

Legal Boundaries for the IDEA Complaint Resolution Process*

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Most of the attention to dispute resolution under the Individuals with Disabilities Education Act (IDEA) focuses on the adjudicative avenue, which starts with the impartial due process hearing and culminates in judicial review.¹ Indeed, many of the texts in special education law give negligible or no attention to the alternative, administrative avenue of the complaint resolution process (CRP).² Yet, in many states dissatisfied parents of students with disabilities take this route of IDEA dispute resolution,³ likely because it requires far less, if any, in terms of legal representation, case preparation, and face-to-face adversariness. The process, similar to the primary mechanism for resolving student disputes under Section 504 and the Americans with Disabilities Act—filing a

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¹ See, e.g., Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 Ed.L. Rep. [731] (2002).

² See, e.g., NIKKI MURDICK, BARBARA GARTIN & TERRY CRABTREE, *SPECIAL EDUCATION LAW*, (2006); PETER LATHAM, PATRICIA LATHAM & MYRNA MANDLAWITZ, *SPECIAL EDUCATION LAW* (2007); ALLAN G. OSBORNE & CHARLES J. RUSSO, *SPECIAL EDUCATION AND THE LAW* (2006); LAURA ROTHSTEIN, *SPECIAL EDUCATION LAW* (2000); MARK C. WEBER, RALPH MAWDSLEY & SARAH REDFIELD, *SPECIAL EDUCATION LAW* (2007); PETER WRIGHT & PAMELA DARR WRIGHT, *WRIGHTSTLAW: SPECIAL EDUCATION LAW* (2007); MITCHELL YELL, *SPECIAL EDUCATION AND THE LAW* (2006). The relatively few exceptions provided understandably limited coverage in comparison to the comprehensive and current canvassing in this Article. See, e.g., THOMAS GUERNSEY & KATHE KLARE, *SPECIAL EDUCATION LAW* 251-252 (2001); DIXIE SNOW HUEFNER, *GETTING COMFORTABLE WITH SPECIAL EDUCATION LAW* 212-213 (2006).

³ Depending on the year(s) and the method, national studies have found that the number of CRP requests was, within a fairly close range, more or less than the number of due process hearing requests under the IDEA. See, e.g., Jay G. Chambers, Jenifer J. Harr & Amynah Dhanani, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000* (May 2003) (available from ERIC – access no. ED471888); Judy Schrag & Howard Schrag, *National Dispute Resolution Use and Effectiveness* 18 (Summer 2004) (available from www.directionserve.org/cadre). As another confirmed, CRP is by far the predominant avenue if the comparison is with the number of due process hearings held rather than the number of hearings requested. U.S. General Accounting Office, *Special Education: Number of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* 17 (September 2003) (available at www.gao.gov).

complaint with the Office for Civil Rights (OCR)⁴—is based on investigation by an agency official and either an induce settlement or an imposed corrective action.⁵ The difference is that the IDEA delegates this process to each state, with variation within a specific regulatory framework.

The applicable framework, since 1992,⁶ has been directly in the IDEA regulations. Generally, the current IDEA regulations continue—with limited additions—the requirement for each state to have a formal, well-publicized CRP⁷; prescribed limitations in terms of time, form, and other overall procedures⁸; and specification for the who and what of complaint filing.⁹

In light of the absence of this information in the professional literature, the purpose of this annotated outline is to synthesize the other pertinent primary sources of law—court decisions, hearing/review officer decisions, and Office of Special Education Programs (OSEP)¹⁰ policy letters¹¹—that fill in the legal boundaries of the CRP.¹² The

⁴ See, e.g., PERRY A. ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (2004).

⁵ For a study of the implementation of the process in 10 diverse states, see Joy Markowitz, Eileen Ahearn & Judy Schrag, *Dispute Resolution: A Review of Systems in Selected States 2-6* (June 2003) (available from www.nasdse.org).

⁶ For the immediate previous period, the General Administrative Regulations contained the applicable procedures. *Id.*

⁷ 34 C.F.R. § 300.151 (2006).

⁸ *Id.* § 300.152 (2006). The time limit is 60 days for the entire process. The new provisions make explicit 1) the opportunity for the “public agency” (e.g., school district) to respond and for parties to resort to mediation (*id.* § 300.152(a)(3)); agreed-upon extensions for mediation or other forms of alternative dispute resolution (*id.* § 300.152(b)(1)(ii)); and 3) the interrelationship with due process hearings, including mandatory deferral (*id.* § 300.152(c)(1)).

⁹ *Id.* § 300.153 (2006).

¹⁰ Analogous to OCR, OSEP is the specialized office within the U.S. Department of Education responsible for administering the IDEA. Both are within the Office for Special Education and Rehabilitation Services, which occasionally issues such policy letters. For the legal force of such administrative interpretations, see Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 Ed.L. Rep. [391] (2003).

¹¹ This otherwise comprehensive coverage does not include OSEP letters that either are outdated or add nothing of note to the current regulations. See, e.g., Letter to Garrett, 29 IDELR 973 (OSEP 1997). It also does not include OCR enforcement letters under the overlapping coverage of § 504. See, e.g., Illinois St. Bd. of Educ., EHLR 257:574 (OCR 1984).

other acronyms used herein are as follows: EHLR = Education of the Handicapped Law Report, which is the predecessor of the IDELR; IDELR = Individuals with Disabilities Education Law Report; IHO = impartial hearing officer; and SEA = state education agency, which in parentheses for citations represents a hearing officer or review officer under the IDEA. The categories are broadly approximate and not mutually exclusive, merely serving to organize the material into a coherent sequence. Each item within these categories needs to be assessed in terms of the legal weight of its cited authority.

¹² Inasmuch as this purpose is to supplement rather than analyze the aforementioned cluster of three IDEA regulations (*see supra* notes 7-9), the reader is advised to review carefully their contents. Except for relatively limited excerpts of or references to selected major subsections, the only regulatory citations in the annotated outline are to relevant subsections of other IDEA regulations.

1. Jurisdiction¹³

- In general, the SEA CRP is not a mutually exclusive forum; it has overlapping jurisdiction with IHOs (albeit with mandatory deferral).¹⁴
- CRP also has overlapping jurisdiction for student records violations under IDEA, with FPCO deferring to CRP for dual parental complaints.¹⁵
- A state may not require the complainant to exhaust CRP before IHO.¹⁶ Conversely, the IHO does not have jurisdiction as the appellate forum for the outcome of CRP.¹⁷
- CRP has exclusive jurisdiction, compared with IHOs, for complaints about the personnel qualifications, such as highly qualified teachers.¹⁸
- CRP also has exclusive jurisdiction for complaints of private schools re the district's consultation responsibilities for parentally placed private school children, and this matter is appealable to OSEP.¹⁹

¹³ This category focuses on subject matter jurisdiction, whereas personal jurisdiction is reserved herein for the state of the next, overlapping category.

¹⁴ See, 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.*, 40 IDELR ¶ 8 (W.D. Mich. 2003); *Wilson v. Sch. Dist. No. 1*, EHLR 556:235 (Or. Ct. App. 1984); Letter to Douglas, 35 IDELR ¶ 278 (OSEP 2001); Letter to Chief State Sch. Officers, 34 IDELR ¶ 264 (OSEP 2000); Letter to Anonymous, 25 IDELR 525 (OSEP 1996); Letter to Hathcock, 19 IDELR 631 (OSEP 1993); Letter to Johnson, 18 IDELR 589 (OSEP 1991); *Walled Lake Consol. Sch. Dist.*, 40 IDELR ¶ 136 (Mich. SEA 2003); *Spring-Ford Area Sch. Dist.*, 28 IDELR 412 (Pa. SEA 1998); cf. 34 C.F.R. § 300.661(c)(3); *OSEP Memo 94-16*, 21 IDELR 85 (OSEP 1994) (deferral policy). *But see* *Kuszewski v. Chippewa Valley Sch.*, 131 F. Supp. 2d 926 (E.D. Mich., 2001), *aff'd on other grounds*, 38 IDELR ¶ 63 (6th Cir. 2003); cf. *Newmarket Sch. Dist.*, 40 IDELR ¶ 26 (N.H. SEA 2003); *Sherwood Sch. Dist.*, 25 IDELR 1254 (Or. SEA 1997) (unappealed state complaint decision may not be relitigated via IHO). For the regulatory codification of mandatory deferral, see *supra* note 9.

¹⁵ Letter to Anderson, 50 IDELR ¶ 167 (OSEP 2008). "FPCO" is the Family Policy Compliance Office, which is the subdivision of the U.S. Department of Education responsible for enforcing the Family Education Rights and Privacy Act (FERPA).

¹⁶ Letter to Chief State Sch. Officers, 34 IDELR ¶ 264 (OSEP 2000). For the regulatory requirement, including the responsibility for timely resolution of any parts not within the scope of the IHO proceeding, see 34 C.F.R. § 300.152(c) (2006).

¹⁷ See, e.g., *Virginia Office of Protection & Advocacy v. Virginia Dep't of Educ.*, 262 F. Supp. 2d 648 (E.D. Va. 2003).

¹⁸ 34 C.F.R. § 300.156(e) (2006).

¹⁹ *Id.* § 300.136 (2006).

- Additionally, CRP has jurisdiction for complaints of parents of parentally placed children, and this jurisdiction is exclusive except for child-find issues.²⁰
- The proper SEA enforcement procedure of an IHO decision appears to be via the CRP (or a § 1983 suit), not via another due process hearing²¹ However, parents need not exhaust the CRP before seeking judicial enforcement of an IHO order.²²
- CRP must include enforcement of settlement agreements that alleged a failure to provide the covered services or placement constitutes a denial of FAPE.²³

Procedures²⁴

- The regulations allow individuals and organizations to initiate the CRP.²⁵ Thus, one parent may file a complaint that triggers the SEA's investigation of a district in terms of the children of all similarly situated parents.²⁶
- Nonresidents of the state may utilize CRP; the location of the violation, not the complainant, is what counts.²⁷
- Similarly, non-parents may file complaints on behalf of students under the CRP.²⁸
- If someone other than the parent files a complaint, the SEA may not provide personally identifiable information to said complainant w/o parental consent.²⁹

²⁰ *Id.* § 300.140 (2006).

²¹ *See, e.g.,* Wyner v. Manhattan Beach Unified Sch. Dist., 323 F.3d 1026 (9th Cir. 2000); Gum v. Nevada Dep't of Educ., 113 P.3d 853 (Nev. 2005); Newtown Bd. of Educ., 41 IDELR ¶ 201 (Ct. SEA 2004); Bd. of Educ., 47 IDELR ¶ 115 (N.Y. SEA 2006); *cf.* Wilson v. McDonald, 558 EHLR 364 (E.D. Ky. 1987) (including provision of FAPE).

²² Bd. of Trustees v. Porter, 307 F.3d 1064 (9th Cir. 2002).

²³ Letter to Shaw, 50 IDELR ¶ 79 (OSEP 2008).

²⁴ For the basic regulatory requirements for the SEA, including timelines, see *id.* § 300.152 (2006). For those specific to the complainant, see *id.* § 300.153 (2006).

²⁵ 34 C.F.R. § 300.622 (2006).

²⁶ Indep. Sch. Dist. No. 281 v. Minnesota Dep't of Educ., 743 N.W.2d 315 (Minn. Ct. App. 2008).

²⁷ Letter to Barniser, EHLR 213:172 (OSEP 1988).

²⁸ Letter to Ash, 23 IDELR 647 (OSEP 1994).

²⁹ Letter to Chief State Sch. Officers, 34 IDELR ¶ 264 (OSEP 2000).

- The IDEA allows states the option of e-mail filings of complaints provided it does not impair the required procedural safeguards.³⁰
- The IDEA regs require the state to resolve but not necessarily investigate every complaint that meets the formal criteria.³¹
- Mediation, as an option, previously was discretionary for CRP.³² However, current regulations require states to provide the parties with the opportunity to resolve the complaint under the IDEA's mediation provision.³³ Moreover, the current IDEA regulations expressly permit as a reason for extending the 60-day deadline the situation where the parties agree to engage in mediation or other state-available voluntary dispute resolution procedures.³⁴ Finally, the regulations require that any resulting settlement be in the form of a legally binding agreement.³⁵
- The issue of whether an SEA is obligated to provide the public with copies of CRP complaint investigation reports is governed by states law.³⁶
- OSEP Commentary: "We have chosen to be silent in the regulations about whether a State complaint decision may be appealed because we believe States are in the best position to determine what, if any, appeals process is necessary to meet each State's needs, consistent with State law."³⁷

³⁰ Letter to Copenhaver, 50 IDELR ¶ 197 (OSEP 2008).

³¹ Letter to Nann, 36 IDELR ¶ 212 (OSEP 2001).

³² Letter to Chief State Sch. Officers, 34 IDELR ¶ 264 (OSEP 2000).

³³ *See supra* note 8.

³⁴ *Id.*

³⁵ 34 C.F.R. § 300.506(b)(6) (2006).

³⁶ Letter to Opuda, 22 IDELR 368 (OSEP 1994).

³⁷ 71 Fed. Reg. 46,607 (Aug. 14, 2006).

- Pending issuance of the new Part C regulations, providers of early intervention services are not entitled to review or respond to parental complaints prior to SEA determinations of whether the provider violated Part C.³⁸
- The deadline for a final decision is 60 days after the filing of the complaint unless “exceptional circumstances.”³⁹ Such exceptional circumstances include a case where the complaint raised system-wide concerns about similarly situated students and the district had received a 10-day extension for responding to the complaint.⁴⁰

Remedies

- “In resolving a complaint in which the SEA has found a failure to provide appropriate services, an SEA... must address--
 - (1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and
 - (2) Appropriate future provision of services for all children with disabilities.”⁴¹
- general limitations period: one year⁴²

³⁸ Letter to Berliner, 50 IDELR ¶ 17 (OSEP 2007).

³⁹ 34 C.F.R. § 300.661(a)-(b)(1) (2006).

⁴⁰ *Indep. Sch. Dist. No. 281 v. Minnesota Dep't of Educ.*, 743 N.W.2d 315 (Minn. Ct. App. 2008).

⁴¹ 34 C.F.R. § 300.151 (2006).

⁴² *Id.* § 300.153(c) (2006).

- However, while the regulations dropped the 1999 version's 3-year period for compensatory services and its reference to possible exceptions for continuing violations. OSEP commented: "States may choose to accept and resolve complaints regarding alleged violations that occurred outside the one-year timeline, just as they are free to add additional protections in other areas that are not inconsistent with the requirements of the Act and its implementing regulations."⁴³
- The CRP's remedial authority extends to district-wide corrective action based on state law that corresponds with but exceeds the IDEA even though the violation was limited to one parent's child.⁴⁴
- However, CRP's corrective action (here partial tuition reimbursement for tutoring) must have direct, not equivocal, nexus to the IDEA deficiency.⁴⁵

Miscellaneous Other

- The parent must receive notice of their procedural safeguards upon filing, i.e., initiating the CRP, for the first time within the school year.⁴⁶ The CRP must be part of said notice.⁴⁷
- CRP decisions are not appealable to court, although their procedures may be, under the IDEA.⁴⁸ In some states, it may be appealable via the state's administrative procedures act.⁴⁹

⁴³ 71 Fed. Reg. 46,606 (Aug. 14, 2006).

⁴⁴ *Indep. Sch. Dist. No. 281 v. Minnesota Dep't of Educ.*, 743 N.W.2d 315 (Minn. Ct. App. 2008).

⁴⁵ *Indep. Sch. Dist. No. 192 v. Minnesota Dep't of Educ.*, 742 N.W.2d 713 (Minn. Ct. App. 2007).

⁴⁶ 34 C.F.R. § 300.504(a)(2) (2006).

⁴⁷ *Id.* § 300.504(c)(5) (2006).

- Similarly, a CRP decision is not appealable to OSEP (except where the IDEA regs specify otherwise).⁵⁰
- The completion of CRP does not substitute for completion of the IHO process for purposes of the judicial requirement of exhaustion.⁵¹
- Are attorney's fees available to prevailing parents in CRP?⁵²

⁴⁸ *See, e.g.*, *Wachlarowicz v. Sch. Bd.*, 40 IDELR ¶ 209 (D. Minn. 2003); *Virginia Protection & Advocacy v. Virginia Dep't of Educ.*, 262 F. Supp. 2d 648 (E.D. Va. 2003); *Lenape Sch. Dist. v. Dep't of Educ.*, 945 A.2d 125 (N.J. Super. Ct. App. Div. 2008).

⁴⁹ Letter to Nann, 36 IDELR § 212 (OSEP 2001).

⁵⁰ Letter to Anonymous, 40 IDELR ¶ 262 (OSEP 2003). The 1999 regulations removed the former provision for Secretarial review, and it is not necessary for a state to have a replacement procedure for review. Letter to Chief State Sch. Officers, 34 IDELR ¶ 264 (OSEP 2000).

⁵¹ *See, e.g.*, *Manning v. Spillane*, 21 IDELR 845 (E.D. Va. 1994).

⁵² *Compare Vultaggio v. Bd. of Educ.*, 343 F.3d 598 (2d Cir. 2003); *Johnson v. Fridley Pub. Sch.*, 36 IDELR ¶ 129 (D. Minn. 2002); *Megan C. v. Indep. Sch. Dist. No. 625*, 57 F. Supp. 2d 776 (D. Minn. 1999) (no), *with Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023 (9th Cir. 2000) (yes). In its commentary to the 2006 regulations, OSEP opined that attorney's fees are not available for CRP because a state complaint is not an "action or proceeding brought under [the adjudicatory provision] of" the IDEA. 71 Fed. Reg. 46,602 (Aug. 14, 2006).