watson*, Apr. 12, 2007.

The IDEA does not require that a parent be present at the IEP meeting in order to have a person that the parent determines has special knowledge or expertise regarding the child at the meeting as a member of the IEP team, and this conclusion applies to a noncustodial parent with authority to make educational decisions for the child unless a protective order restricts that authority. *Letter to Serwicki*, Feb. 28, 2005.

The IDEA does not require school districts to provide parents and their representatives a general right to observe their children's classrooms. *Letter to Mamas*, May 26, 2004. Whether the school district must make an employee who is party-invited, rather than a mandated, member of the IEP team attend the IEP meeting is a matter of state and/or local policy. *Letter to Byrd*, Aug. 28, 2003.

The IDEA does not require related services personnel to be members of the IEP team, although it would be appropriate to consult with them in the development of the IEP. *Letter to Leeds*, Aug. 22, 2003.

The IEP team does not decide promotion or retention (as distinct from placement) of the child unless the state or local education agency delegates this responsibility to the team. *Letter to Davis-Wellington*, Aug. 19, 2003.

If the parents provide informed consent for the initial provision of services and the IEP team subsequently determines that additional services are necessary for FAPE during the period of the IEP, the IDEA does not require consent for these additional services. *Letter to Yudien*, Mar. 20, 2003.

### **IEP Contents**

The school district may not bar or limit specific related services from being in a child's IEP based solely on the placement of the child in a particular program without regard to the child's individual needs for the service. *Letter to Rowland*, Sept. 9, 2019.

“Now, as a result of *Andrew F.*, each child's [IEP] must be appropriately ambitious in light of his or her circumstances, and every child should have the chance to meet challenging objectives.” *Q&A: Andrew F. v. Douglas County School District Case*, Dec. 7, 2017.

A state-imposed requirement that requires a physician's prescription for a related service is not inconsistent with the IDEA if it does not entail a cost to the parents or a delay to the child. *Letter to Anonymous*, Mar. 3, 2016.

The obligation for the IEP to be designed to enable the child to progress in the “general curriculum,” refers to “the curriculum that is based on a State's academic content standards for the grade in which a child is enrolled.” *Dear Colleague Letter*, Nov. 16, 2015.

The school district's FAPE obligation includes appropriately responding to bullying of or by a child with disabilities. *Dear Colleague Letter*, Aug. 20, 2013.

A district policy that mandates a start date for related services for all children with disabilities at a specific time, such as week 3, after the beginning of the school year is not consistent with the IDEA. *Letter to Ackerhalt*, Sept. 6, 2012.

\*542 “The fact that some ... services may also be considered ‘best teaching practices’ or ‘part of the district's regular education program’ does not preclude those services from meeting the definition of ‘special education’ or ‘related services’ and being included in the child's IEP.” *Letter to Chambers*, May 4, 2012.

Students with disabilities placed in private schools by their parents, whether FAPE is at issue or not, do not have a general right to transportation as a related service. *Letter to Luger & Weinberg*, Dec. 6, 2011.

The IDEA requirement for the IEP to specify the “duration” of each related service means “information about the amount of services that will be provided to the child, so that the level of the [district's] commitment of resources will be clear to parents and other IEP Team members.” *Letter to Matthews*, Jan. 7, 2010.

Accessing the general curriculum does not necessarily mean age-based grade-level text-books; whether such textbooks are appropriate, is an IEP team decision based on individual factors, including the nature and severity of the child's disability and the need for adaptations or alternatives. *Letter to Anonymous*, May 6, 2008.

The IDEA regulations do not permit a Section 504 plan to substitute for an IEP. *Letter to Morse*, Oct. 2, 2003.

The IEP, including the placement, must be based on the child's individual needs, not the particular disability classification. *Letter to Veazey*, Nov. 26, 2001.

### **IEP Delivery**

Despite shortages, “[states] **may not** waive the special education or related services personnel certification or licensure requirements on an emergency, temporary, or provisional basis.” *Personnel Qualifications under Part B ...*, Oct. 4, 2022.

Under the IDEA, the same qualifications apply to personnel providing ESY services as those providing special education and related services to implement the child's IEP. *Letter to Copenhaver*, Nov. 7, 2007.

The state or local education agency may arrange either directly or via a third-party contract for a private school to serve a child with disabilities, but the state or local agency remains responsible for compliance with the IDEA, including the obligation for FAPE to the child. *Letter to Stockford*, Feb. 17, 2005.

A school district's contractual arrangement for the provision of a child's special education services by a school district in a neighboring state does not divest the local and state education agency in which the child's family resides from their obligations under the IDEA. *Letter to Librera*, May 26 and Dec. 20, 2004.

Parents do not have the right under the IDEA to be informed of the specific qualifications of the personnel delivering instruction to their child unless the IEP team determines that particular training, experience, and/or knowledge is necessary for providing FAPE. *Letter to Dickman*, Apr. 2, 2002.

### **Parentally Placed Private School Students**

“Whether home-schooled children with disabilities are considered parentally-placed private school children with disabilities is determined under State law. If the State recognizes home schools as private elementary schools and secondary schools, children with disabilities in those home schools must be treated in the same way as other parentally-placed private school children with disabilities.” *Questions and Answers on Serving Children with Disabilities* \*543 *Placed by Parents in Private Schools*, Feb. 2022.

The school district does not have to offer FAPE, via a proposed IEP, for a parentally placed private school child who is eligible under the IDEA if the parents make clear their intent to keep the child in the private school. *Letter to Wayne*, Jan. 29, 2019.

Parentally placed private school children are entitled to transportation to and from the service site if other than the private school and if necessary to benefit from or participate in the services provides under the IDEA's equitable services regulations. *Letter to Chambers*, Dec. 27, 2016.

The IDEA's equitable services obligation, including child find, of the district of location of private schools applies to international students, i.e., those whose parents reside outside the country, who are enrolled in the private school. *Letter to Sarzynski*, July 6, 2015.

The obligation of the district of location to parentally placed children with disabilities in private schools applies for private residential not just day special education schools. *Letter to Mendelson*, Aug. 29, 2007.

The obligation of the district of location to parentally placed children with disabilities in private schools does not apply to for-profit private schools. *Letter to Chapman*, Aug. 22, 2007.

### **Transfer Students**

The “comparable services” requirement for transfer students, whether from in-state or out-of-state, includes ESY, regardless of whether the child transferred during the school year or the summer. *Letter to State Directors ...*, Nov. 10, 2022.

Although the transfer provisions of the IDEA from both out-of-state and in-state refer to “within the same school year,” the receiving school district must have an IEP in effect for the child at the beginning of the new school year. *Letter to Siegel*, Feb. 21, 2019.

The “comparable services” requirement for students who transfer from out-of-state or in-state includes ESY if the previous district's IEP provided for ESY. *Letter to State Directors of Special Education*, July 19, 2013.

When a child with an IEP transfers into the school district from another district in the same state, the full IEP team must develop the temporary goals except to the extent that the excusal provision applies or the parents and the district agree to use the amendment provision of the IDEA regulations. *Letter to Finch*, Apr. 10, 2012.

### **Miscellaneous - FAPE**

“Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services--or even making decisions about how to provide services--IEP teams ... must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations.” *Supplemental Fact Sheet Addressing the Risk of COVID-19 ...*, Mar. 21, 2020.



The FAPE obligation continues “to the greatest extent possible” during the pandemic. *Questions and Answers ... During the Coronavirus ... Outbreak*, Mar. 12, 2020.

The IDEA does not require school districts to communicate with the parents' attorney beyond the authorized role of the attorney at IEP meetings and DPHs. *Letter to Marcus*, Dec. 27, 2016.

The IDEA does not require a district to provide special education and related services for its GED test preparation program unless the state treats this program to be a part of an \*544 appropriate secondary education. *Letter to Cort*, May 14, 2010.

The IDEA does not allow IEP teams to waive a state-mandated physical education requirement that applies to all children because the child with a disability needs more reading instruction; if the child needs such additional instruction for FAPE, the IEP team should explore scheduling alternatives, such as extended school day or year. *Letter to Irby*, Feb. 12, 2010.

While the IDEA requires that IEP Teams consider the use of positive behavioral interventions and supports, it does prohibit the use of aversive behavioral interventions, leaving such matters to state law or policy. *Letter to Trader*, Oct. 19, 2006.

The IDEA does not address whether a child with disabilities has the right to experience each grade level in sequence, with the application of the specific relevant requirements of the IDEA regulation ultimately left to a DPH based on the individual circumstance of the case. *Letter to Carroll*, Nov. 4, 2004.

A state agency that has custody of a child may not serve as the parent or surrogate parent under the IDEA. *Letter to Yudien*, Mar. 11, 2003.

A state may use criteria other than regression/recoupment to determine eligibility for ESY. *Letter to Given*, Feb. 4, 2003.

### **LRE**

LRE applies to the school district responsible for providing FAPE at the preschool level regardless of whether the district offers preschool to nondisabled students. *Dear Colleague Letter*, Jan. 7, 2017.

The IDEA does not require data or measurement to document when a child with a disability should be moved from a less restrictive to a more restrictive placement, but the IEP must include an explanation for the team's determination of the extent, if any, to which the child, cannot participate with nondisabled children in the regular class and in nonacademic activities. *Letter to Anonymous*, Mar. 7, 2012.

A child may be placed in a special purpose school for students with autism only if the IEP team determines that this placement is necessary to meet the needs of that child and that the child cannot be educated satisfactorily in a less restrictive setting, even with the use of appropriate supplementary aids and services. *Letter to Autin*, Mar. 7, 2011.

Placement decisions must not be made solely on factors such as disability classification or severity, availability of space or special education and related services, configuration of the service delivery system, or administrative convenience. *Letter to Trigg*, Nov. 30, 2007.

The IDEA does not limit the number or percentage of students with disabilities placed in regular classes to provide FAPE in the LRE. *Letter to Anonymous*, July 23, 2003.

### **Discipline**

“[The] IDEA does not prescribe specific disciplinary actions an LEA must take, but it *does* set some limits.” Moreover, although the IDEA does not authorize or prohibit seclusion or restraints, “the Department’s position is that restraint or seclusion should not be used except in situations where a child’s behavior poses an imminent danger of serious physical harm to themselves or others.” *Questions and Answers: ... Discipline Provisions*, July 19, 2022.

**\*545** The two specified remedies for cases concerning disciplinary changes in placement do not preclude the IHO from alternatively or additionally ordering other remedies. *Letter to Zirkel*, May 13, 2019.

For a child in the “deemed to know” category, the IDEA (a) does not provide for any extension to the 10-day deadline for the manifestation determination, (b) does not require the evaluation to be expedited, and (c) requires the school district to at least offer the parents a printed copy of the procedural safeguards notice rather than only referring them to a posting of the notice on the district website. *Letter to Nathan*, Jan. 9, 2019.

Exclusionary measures such as a shortened school day do not generally amount to disciplinary removals if the child continues to receive the services specified in the IEP unless these measures are implemented repeatedly. *Letter to Mason*, July 27, 2018.

The exclusionary measures that may rise to the level of disciplinary removals include (a) a pattern of office referrals or time-outs; (b) repeatedly subjecting the child to “administrative leave” or “days off”; (c) repeatedly requiring as a condition of return to school a risk assessment or psychological evaluation; and (d) regularly requiring shortened school days. *Dear Colleague Letter*, Aug. 1, 2016.

In conjunction with a manifestation determination, the district must obtain consent to conduct an FBA, but an FBA is not required uniformly in this context (e.g., if a BIP is already in place). *Letter to Gallo*, Apr. 2, 2013.

In a manifestation determination case, the IDEA neither precludes nor requires the hearing officer to determine whether the student’s action amounted to a violation of the district’s student conduct code. *Letter to Ramirez*, Dec. 5, 2012.

“School days” for the purpose of the timeline for completing an expedited hearing includes the days of summer school for instructional purposes of both students with and without disabilities, thus not extending to ESY. *Letter to Cox*, June 22, 2012.

Suspension from the school bus for a child who has transportation on the IEP counts as a removal for purposes of determining a disciplinary change in placement regardless of whether the parents choose to transport the child to school. *Letter to Sarzynski*, June 12, 2012.

The IDEA does not require FBAs to be conducted by Board Certified Behavior Analysts unless state law so specifies. *Letter to Janssen*, June 5, 2008.

The IDEA neither requires nor prevents a district from postponing the expulsion hearing of a child not previously determined eligible for special education pending an expedited DPH to determine whether the district is deemed to have the requisite knowledge for manifestation-determination protection during an expedited evaluation. *Letter to Anonymous*, Sept. 15, 2007.

The 10-day timeline for manifestation determinations does not preclude the team from deciding that additional evaluations are necessary to continue the review later to finalize the determination. *Letter to Yudien*, Aug. 1, 2003.

## **Remedies**

The parents’ omission or inclusion of a proposed resolution of the problem in the complaint does not limit in any way the IHO’s authority to issue an appropriate equitable remedy. *Letter to Zirkel*, Apr. 15, 2022.

The district should implement the IHO's remedial order as soon as possible unless it has a specific reason to do otherwise, and the applicable period for appeal does not qualify on a \*546 blanket basis as such a justifying reason. *Letter to Voigt*, June 2, 2014.

Under the IDEA, the same qualifications apply to personnel providing special education and related services to implement the child's IEP and those providing compensatory education services. *Letter to Anonymous*, June 14, 2007.

A state or local policy that limited the remedy of tuition reimbursement retroactively to the date of filing for a DPH would not be allowed under the IDEA. *Letter to Heckler*, July 22, 2004.

## **DPHs**

### **Prehearing**

In a state that requires parental consent for any proposed change to the child's IEP or placement, the district may file for a DPH to override the parent's refusal if it would result in denial of FAPE. *Letter to Anonymous*, Nov. 17, 2021.

A school district's filing of a DPH complaint on the same issues of the parents' pending state complaint is strongly discouraged as a violation of the spirit, even if not the letter, of the IDEA. *Dear Colleague Letter*, Apr. 15, 2015.

A state education agency or school district may prohibit, require, or otherwise regulate the use of recording devices at the resolution session. *Letter to Savit*, Feb. 10, 2014.

IHOs, not state education agencies, have the authority to determine the sufficiency of and jurisdiction for the complaint for a DPH. Similarly, whether the non-complaining party may raise issues at the DPH that were not identified in the complaint is within the discretion of the IHO. *Questions and Answers on IDEA Part B Dispute Resolution*, July 23, 2013.

A parent who disagrees with the other parent's revocation of consent for their child's continued special education services does not have the right to use the DPH to override the other parent's revocation. *Questions and Answers on IDEA Part B Dispute Resolution*, July 23, 2013.

At a resolution session, a district's refusal to discuss the issues raised in the parents' complaint is inconsistent with the IDEA. *Letter to Casey*, Mar. 27, 2013.

In-person as compared to alternative means of parent participation for the resolution session is preferable but not required under the IDEA. *Letter to Walker*, Aug. 9, 2012.

If the district notifies the parent of its intent to schedule a resolution meeting within the applicable deadline, and the parents respond in advance of the meeting that circumstances prevent them from attending the meeting in person, the district should offer alternative means to ensure parent participation, such as video conferences or conference telephone calls, subject to the parents' agreement. *Letter to Eig*, Apr. 23, 2012.

The IDEA does not allow the state education agency to delay the commencement of the resolution session timeline by waiting until after the school district's winter break to notify the district of the parents' filing of a DPH complaint just before or during the break. *Letter to Anderson*, Nov. 10, 2010.

If the parents agree to attend the resolution session, but with instructions from their attorney "not to agree to ... or sign anything," the IHO does not have the authority to dismiss the case, because the IDEA does not require the parents to agree to any district resolution proposal at the session. *Letter to Irby*, Jan. 12, 2010.

\*547 For the resolution session, attendance by the district's attorney is limited to when the parents bring an attorney, not a non-attorney advocate or other qualified individual. *Letter to Lawson*, Feb. 2, 2010.

A school district may not require parents to sign a confidentiality agreement as a precondition for holding a resolution session. *Letter to Baglin*, Oct. 30, 2008.

### **Hearing**

Dismissal or other summary disposition of a party's complaint without a hearing for a reason other than insufficiency is inconsistent with the IDEA, unless both parties agree. *Letter to Zirkel*, Apr. 15, 2022.

DPHs may be conducted virtually when public facilities have restrictions that prevent in-person DPHs if the IHO concludes that such procedures are consistent with legal practice in the state and the parents' rights under the IDEA. *Part B Dispute Resolution in COVID-19 Environment Q-&-A*, June 22, 2020.

Parents have the right to invite observers to a closed DPH if these individuals have special knowledge or training with respect to the problems of children with disabilities, but inviting members of the press would require an open DPH. *Letter to Eig*, Aug. 4, 2016.

For a complaint that contains both disciplinary and non-disciplinary issues, the IHO has the discretion to separate out the non-disciplinary issues so that the disciplinary issues are resolved per the requirements for an expedited DPH. *Letter to Snyder*, Dec. 13, 2015.

The IDEA does not bar a state policy or practice that limits each party to 9 hours for direct-and cross-examination of witnesses unless exceptional circumstances, and the proper recourse to challenge its application is on judicial appeal. *Letter to O'Sullivan Kane*, Jan. 7, 2015.

Extensions are not permissible for expedited DPHs, regardless of the parties' mutual agreement. *Questions and Answers on IDEA Part B Dispute Resolution*, July 23, 2013.

An IHO (or, in two-tier states, a review officer) may not unilaterally extend the 45-day period for the issuance of the decision or, upon party request, grant an extension for an indefinite period. *Questions and Answers on IDEA Part B Dispute Resolution*, July 23, 2013.

The IDEA does not prohibit admission at the DPH of information discussed at a resolution meeting unless the parties voluntarily entered into a confidentiality agreement. *Questions and Answers on IDEA Part B Dispute Resolution*, July 23, 2013.

Absent parental consent, school district employees who are not witnesses or who do not fit the representation/accompaniment provisions of the IDEA regulations for DPHs are not allowed to attend or have personally identifiable information from a closed DPH. *Letter to Gran*, Nov. 30, 2012.

Whether a non-attorney may “represent” the parents at a DPH is left to each state. *Letter to Lawson*, Feb. 2, 2010.

### **Posthearing**

The State should not redact the names of the IHO and the district or the case number unless the release of such information would result in the release of personally identifiable information of the student(s). *Letter to Anonymous*, Mar. 3, 2016.

Although motions for reconsideration are not allowed after the issuance of the IHO's final decision, it is permissible for a party to request correction of technical or typographical errors \*548 that do not affect the outcome or substance of the decision. *Questions and Answers on IDEA Part B Dispute Resolution*, July 23, 2013.

Upon the issuance of the final decision, a motion for reconsideration is not permissible. *Letter to Colleye*, Oct. 20, 2010.

The parents' right to a written, or, at their choice, electronic transcript of and decision from the DPH must be at no cost to them. *Letter to Connelly*, Aug. 15, 2007.

### **Miscellaneous - DPHs**

“[An IHO's] final written or, at the option of the parents, electronic findings of fact and decision to dismiss a party from the due process action would generally satisfy IDEA's administrative exhaustion requirement.” *Letter to Anonymous*, Nov. 17, 2021.

A state law that postpones implementation of an IHO's order (in a one-tier state) in the parents' favor for tuition reimbursement is permissible under the IDEA. *Letter to Philpot*, Nov. 7, 2012.

Stay-put upon filing for a DPH is, if at issue, a matter for the IHO's initial determination. Conversely, if the child's current educational placement is not in dispute, the school district should implement it automatically. *Letter to Goldstein*, Oct. 18, 2012.

State rules and IHOs may determine procedural matters not addressed in the IDEA, such as which party has the burden of production, so long as their determinations do not interfere with a party's right to an impartial DPH. *Letter to Anonymous*, Mar. 7, 2012.

Contrary to the Eighth Circuit's decision in *Thomson v. Board of Special School District No. 1* (1998) and reaffirmed in *C.N. v. Willmar Public Schools* (2010), in states outside the Eighth Circuit, parents who enroll their child with disabilities in a new school district do not lose their right to a DPH against the district that the child previously attended as long as their complaint is within the IDEA's statute of limitations. *E.g.*, *Letter to Goetz & Reilly*, Oct. 4, 2010.

Although the IDEA prohibits IHOs from being state education agency employees, they may be employees of other state agencies. *Letter to Chester*, Jan. 15, 2009.

The IHO has jurisdiction for a parent's complaint challenging an IEP with which they had agreed. *Letter to Anonymous*, Dec. 12, 2008.

For expedited DPHs, the 15-calendar-day limit for the resolution session is within the 20-school-day limit for the hearing, thus allowing sufficient time for the same 5-business-day deadline for the parties' disclosure as applies to regular DPHs. *Letter to Gerl*, May 1, 2008.

A state may have uniform rules providing or rejecting IHO authority to review and/or enforce settlement agreements reached outside of the IDEA's mediation or resolution processes just as long as such rules have general application not limited to students with disabilities. *Letter to Shaw*, Dec. 12, 2007.

A state law allowing a party to choose to appeal a DPH decision to a state court that does not have the authority to hear additional evidence at the request of a party is inconsistent with the IDEA. *Letter to Anonymous*, Aug. 12, 2004.

A state's use of its administrative law judge agency for DPHs does not require a second, review officer tier. *Letter to Anonymous*, Dec. 10, 2003.

The IDEA does not prohibit a state from using an independent administrative law judge system for DPHs or second-tier reviews. *Letter to Greer*, Sept. 12, 2002.

\*549 A 30-day limit for filing for judicial appeal of a DPH decision is too short in the Eighth Circuit. *E.g.*, *Letter to Harding*, June 4, 2002.

Requiring raising an issue at an IEP meeting of the child as a prerequisite to the issue being in the jurisdiction of the IHO would violate the IDEA. *E.g.*, *Letter to Lenz*, Mar. 6, 2002.

Footnotes

- a1 *Education Law Into Practice* is a special section of the Education Law Reporter published in collaboration with the Education Law Association. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 413 Educ. L. Rep. 535 (September 14, 2023).
- aa1 Perry Zirkel is University Professor Emeritus of Education and Law at Lehigh University, Bethlehem, PA. He is a Past President of the Education Law Association. His website is perryzirkel.com.
- 1 The website URL is <https://sites.ed.gov/idea/policy-guidance/>. It currently contains approximately 700 policy letters and memoranda. The LRP commercial database, SpecialedConnection, includes not only all of these policy interpretations but also those that pre-date 2001. Given the scope limitation of the website, the coverage here does not extend to the agency commentary accompanying the IDEA regulations. *E.g.*, *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46,540, 46,547-46,743 (Aug. 14, 2006).
- 2 For an overview and explanation of these basic building blocks, or key component concepts, see Perry A. Zirkel, *Special Education Law: Illustrative Basics and Nuances of Key IDEA Components*, 38 Tchr. Educ. & Special Educ. 263 (2015). For the published court decisions within these component categories, see Perry A. Zirkel, National Update of Case Law under the IDEA: 1998 to the Present (available at perryzirkel.com).
- 3 For overlapping but much broader source coverage, see Perry A. Zirkel, *Impartial Hearings Under the IDEA: Updated Legal Issues and Answers*, 43 J. Nat'l Ass'n Admin. L. Judiciary 1 (2022).
- 4 Perry A. Zirkel, *The Law of Evaluations under the IDEA*, 368 Educ. L. Rep. 594 (2019).
- 5 Perry A. Zirkel, *Independent Educational Evaluations at Public Expense under the IDEA: The Next Update*, 402 Educ. L. Rep. 23 (2022).
- 6 Perry A. Zirkel, *The Law on RTI and MTSS*, 373 Educ. L. Rep. 1 (2020).
- 7 Perry A. Zirkel, *Speech Language Pathology under the Individuals with Disabilities Education Act*, 396 Educ. L. Rep. 377 (2022).
- 8 Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process: An Update*, 313 Educ. L. Rep. 1 (2015); see also Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes--Complaint Procedures and Impartial Hearings: An Update*, 369 Educ. L. Rep. 550 (2019).

- 9 Perry A. Zirkel, *Stay-Put under the IDEA: The Latest Update*, 404 Educ. L. Rep. 398 (2022).
- 10 These issues are among the most frequent topics of the OSEP policy interpretations.
- 11 Other, more marginal exclusions are for the topics of charter schools, records/confidentiality, state- or district-wide assessments, and transition services.
- 12 A few policy memoranda specific to the pandemic are included only as limited examples, especially for issues that may extend beyond the period that has already passed for filing for a DPH.
- 13 Although the website is for OSEP, it includes some policy interpretations of the Office for Civil Rights and other offices in the U.S. Department of Education.
- 14 See 20 U.S.C. § 1406(d)-(e) (distinguishing these policy interpretations from duly adopted regulations and requiring OSEP to include notice that they are informal guidance and not legally binding).
- 15 See, e.g., *K.D. v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 255-56, 358 Educ. L. Rep. 98 (3d Cir. 2018) (concluding that the OSEP Nov. 16, 2015 guidance was not persuasive); *Hernandez v. Grisham*, 508 F. Supp. 3d 893, 1006-08, 391 Educ. L. Rep. 207 (D.N.M. 2020) (concluding that the identified OSEP policy guidance for the COVID-19 pandemic was not persuasive).
- 16 Based on the applicable Supreme Court jurisprudence, including *Skidmore v. Swift & Co.*, 323 U.S. 144 (1944) and *Auer v. Robbins*, 519 U.S. 452 (1997), the relevant factors for this standard consist, for example, of whether the agency interpretation is (1) inconsistent with its own regulations, and (2) a fair and considered judgment on the matter. See, e.g., Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?*, 171 Educ. L. Rep. 391 (2003). For an analysis of the extent of courts' citation of OSEP policy letters, see Perry A. Zirkel, *The Courts' Use of OSEP Policy Interpretations in IDEA Cases*, 344 Educ. L. Rep. 671, 673 (2017).
- 17 The respective subcategories for each of these three categories are as follows:
- Eligibility: Child Find, Evaluation, Eligibility, and Miscellaneous
  - FAPE: IEP Process, IEP Contents, IEP Delivery, Parentally Placed Private School Students, Transfer Students, and Miscellaneous
  - DPH: Prehearing, Hearing, Posthearing, and Miscellaneous.

413 WELR 535