

*SEAC Due Process Committee Report*

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**March 8, 2004**

**TO: Special Education Advisory Council (SEAC)**  
**FROM: SEAC Due Process Committee**  
**SUBJECT: REPORT ON REVIEW OF DUE PROCESS HEARINGS**

**PURPOSE**

The State Education Agency (DOE) is required by the Individuals with Disabilities Education Act (IDEA) to provide the findings and decisions of Due Process Hearings to the Special Education Advisory Council (SEAC). It is not clear from the IDEA what the SEAC should do with these findings. However, members of the SEAC expressed concerns in recent months following the change October 2002 in the agency responsible for conducting the Due Process Hearings. Consequently, the SEAC Due Process Committee decided to review decisions of Due Process Hearings for the year prior to and the year following that change.

The Committee hoped that such a review might provide an opportunity for the SEAC to make recommendations to the DOE that might reduce the number of hearings conducted in Hawai i. Outcomes from these recommendations could be far reaching and include, but not be limited to, the following results: 1) improved school and family relationships, 2) decreased litigation costs, and 3) access for students with disabilities to the general curriculum in the least restrictive environment to enable them to reap greater benefit from their education.

**BACKGROUND**

As part of its review, the Committee searched for information from national resources on Due Process Hearings to determine whether information was available from other states to provide comparable information on Hawai i. Surprisingly, few resources were found. The following is a summary of the resources.

Although due process requirements have been part of IDEA for decades, no mandate exists for data collection on a national level. The most recent report by the Office of Special Education Programs (OSEP), *Twenty-Fourth Annual Report to Congress on the Implementation of IDEA*, made no significant reference or mention of due process. OSEP now plans to obtain consistent information from states through performance reporting. Part of this reporting system will include data on numbers of complaints, due process hearings, and mediations. Initial state reports of this information are due by March 31, 2004.

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OSEP has a Cooperative Agreement with the National Association of State Directors of Special Education (NASDSE) to compile state data on due process hearings under Project FORUM. NASDSE collects surveys from states. However, the data are of limited value because of differences in the way the data are collected. (Attached to this report is the listing, published by NASDSE, of the number of hearings requested and held in Hawai i for the years of 1990-2000. However, without information on IDEA enrollment by state, rates cannot be calculated, and it is not possible to draw any conclusions from the data.)

The Office of Special Education Programs is looking at due process as part of its Study of State and Local Implementation and Impact of the Individuals with Disabilities Education Act (SLIIDEA). The results of that study are not yet available. An organization called Abt Associates developed a presentation for a national meeting, but the presentation contained only summary comments from focus groups and did not include data.

The General Accounting Office concluded a study in September 2003, entitled *Special Education: Numbers of Formal Disputes are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts*. The following are some of the highlighted findings of the study.

- § Over a five year period from 1996-2000, although the number of requests for hearings steadily increased, the number of hearings held decreased because many requests were withdraw).
- § The national average of due process hearings was calculated at about five hearings annually per 10,000 IDEA students. Nearly 80 percent of all hearings are held in 5 states — California, Maryland, New Jersey, New York, and Pennsylvania, and the District of Columbia. For those states, the range was from a low of 3 in California to 24 for New York, with a rate of 336 for the District of Columbia.
- § The cost of a mediation hearing is about one-tenth the cost of that of a hearing before a hearing officer. One state reported an average cost of \$1,000 for a mediator s services, compared with \$9,000 for a hearing officer s services.
- § The most frequent reasons for due process hearings were based on identification-eligibility, types of services needed, whether the program was being implemented, and whether the most appropriate educational environment was provided for certain students. The relative frequency of these reasons was not provided.
- § Reasons why parents may not take formal action to resolve issues with schools include the lack of information on how to file formal complaints, a perception by parents that the available remedies were ineffective, and parents reluctance to have conflict with school officials.

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**DUE PROCESS HEARINGS IN HAWAII**

According to the GAO, the national average of due process hearings held annually is five due process hearings per 10,000 IDEA students. Where does Hawaii fit into this range? Table 1 provides some comparable data for Hawaii.

**Table 1.**  
**Due Process Requests/Hearings Rate per 10,000 IDEA Enrollment**

<u>Year</u>	<u>Number of IDEA Students</u>	<u>Number of Requests</u>	<u>Rate</u>	<u>Number of Hearings</u>	<u>Rate</u>
2000-2001	20,138	131	65.0	34	16.9
2001-2002	20,320	174	85.6	41	20.2
2002-2003	20,808 <sup>†</sup>	75 <sup>*</sup>	**	33	**

<sup>\*</sup>Partial year through December 31, 2003  
<sup>\*\*</sup> Cannot calculate a comparison due to partial year.

Data on Hawaii's due process hearings also include due process hearings for students under Section 504 of the Rehabilitation Act. Although data from other states apparently also include hearings for Section 504 students, it is not certain whether the data from all states include those students. However, based on the data in Table 1, it would appear that Hawaii's numbers for due process hearings are three to four times higher than the national average.

**PROCEDURE**

- § The Committee reviewed all Due Process Hearing Decisions, beginning with a decision rendered on October 13, 2001, and concluding with a decision rendered on December 31, 2003, a total of 66 decisions.
- § The Committee, comprising three persons, divided the decisions into three groups, with each member individually reading a portion of the decisions. In this way, the Committee read and analyzed all 66 decisions.
- § For decisions rendered prior to the transfer of responsibility to the Department of Commerce and Consumer Affairs, the members analyzed each decision by the petitioner, the respondent, the issue, and the decision. For decisions rendered after the transfer of responsibility to the Department of Commerce and Consumer Affairs, decisions were additionally analyzed by hearing officer.
- § In developing its findings, the Committee met twice, and extensively discussed each decision as a group.
- § Based on these discussions, the Committee developed its findings and recommendations, and drafted this report.

## **FINDINGS**

**Lack of Consistency in Maintaining Confidentiality.** The DOE's method of rendering confidentiality varied considerably. In some decisions, the DOE had blacked out so much information that the readability of the decision was reduced. But frequently, the person blacking out the identifiable information would fail to black out the student's name in every instance in which the name appeared in the report. The names of all public school personnel were blacked out in some decisions but not in others. In one decision, no identifying information was removed—even the name and birthdate of the child were included.

**Lack of Consistency in Reporting.** Similarly, there was inconsistency in the reporting of information by the Hearing Officer. For example, in some reports, the eligibility category under IDEA was included; in others, the category was not included and had to be deduced by the Committee. Of concern is that recent reports included extensive and unnecessary documents, including the IEP and its attachments.

**Unnecessary Hearings.** In a number of cases, the Committee could not understand why the Attorney General would have taken the issue to hearing. For example, in several cases, a principal did not grant a geographic exception in spite of DOE regulations specifying that students under IDEA do not need a geographic exception. In another case, a child was obviously eligible under one IDEA category but not under another; yet, the DOE failed to offer FAPE under the obvious eligibility category. Further, a number of hearings contained what the hearing officer described as procedurally-fatal flaws. It appears that much time, expense, and grief could have been spared all parties had the DOE settled these cases prior to a hearing.

**Private School Placements.** A high percentage of the hearings revolved around placement in private schools. However, since no national data base were identified on this subject, it is not possible to determine whether this high percentage in Hawaii is unusual, or is consistent with data from other states.

**Possible Bias in Reviews by the Department of Commerce and Consumer Affairs.** Data on decisions rendered by the Department of Commerce and Consumer Affairs in 2002-2003 seem to indicate a shift toward decisions in favor of the DOE over the parents (or legal guardian). The information shown in Table 2 is based on an analysis of data provided by the DOE, and on the Committee's analysis of the recent decisions by the Department of Commerce and Consumer Affairs. Although the shift appears to be changing toward more decisions in favor of the DOE, it is too early to determine if this is an established trend.

Over the period reviewed, six different hearing officers rendered decisions, with three of them rendering the majority of the decisions. However, the Committee did not find evident bias by any hearing officer in favor of either the parent or the DOE.

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**Table 2.  
Results of Hearings**

School Year	Decision for Parent	Decision for DOE	Split Decision*
2000-2001	19	12	3
2001-2002	24	9	8
2002-2003	14	16	3

\*A Split Decision is a decision that is partially for the Parent and partially for the DOE.

**Lack of Partnership.** Evident from a reading of the hearings is that lack of a partnership between some schools and families was the root cause that eventually resulted in a hearing. This lack of partnership may partially be why, although the Hearings covered a number of disability categories, students with autism spectrum disorders were disproportionately represented and constituted the highest percentage of students in the decisions that the Committee reviewed.

Most of the split decisions were based on the failure of a family to notify the DOE appropriately (e.g., within a required timeline) of their decision to unilaterally place a child in a private school. The Committee could not determine if families had been informed of their responsibilities regarding timely notification. The SEAC may want to further address this issue and find ways to better assure that families are aware of time requirements.

### **RECOMMENDATIONS**

Based on these findings, the Committee unanimously agreed to the following recommendations.

**Confidentiality.** The DOE needs to make uniform decision on what constitutes confidentiality. Federal regulations [300.500 (3)] specify the following:

- (i) The name of the child, the child's parent, or other family member
- (ii) The address of the child
- (iii) A personal identifier, such as the child's social security number or student number; or
- (iv) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

To assure confidentiality in the reports, the Committee makes the following recommendations.

- § Identifying information on the child and family should occur only on the cover page and be excluded on any distributed copies.
- § In the report, the words "the student" should be used in lieu of the child's name and any references by gender.

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- § Similarly, the parents or the mother or the father be used instead of any names.
- § No copies of IEPs should be appended to the report.

**Consistency.** All hearing officers should adopt a consistent pattern of reporting information. For an analysis by the SEAC to be meaningful, the eligibility category, and the name of the school are key data elements that are needed. Yet, the name of the school, complex, and district were routinely blacked out in reports, even though IDEA does not specify this information as an issue of student confidentiality.

It is also important that someone in the DOE be responsible for reviewing all decisions for accuracy. In one instance, although the discussion clearly showed that the decision was rendered for the petitioner (parents), the final paragraph stated that it was rendered for the respondent (DOE). This error resulted in an inaccurate summary count. Such a mistake should be corrected by the Hearing Officer prior to distribution of reports.

**Quality of Case.** Cases with fatal procedural flaws should not be allowed to go to Hearing. Any case for a proposed hearing should determine that all required individuals participated or were afforded an opportunity to participate in the IEP. The Committee is concerned that many of the hearings were repeat hearings for the same child and family over the period reviewed.

**Partnerships with Families.** This is something that needs to be worked on systemically to improve relationships and engender trust between families and schools. To make more specific recommendations in this area, the Committee needs further information (e.g., names of schools), which was not consistently available to the Committee during its review. As efforts are made to encourage utilization of mediation, it is important that both parties approach mediation in a good-faith effort to resolve differences prior to going to hearing.

**Availability to the General Public.** IDEA Regulations [300.509 (d) (2)] specify that these findings and decisions be available to the public. Members of the Committee were not aware of how or whether this is currently being done. But however it is done, the issue of confidentiality becomes crucial, and strict guidelines must be enforced. SEAC may want to inquire how this is currently being accomplished.

**Quality Assurance Process.** Finally, the Committee recommends that the SEAC ask to have the DOE put in place procedures to assure that each Due Process Hearing Report is reviewed, and a quality-assurance process determine whether systemic changes or training is needed to address similar issues in other schools and complexes. SEAC would like to be involved in this process.

**Future Reviews by the SEAC.** The Committee believes that this review has been a valuable process and would like to work with the SEAC and the DOE to provide a continuing process for reviewing the decisions. In this regard, the Committee offers the following recommendations.

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- § The Committee should be provided copies of the decisions quarterly and each Committee member will read each of the decisions.
- § The Committee would also like to be provided any data or information that the DOE receives from national studies or information from other states that would assist the Committee in its deliberations.
- § The Committee would like to have a copy of the information submitted by the DOE to OSEP under the performance reporting requirement.
- § Future reports should assure confidentiality for the child and family, but should include information (e.g., name of the school) to enable the Committee to make a more thorough analysis.
- § Comparable information on the hearing settlement agreements (separate from those that are dismissed) would be helpful to the Committee.
- § The Committee would like additional information, such as the number of decisions that are appealed, by whom, and with what results.
- § The Committee would also like information on the cost of hearings in Hawai i, comparing the cost of mediation versus a due process hearing.
- § The Committee is concerned that, based on information provided to it, the number of mediation requests may be declining. The percentage of mediated hearings is already considerably below the national average. The Committee recommends that the SEAC continue to monitor the relationship between mediation and due process hearings.

Finally, the Committee commends the DOE for the January 9, 2004, memorandum from the Superintendent, *Validating the Implementation of Agreements, Decisions, and Orders, Revised*. The outlined process should be an effective way to assure that agreements are implemented in a timely manner.

Committee Members:           Jasmine Williams, Chair  
  Sue Brown  
  Jean Johnson

### **REFERENCES**

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