

**My Powers Are Beyond Your Comprehension...:
Hearing Officer and Mediator Training/
Certification in Compliance With IDEA '04**

Jim Gerl
Scotti & Gerl
216 South Jefferson Street
Lewisburg, WV 24901
(304) 645-7345 phone
(304) 645-7362 fax

jimgerl@yahoo.com

email

<http://specialeducationlawblog.blogspot.com/>

blog

© 2011 James Gerl

To accompany a presentation at
CADRE's 5th National Symposium on
Dispute Resolution in Special Education
October 26 -28, 2011

I. INTRODUCTION

A. Tools For Dispute Resolution

There are four dispute resolution mechanisms provided by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq, (hereafter sometimes referred to as “IDEA”) and the accompanying federal regulations: mediation, state complaints, resolution sessions, and due process hearings. In addition, some states and districts are experimenting with fifth method-facilitated IEP meetings.

Special education disputes may be resolved through any of the five methods or by any combination of the methods. It is highly unusual under the law for an aggrieved party to be permitted to invoke more than one resolution option. Although mediation is often used in combination with litigation, it is rare for other formal methods to be combined. An unhappy party could file a state complaint wait for the results and then file a due process hearing over the same dispute. The same dispute can be submitted at any time in the process to mediation. A resolution session occurs in every due process filed by a parent unless waived or submitted to mediation in lieu thereof. It is true that if the complaint and due process are filed at the same time, the portions of the state complaint duplicating the due process complaint are held in abeyance until resolution of the due process, but if they are not filed at the same time, there is no prohibition upon the utilization of multiple methods.

Adding to the frustration of this lack of finality is the fact that the result of most of the options may also be appealed to one or more levels of the court system. The U. S. Supreme Court has noted that the judicial review process for special education cases takes a long time, referring to the appellate process as “ponderous.” *Town of Burlington v. Dept of Educ* 471 U.S. 358, 105 S.Ct. 1996, 556 IDELR 389 (1985).

This outline will provide some general discussion as to mediation and due process hearings. For more detailed discussion

of dispute resolution options, please see this link is to the NICHCY Training Program – Module 18: Options for Dispute Resolution:
<http://www.nichcy.org/Laws/IDEA/Pages/module18.aspx>

B. Mediation

Mediation is a highly flexible way to resolve disagreements between school systems and parents of children with disabilities. An impartial person, called a mediator, helps parents and school district personnel to communicate more effectively and develop a written document that contains the details of their agreement. The mediator has been trained in effective mediation techniques.

Participation in mediation is completely **voluntary**; parents and school districts only have to participate if they choose to. The mediation process is also **confidential**; discussions cannot be used in any future due process hearing or court proceeding. 34 CFR § 300.506(b)(8); 71 Fed. Register No. 156 at pages 46695-96 (August 14, 2006).

IDEA requires state education agencies to provide a mediation system at no cost to the parties; mediation is free for both parents and school districts. Mediation must be available at any point in the process, including disputes arising before a due process complaint has been filed. IDEA §615(e).

A mediation agreement must state that mediation discussions are confidential and may not be used in a subsequent due process hearing or court proceeding. § 615(e)(2)(F)(i). IDEA specifically provides that mediation agreements are enforceable in court. § 615(e)(2)(F)(iii). OSEP has noted that nothing prevents parties to a mediation from agreeing to have the mediator facilitate an IEP team meeting. 71 Fed. Register No. 156 at page 46695 (August 14, 2006).

Mediators must be selected on a random, rotational or other impartial basis, and one such impartial basis would be agreement by the parties. 71 Fed. Register No. 156 at page 46695 (August 14, 2006). Because mediators are not selected by the parents, states

are not required to provide a list of their mediators or their qualifications to the parents or the public in general. 71 Fed. Register No. 156 at page 46695 (August 14, 2006).

ADDITIONAL RESOURCES for MEDIATORS: In addition to the general IDEA resources, mediators should frequently visit the CADRE website. The Consortium for Appropriate Dispute Resolution in Special Education is an OSEP funded group that encourages mediation, IEP facilitation and other means of special education dispute resolution that are less formal and legalistic than due process hearings. Their website is loaded with helpful articles, materials and other information and may be found at <http://www.directionservice.org/cadre/index.cfm>

Here is the OSEP Topic Brief on Mediation:

<http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C21%2C>

C. Due Process Hearings

A due process hearing resembles a court trial. Increasingly, parties are represented by lawyers. Opening statements are made. Testimony is provided by parents, teachers, related service providers, administrators, and many others- often by expert witnesses. Although the formal rules of evidence are generally not applied, exhibits, or documentary evidence, are offered and admitted. The tone is increasingly adversarial. Either closing arguments are made or written briefs are submitted. Hearing officer decisions are generally lengthy and legalistic in tone. The decision of the hearing officer may be appealed to one or more courts.

Parents and local education agencies may file a due process complaint for any matter related to the identification, evaluation, educational placement or the provision of a free and appropriate public education to a child with a disability. IDEA §§ 615(f);615(b)(6).

IDEA imposes a two-year statute of limitations on due process complaints. Unless state law imposes a contrary limitations period, a party must request a due process hearing within two years of the date that the party knew or reasonably should have known about the alleged action that forms the basis of the complaint. § 615 (f)(3)(C). The statute of limitations recognizes two exceptions – cases in which the parent was prevented from requesting the hearing due either to specific misrepresentations by the LEA that it had resolved the problem or to the LEA’s withholding of information that the IDEA requires it to provide. § 615 (f)(3)(D). OSEP has clarified that a state may adopt a statute of limitations either shorter or longer than two years by statute or regulation, but not by common law, subject to the notification provisions of IDEA. 71 Fed. Register No. 156 at pages 46696-97 (August 14, 2006). It is the province of the hearing officer to determine whether a specific complaint has been filed within the statute of limitations and whether an amended complaint relates to a previous complaint. 71 Fed. Register No. 156 at pages 46698 (August 14, 2006).

IDEA provides that the party requesting the due process hearing “...shall not be allowed to raise issues at the due process hearing that were not raised in the (due process hearing) notice...,” unless the other party agrees. § 615 (f)(3)(B). see, 34 CFR §300.511(d); 71 Fed. Register No. 156 at pages 46705 -06 (August 14, 2006). However, note that IDEA § 615 (o) provides that nothing in § 615 “... shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.”

OSEP noted that states have considerable latitude in developing procedural rules for due process hearings and that determinations upon procedural matters not specifically addressed by IDEA are within the sound discretion of the hearing officer so long as the parties’ right to a timely hearing is not denied. 71 Fed. Register No. 156 at page 46704 (August 14, 2006). Other items left to the discretion of the hearing officer include the following: decisions concerning appropriate expert witness testimony. 71 Fed. Register No. 156 at page 46691 (August 14, 2006); ruling upon compliance with timelines and the statute of limitations. 71 Fed. Register No.

156 at page 46705 (August 14, 2006); determining when dismissals are appropriate. 71 Fed. Register No. 156 at page 46699 (August 14, 2006); whether the non-complaining party may raise other issues at the hearing that were not raised in the due process complaint. 71 Fed. Register No. 156 at page 46706 (August 14, 2006); the meaning of the word “misrepresentation” for purposes of the exception to the statute of limitations for filing a due process complaint. 71 Fed. Register No. 156 at page 46706 (August 14, 2006); and providing proper latitude for pro se parties. 71 Fed. Register No. 156 at page 46699 (August 14, 2006).

Concerning the five business day rule for disclosure of evidence prior to a due process hearing, OSEP commented that nothing prevents parties from agreeing to a shorter period of time. 71 Fed. Register No. 156 at page 46706 (August 14, 2006).

As to the location and time of due process hearings, OSEP resisted the suggestion that they be conducted in a “mutually convenient” time and place, fearing that the large number of participants to a hearing would necessitate long delays if mutually convenient times and locations were required. The regulations retain the requirement that hearings be conducted at a time and place that is reasonably convenient to the parents and student. 34 CFR § 300.515(d); 71 Fed. Register No. 156 at page 46707 (August 14, 2006).

Here is the OSEP Topic Brief on Due Process Hearings:

<http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicBrief%2C16%2C>

Here is the OSEP Questions and Answers On Procedural Safeguards and Due Process Procedures For Parents and Children With Disabilities:

<http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C6%2C>

II. Hearing Officer and Mediator Qualifications:

A. Qualifications for Hearing Officers

1. What's Required: The Statute and Regulations

Before the reauthorization changes took effect, the only qualification for a due process hearing officer was that the hearing officer not be an employee of the SEA or LEA. Section 615 (f)(3); and that he not have a personal or professional interest that would conflict with objectivity, 34 C.F.R. Section 300.508(a)(2)(old regs). IDEA'04 adds three more qualifications for due process hearing officers. The following new qualities are required in a hearing officer: the knowledge and ability to **conduct hearings** in accordance with standard legal practice; the knowledge and ability to **write decisions** in accordance with standard legal practice; knowledge of and ability to understand special education **law**. Section 615 (f)(3)(A)(ii)-(iv).

The changes in the qualifications for hearing officers are significant. The fact that the Congress amended this section signals at least some concern about hearing officers.

SEA personnel who train and select hearing officers need to be mindful of these changes to the law. Those who train hearing officers should be people with experience in conducting due process hearings and in writing decisions thereafter. New hearing officers should be able to cite prior experience concerning these qualifications.

OSEP has noted in response to comments to the 2006 regulations that:

Impartial Hearing Officer (Sec. 300.511(c))

Comment: A few commenters recommended revising Sec. 300.511(c)(1)(i)(B) to state that a hearing officer must not have a personal or professional conflict of interest.

Discussion: Section 300.511(c)(1)(i)(B) incorporates the language in section 615(f)(3)(A)(i)(II) of the Act and provides that a hearing officer must not be a person having a personal or professional interest that conflicts with the person's objectivity in the hearing. The meaning of this requirement is clear and we do not believe it is necessary to change it to ensure continued compliance with this longstanding requirement.

Changes: None.

Comment: One commenter recommended that the regulations require the conduct of impartial hearing officers to be addressed by the State judicial code of conduct.

Discussion: Under section 615(f)(3) of the Act and Sec. 300.511(c), a hearing officer must possess the knowledge and ability to conduct hearings and to render and write decisions in accordance with appropriate, standard legal practice. We

believe that this provides sufficient guidance. The application of State judicial code of conduct standards is a State matter.

Changes: None.

Comment: One commenter noted that Sec. 300.511(c)(1)(iii) and (iv) require a hearing officer to possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice, and recommended that the regulations outline standard legal practice so that parents without attorney representation will have this information.

Discussion: The requirements in Sec. 300.511(c)(1)(iii) and (iv) incorporate the requirements in section 615(f)(3)(A)(iii) and (iv) of the Act. These requirements are general in nature and appropriately reflect the fact that standard legal practice will vary depending on the State in which the hearing is held. Accordingly, it would not be feasible to outline standard legal practice in these regulations, as recommended by the commenter.

Changes: None.

Comment: Some commenters recommended that the regulations require hearing officers to receive ongoing, periodic professional development regarding new regulations and court decisions so that their decisions reflect the latest developments and interpretations. A few commenters recommended requiring SEAs to provide training for hearing officers by trainers who are experienced in conducting hearings and writing decisions in accordance with standard legal practice. A few commenters recommended that the regulations require hearing officers to be informed that they are bound by the decisions of courts that govern their jurisdiction.

Discussion: It is not necessary to regulate in the manner recommended by the commenters because this is a responsibility of each State. The Act prescribes minimum qualifications for hearing officers, which are reflected in Sec. 300.511(c). Pursuant to its general supervisory responsibility, each State must ensure that individuals selected to conduct impartial due process hearings meet the requirements in Sec. 300.511(c)(1)(ii) through (iv). States are in the best position to determine the required training and the frequency of the required training, consistent with State rules and policies.

Changes: None.

Comment: One commenter noted that the Act does not include the provision in Sec. 300.511(c)(2), which provides that a person who otherwise qualifies to conduct a hearing is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer. The commenter, therefore, recommended removing Sec. 300.511(c)(2).

Discussion: We do not agree that the provision should be removed. This provision is longstanding. Although the Act prohibits an individual who is

employed by a public agency involved in the education or care of the child to be a hearing officer, we believe that it is important to continue to clarify that a person's payment for serving as a hearing officer does not render that individual a public agency employee who is excluded from serving as a hearing officer. In many instances, public agencies retain hearing officers under contract. The fact that an individual is hired by a public agency solely for the purpose of serving as a hearing officer does not create an excluded employee relationship. Public agencies need to ensure that hearing officers conduct due process hearings and it is only reasonable that those persons are paid for their work as hearing officers.

Changes: None.

71 Fed. Register No. 156 at page 46705 (OSEP August 14, 2006).

2. What's Required: Caselaw

a. Wooley ex rel EW v. Valley Center-Panama Unified Sch Dist 47 IDELR 66 (S.D. Calif 1/22/7) Court denied parents argument that exhaustion of administrative remedies should be excused because the state hearing officers are allegedly insufficiently **trained** and **unqualified** under IDEA'04. The Court noted that the parents could raise the issue on appeal after first having a due process hearing.

b. Kerry M. v. Manhattan Sch Dist No. 114 106 LRP 58405 (ND Ill. 9/29/6) Court rejected a claim that the state DOE failed to properly train its HOs where the HO conducted the specific hearing in question properly. See, HH by Hough v. Indiana Bd of Special Educ Appeals 47 IDELR 250 (N.D. Ind. 4/12/7) (IDEA'04 HO qualifications apply only to HOs and not SROs???)

c. NB UNPUBLISHED Keene v. Zelman 53 IDELR 5 (6th Cir. 7/29/9) UNPUBLISHED Parents brought a class action against Ohio SEA alleging illegal policies resulting in widespread dismissals of dp complaints and improper HO **training**. Also alleged was that HOs were to do nothing for the first 30 days and bill no more than one hour during that time. Sixth Circuit approved settlement that included an agreement to retrain HOs and an award of \$81,000 vs SEA.

d. Quatroche v. East Lynne Bd of Educ 604 F.Supp.2d 96, 53 IDELR 96 (D. Conn. 3/31/9) If allegation had been that an SEA system of HO **training** affected a number of dp hearings, parent would state claim for a systemic violation. Here the allegation was that lack of sufficient ho training affected only one dp complaint, therefore no systemic violation and court dismissed.

e. York County District Three 49 IDELR 178 (SEA SC 1/24/8) SRO rejected parent argument that HO was improperly **trained and unqualified** even though ho decision contained numerous errors where his FAPE conclusion was correct. JW by JEW & JAW v. Fresno Unified Sch Dist 570 F.Supp.2d 1212, 51

IDELR 133 (E.D. Calif 7/9/8) Court rejected parent challenge to HO qualifications where parents failed to exhaust administrative remedies by taking advantage of California procedure permitting a preemptory challenge to a HO.

f. CS by Struble v. California Dept of Educ 50 IDELR 63 (S.D. Calif 4/30/8) Court rejected parent challenge based upon SEA failure to provide 80 hours of **training** per year as required by state law where parents failed to show that HOs were not qualified under IDEA standards. JR by WR & NR v. Sylvan Union Sch Dist 48 IDELR 253 (E.D. Calif 3/10/8) Court rejected allegations that California OAH systematically violated IDEA by failing to provide knowledgeable HOs where allegation was based only upon conjecture. MO by Ondrovic v. Indiana Dept of Educ 51 IDELR 6 (N.D. Ind. 8/29/8).

g. Wooley ex rel EW v. Valley Center-Panama Unified Sch Dist 47 IDELR 66 (S.D. Calif 1/22/7) Court denied parents argument that exhaustion of administrative remedies should be excused because the state hearing officers are allegedly insufficiently **trained** and **unqualified** under IDEA'04. The Court

noted that the parents could raise the issue on appeal after first having a due process hearing.

B. Qualifications of Mediators: What's Required

A state education agency must provide a mediator to conduct the mediation who is qualified and impartial and trained in effective mediation techniques. IDEA §614(e)(2)(A)(iii); 34 C.F.R. §300.506(b)(1)(iii).

In the commentary to the 2006 federal regulations OSEP stated:
Comment: Some commenters suggested defining "effective mediation techniques" as techniques recognized by any State or national accreditation or professional mediation association. The commenters also recommended requiring a formal training and certification process for mediators, which is created and paid for by the SEA.

Discussion: We decline to define "effective mediation techniques" in the manner suggested by the commenters. States have used a number of successful techniques over the years to resolve disputes between parents and public agencies, and we do not want to restrict a State's discretion by providing a particular definition. Whether formal training and certification for mediators is required is a decision best left to each State, depending on State policy.

Changes: None.

Comment: A few commenters recommended requiring mediators to be unbiased and knowledgeable in laws, regulations, and best practices related to children with disabilities. Some commenters recommended requiring the list of mediators to include information on the mediator's qualifications. Other commenters recommended that the list of mediators and their qualifications be provided to parents and the public.

Discussion: We do not believe additional regulations regarding the qualifications of mediators are necessary. Section 300.506(b)(3), consistent with section 615(e)(2)(C) of the Act, requires States to maintain a list of individuals who are qualified mediators and knowledgeable in the laws and regulations relating to the provision of special education and related services. In addition, Sec. 300.506(c)(1)(ii) requires impartial mediators who do not have a personal or professional interest that would conflict with the person's objectivity.

Parents do not select the mediator to mediate a particular case. Rather, Sec. 300.506(b)(3)(ii) requires that the process for selecting mediators be impartial. Therefore, we do not believe that public agencies should be required to provide the list of mediators and their qualifications to parents and the public. However, there is nothing in the Act that would prohibit a State from making this information available to parents and the public, if it chooses to do so.

71 Fed Register No. 156 at page 46695 (OSEP August 14, 2006)

III Training - Certification of Hearing Officers and Mediators: Discussion Topics

A. Certification Options

1. National Association of Hearing Officials. NAHO maintains a certification program for hearing officers. See website: <http://www.naho.org/certification.htm>

2. National Judicial College. NJC has a certificate program in Administrative Law. See website: <http://www.judges.org/certificate/certificates.html#aljcert>

3. Many organizations certify mediators. For example, see the mediate.com website:
<http://www.mediate.com/certification/>

B. Training Options

NOTE: This document, and any discussion thereof, is intended for educational purposes only. Nothing stated or implied in this document, or in any discussion thereof, should be construed to constitute legal advice or analysis of any particular factual situation.