March 10, 2006
April 18, 2006 (Revised)

TO: **Special Education Advisory Council (SEAC)**

FROM: **SEAC Due Process Committee**

SUBJECT: **REPORT ON REVIEW OF 2004-2005 DUE PROCESS HEARINGS**

BACKGROUND

Legislative Charge. Under Section 612(a)(21) of IDEA 1997, the responsibilities of the Special Education Advisory Panel (Council) (SEAC) include the following:

- Advise the State Educational Agency (SEA) of unmet needs within the State on the education of children with disabilities;
- Comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;
- Advise the SEA in developing evaluations and reporting on data to the Secretary under section 168;
- Advise the SEA in developing corrective action plans to address findings identified in Federal monitoring reports under this part; and
- Advise the SEA in developing and implementing policies relating to the coordination of services for children with disabilities.

The Individuals with Disabilities Education Act (IDEA) [300.509(d)(1)] requires the State Education Agency (DOE) to provide the findings and decisions of Due Process Hearings for review by the Special Education Advisory Council (SEAC).

Following a discussion during the SEAC Retreat held in 2003, a decision was made to establish a Due Process Committee to review these reports of the Due Process Hearings and to issue a report following those reviews. The SEAC's Due Process Committee submitted its first report to the SEAC on March 8, 2004. That report covered portions of two years of Due Process Hearings, SY 2002-2003 and SY 2003-2004.

Intent. The Committee remains hopeful that such reviews might enable the SEAC to make recommendations to the DOE that reduce the number of hearings conducted in Hawai`i. Outcomes from these recommendations could be far reaching and could include the following: 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.

Further, during its review of the literature, the Committee determined that in the study entitled, "What Are We Spending on Procedural Safeguards in Special Education, 1999-2000," 62% of the school districts reported having no cases involving complaints, mediations, due process, or litigation. The Committee hopes that this report will provide opportunities for the SEAC to work closely with the DOE toward the goal that someday, the same can be said of Hawai`i's State Educational Agency.

Process. Members of the Committee—Sue Brown, Jean Johnson, Jasmine Williams (Chair), and Ivalee Sinclair (Ex-Officio)—devoted many hours to this review process. Staffing for the effort was provided by Susan Rocco. All three members of the Committee read each of the reports of the Due Process Hearings—each member took responsibility to be the primary reviewer for about one-third of the reports. The Committee held three half-day, face-to-face meetings to discuss each of the reports. Additionally, two half-day meetings were held to draft this report. The process was complicated by the receipt on March 2 of four new cases to be included in the reviews. It was further complicated on March 7 by information that there were another 18 reports not included in the list.

Altogether, 68 reports were reviewed. The information on the reviews was summarized on a spreadsheet that quantified information the reviewers considered important for analysis (Copy Attached). Included in the analysis were the date of the request, the petitioner, decision date (and elapsed time), prevailing party, hearing officer, attorney, issue, decision, data on the student (age, sex, and disability), prior hearings (if any) involving this family, and if this was actually a private school placement issue. Additionally, key statistical information was quantified in charts to provide for further analysis.

RESULTS FROM RECOMMENDATIONS IN THE FIRST REPORT

Since this is the second report in this series, this report begins with a summary of recommendations the Committee made on March 8, 2004, and the changes resulting from those recommendations. The following recommendations were accepted by the SEAC and forwarded to the Superintendent. Although no formal response was ever received from the Superintendent; nevertheless, the Committee suggests the following resulted from those recommendations.

Confidentiality. On this issue, the Committee made 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.
- Similarly, "the parents" or "the mother" or "the father" should be used instead of any names.
- No copies of IEPs should be appended to the report.

Result. These recommendations were accepted and implemented. The reports are now easier to read than they were when such information was simply redacted, sometimes inconsistently. Additional recommendations on this topic are found at the conclusion of this report.

Consistency. This issue involved consistency in reporting and responsibility for reviewing all decisions for accuracy.

Result. This recommendation was accepted and implemented. Further recommendations on this issue are made later in this report.

Quality of Case. Quality of cases included both those with "fatal procedural flaws" and repeat hearings. Concern was expressed that those cases with obvious fatal procedural flaws should not be allowed to go to Hearing. Before any case proceeds to Hearing, it should be determined that all required individuals participated or were afforded an opportunity to participate in the IEP. The Committee also expressed concerns that many of the hearings were repeat hearings for the same child and family over the period reviewed.

Result. This continues to be an area of concern, with limited evidence that it has been addressed. Further recommendations are included in this report.

Partnerships with Families. Improving relationships to build partnerships with families needs to be worked on systemically to 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 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.

Result. The Superintendent's letter, dated July 1, 2004, to Complex Area Superintendents, District Educational Specialists, Principals, Public Charter School Administrators,

Special Education Teachers, and Section 504 Coordinators was an admirable effort to address this issue. However, the Committee finds no reason to celebrate any improvement in this area. This issue will be further addressed later in the report.

Availability to the General Public. Previously the Hearings were not made available to the public despite IDEA Regulations [300.509 (d) (2)] that specify that these findings and decisions be available to the public.

Result. As a result of these recommendations, the hearings are now posted on the DOE website. Reports are available from SY 2002-03, with the reports for SY 2005-06 being uploaded. The reports covered in this report are for SY 2004-05. The reports are easily located and readable in a PDF format. To view the reports, go to http://doe.k12.hi.us/reports/SpecialEducation/DueProcessHearingReports.

However, a review of the DOE website on February 22, 2006, determined that 21 of the 63 2004-2005 decisions had not been posted on the website. Only one had been posted for the 2005-06 SY. ***The DOE is encouraged to ensure that all reports are entered on the website within a specified timeframe. Thirty days would be considered a reasonable time.***

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

Result. Again, the July 1, 2004, memorandum from the Superintendent was an admirable attempt to address this issue. However, a review of the reports for SY 2004-2005 provides little encouragement that this change is being implemented. Members of the SEAC have not been involved in that process.

RECENT LEGISLATION AND JUDICIAL DECISIONS

As the Committee approached the review of the 2004-2005 SY Hearings, it was mindful of two events listed below that will affect future Due Process Hearings.

IDEA 2004. *IDEA 2004* included some significant changes to Due Process Hearings. Previously, parents were able to recoup attorney fees in situations where they prevailed in due process hearings and court cases, but the schools had not been able to recoup at-

torney fees in situations where they prevailed. *IDEA 2004* enables schools to recoup costs in certain situations from the parents and parents' attorneys. Specifically, *IDEA 2004* states that the court may award fees to the prevailing state educational agency against parents' attorneys who (a) file a complaint or other cause of action that is frivolous, unreasonable, or without foundation, or (b) continue to litigate after litigation clearly has become frivolous, unreasonable, or without foundation.

Additionally, this legislation made a significant change in the timeline by adding a 30-day resolution period prior to the 45-day timeline. Thus, under the revised legislation, a total of 75 days are permitted.

Schaffer vs Weast. In *Schaffer vs. Weast* (2005 Maryland), the Supreme Court shifted the burden of proof in Due Process Hearings to the Petitioner who instituted the proceedings. Since this is most frequently (99% in the 2004-2005 cases reviewed) the families, this places onerous burdens on families and places them at further disadvantage to the system with its virtually unlimited resources for legal and professional support.

During the last SEAC meeting, a briefing was held on the legislation pending before the current session of the Hawai`i Legislature (SB 2733) that would maintain the responsibility for the burden of proof with the DOE. The SEAC has submitted testimony in favor of that legislation. Unfortunately, that bill has subsequently been amended.

SURVEY OF THE LITERATURE

Prior to 2000, minimal information was available on the use and effectiveness of various procedures for resolving disputes. Ahern in1994 found that there was no policy in place requiring the compilation of national data on the implementation and outcomes of due-process procedures. Although requirements for due process have been part of IDEA for decades, no mandate existed for collecting data at the national level. The most recent report by the Office of Special Education Programs (OSEP), *Twenty-Fifth Annual Report to Congress on the Implementation of IDEA*, did not discuss due process.

Review of Research. A comprehensive search of the published literature on this subject revealed few recent scholarly publications. Getty and Summy (2004) gave an overview of the process, and described common violations and some of the possible perceptions and outcomes. These authors summarized by saying, "The number of due process requests will continue to rise until the field of education truly accepts people with disabilities and learns how to accommodate individual special needs." Downing (2004) de-

scribed the narrow and sometimes conflicted outcomes of the due process and court cases involving related services.

Project Forum. For a number of years, the OSEP funded Project FORUM through the National Association of State Directors of Special Education. That project produced a number of brief analysis papers, based on reports from state agencies, describing available information on due process. Ahern (2001) reported the following data for the number of hearings requested in Hawai`i for the decade of the 1990s: 1991 - 22; 1992 - 23; 1993 - 25; 1994 - 37; 1995 - 16; 1996 - 32; 1997 - 56; 1998 - 71; 1999 - 76; 2000 - 131. During that same decade, the number of students served under IDEA in Hawai`i increased substantially as a result of the Felix Consent Decree.

In May 2003, Drs. Howard and Judy Schrag issued a report entitled "Dispute Resolution (DR) Procedures, Data Collection, and Caseloads." States were identified by codes. Hawai`i was in the bi-modal distribution of states with high percentages of hearings. In June 2003, a report was published entitled, "Dispute Resolution: A Review of Systems in Selected States," edited by Joy Markowitz, Eileen Ahern, and Judy Shrag. These two publications were funded under Project FORUM of the National Association of State Directors of Special Education

The General Accounting Office (GAO) Report. The most authoritative report on the subject of dispute resolution was the 2003 report by the General Accounting Office (GAO) entitled, *Special Education: Numbers of Formal Disputes are Generally Low and States are Using Mediation and Other Strategies to Resolve Conflicts.* That report established a benchmark for a national average in 2000 of about 5 hearings held per 10,000 IDEA students.

What Are We Spending on Procedural Safeguards in Special Education, 1999-2000.
The American Institutes for Research (AIR) conducted a descriptive study as part of a broader study within the Special Education Expenditure Report (SEEP). The final report, entitled "What Are We Spending on Procedural Safeguards in Special Education, 1999-2000?" was issued in May 2003. That study, based on survey responses from education officials in a sample of districts, published the following findings (Chambers, 2003).

- Special Education mediation, due process, and litigation expenditures accounted for only 0.3 percent of total special education expenditures.
- The expenditure per special education pupil on mediation, due process, and litigation activities was approximately $24.

- The average cost for mediation or due process was $12,200 (the survey was not able to separate the two costs, page 8).
- The cost of litigation for any given open case averaged $94,600 in 1999-2000.
- The above figures may underestimate expenditures because they do not include staff personnel costs and reimbursements for legal expenses to which families became entitled.
- ***Procedural safeguard cases were concentrated in less than two-fifths of the nation's school districts, with 62% of the districts reported having no cases involving complaints, mediations, due process, or litigation.***

OSEP Contract with the Consortium for Appropriate Dispute Resolution in Special Education (CADRE). In response to the lack of reliable data from states, the OSEP initiated a consistent method of reporting from states through performance reporting. Part of this reporting system was to include data on numbers of complaints, due process hearings, and mediations. Initial state reports of this information were due by March 31, 2004. The OSEP is reviewing the issue of due process hearings as part of its "Study of State and Local Implementation and Impact of the Individuals with Disabilities Education Act" (SLIIDEA).

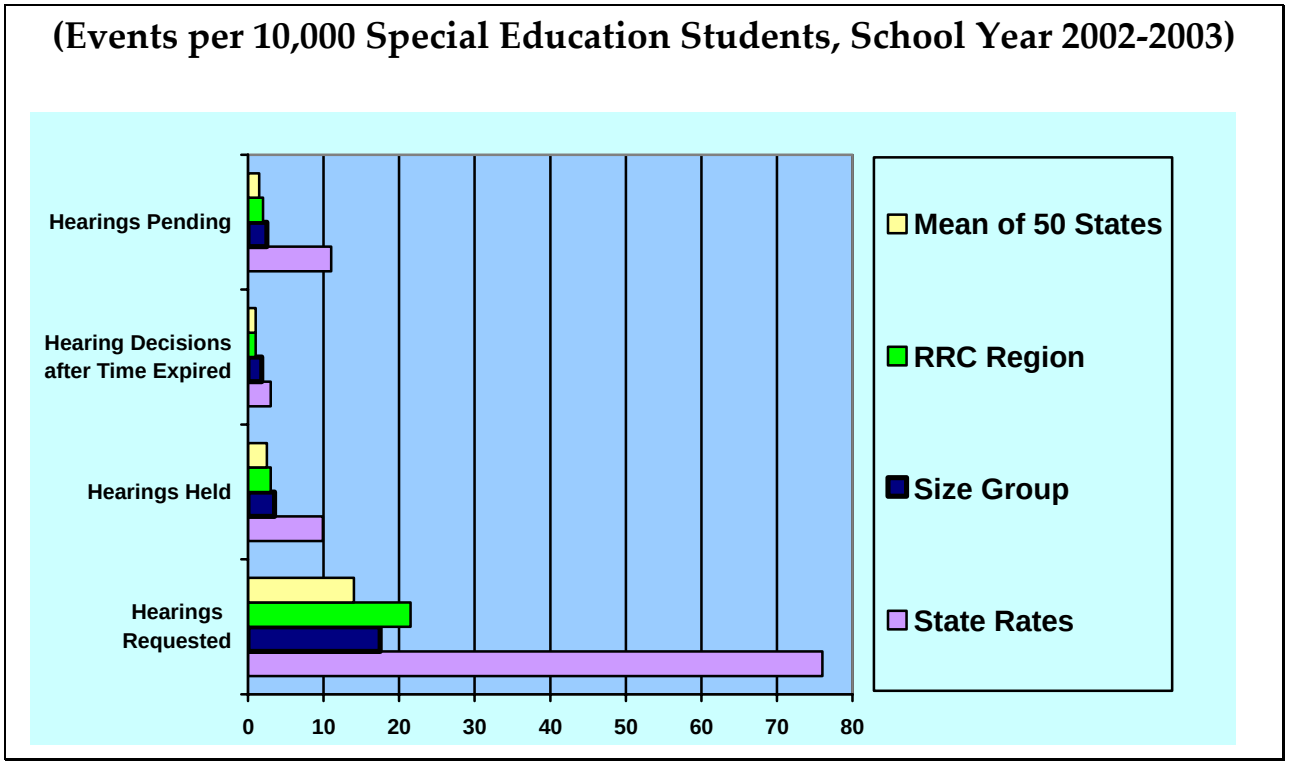
The OSEP has contracted with the Consortium for Appropriate Dispute Resolution in Special Education (CADRE) at the University of Oregon to compile and analyze the statistics on dispute resolution. The CADRE issued a report in the summer of 2004 entitled, *National Dispute Resolution Use and Effectiveness Study.* The findings include the following.

- Data were obtained from 49 states and the District of Columbia, showing a distribution of from 3 cases to 2,292 cases per 10,000 of special education students.
- Ten states were in the high-ratio group and 39 in the low-ratio group.
- Over one-third of the cases involved repeat filings or requests.
- About half of the complaints filed were ultimately decided in favor of parents.
- Students involved in dispute resolution appear to be predominately male, with the highest frequency of cases for students in their early teens.
- While students with autism accounted for 1 percent of the population of students with disabilities, they accounted for over 11 percent of the dispute-resolution population.
- Other disability groups who disproportionately used the system included students with disabilities such as deaf-blindness, emotional disturbance, hearing impairment, multiple disabilities, and traumatic brain injury.

- A consumer satisfaction survey found that about one-third of the parents indicated they would not use the dispute resolution process again because they had experienced outcomes that did not enhance their child's education.
- Parents reported that solutions worked out in the mediation agreement were ineffective or not implemented, and, to a lesser degree, complained that decisions or corrective actions were not effective.
- Thus, repeat utilization of mediation services was found to be low.
- The data showed clearly that many mediation agreements were not strategic or appropriate, or many mediation agreements were not implemented by the parties.

Data obtained from the CADRE provided comparable data for Hawai`i in relation to states of comparable size, comparable to states within the region, and comparable national data. These data are shown in Figure 1. However, a discrepancy exists in the data. The data reported by the CADRE indicate that Hawai`i had 23 Hearings during that year. The actual number appears to be 34. It is unclear why the discrepancy exists because 25 of the decisions were rendered by June 30, 2003, another 7 by December 31, and only 2 in 2004.

Figure 1. Hawai`i and Comparator Group Dispute Resolution Rates



The data cover the 2002-2003 School Year. The Regional Resource Center (RRC) region includes the western states. For "size group," Hawai`i is in the smallest group, based on a Child Find count of less than 33,000. ***Hawai`i's rate for each of the indicators relative to the nation, region, and size group is obviously not a cause for celebration.***

The CADRE reports will provide a valuable data source for the DOE and for the SEAC to monitor changes in Hawai`i's rates over time.

DUE PROCESS HEARINGS IN HAWAI`I

Dilemma in Reporting: What to Include, What to Exclude? As the Committee worked on this report, members of the Committee discussed a number of times which reviews to include in the report and what not to include. Its report of March 8, 2004, was obviously completed prior to the completion of hearings for that year.

The DOE numbers cases based on a *calendar yea*r (first case of the calendar year would be 2006-001), but reports cases to the OSEP based on a *school yea*r (all cases filed between July 1 and June 30 of any given year). This report is of all cases filed within the school year but not necessarily heard within that year. And, since not all decisions are rendered during that year, reporting full data for the school year becomes problematic, since, as this report will later indicate, some cases can take 18 months before the decision is rendered. To fully describe one year of Due Process Hearings, then, becomes problematic because of the number of cases that may be pending. Additional problems arise when cases are appealed.

Further issues arise when the Committee has not reviewed Hearings for a previous period. For example, the previous report was completed on March 7, 2004, but obviously did not cover all the cases filed or heard in 2004. To not in some way acknowledge the findings and results of those cases creates a gap in the knowledge-base being provided by the Committee.

Thus, when the Committee began its deliberations for the 2004-2005 SY, it had to grapple with the issue of what to include and what to exclude in its deliberations. Dialogue with the DOE and the Hearing Officers would be helpful to find a methodology that clearly reflects the complete results for any given school year. The Committee chose to address this issue in a number of ways, as will be described in the following pages.

2002-2003 School Year. Table 1 on the following page is based on the data that the Hawai`i Department of Education provided to the OSEP by March 31, 2004. The CADRE compiled the data into state and national summary statistics. Although these statistics are the most thorough and complete comparable data available to date, interpretation of

the data is challenging. For example, to obtain full data for this school year, would adding the data for hearings held and hearings pending, provide a more complete picture?

The Committee also had concerns about the number of "late decisions." The percentage of 30% of the decisions being rendered after the 45 day timeline seemed very low in comparison to the 96% late decisions identified in the cases reviewed for the 2004-2005 SY.

However, what is obvious is that Hawai`i's data for each of the indicators are poorer than for other states of our size, other states in the region, the nation as a whole, and states serving a comparable percentage of students.

Table 1.
Due Process Requests/Hearings—Rate per 10,000 IDEA Enrollment
Hawai`i, Group, and National Summary Statistics (SY 2002-2003)

Hearing Event	N* in HI	HI Rate	Mean Rate 50 States	Comparator Size Rate**	RRC Region Rate***	Comparator % Served Quintile****
Requested	179	76.1	14.1	18.0	21.3	23.5
Held	**23**	**9.8**	2.5	3.7	3.0	3.4
Late Decision	7	3.0	0.5	0.9	0.6	0.7
Pending	25	10.6	1.2	2.0	1.5	1.7

*Number reported by Hawai`i.
** Comparator size group divides states into five groups based on total Child Find. Since Hawai`i served 23,509 students, it was in the smallest group of states serving less than 33,000 students under IDEA.
*** RRC refers to states in the served by the Western Resource Center.
**** Comparator% Served Quintile divides states into five groupings of ten states each based on the percentage of students served under IDEA. Hawai`i falls into the 5th Quintile of states serving <10.5%, with Hawai`i serving 10.47%, ranking 41st in the percentage of students served under IDEA.

The actual number held in Hawai`i was 34 when all the decisions were rendered (data from the DOE website). The December 1, 2002, Child Count for Hawai`i, was 23,509. If all 34 were included, the rate would be 14.5 per 10,000 students (in comparison to the GAO rate of 5.0 per 10,000 students). Unpublished data from the CADRE indicate that Hawai`i's rate of Due Process Requests and Hearings Held was second only to New York State for the 2002-2003 SY.

2003-2004 SY. These data would have been submitted to the CADRE in March 2005 and are not yet available for analysis. Some of these were reviewed as part of the Committee's March 8, 2004 report.

2004-2005 SY. Initially, the Committee began reviewing Due Process Hearings for the 2004-2005 SY. However, as discussed in a previous section, the Committee encountered a number of dilemmas. Included in the initial documents were four cases from 2003-2004 SY, which although filed, that year, were not decided until the 2004-2005 SY. All four cases involved students from the Big Island. Subsequently, the Committee learned that there was a fifth case that should be considered part of this group. Committee members believed these cases presented compelling reasons for including them in the current analysis.

On March 2, 2006, the Committee received four new cases that it had not previously reviewed. And on March 7, 2006, the Chief Hearing Officer suggested that there were 17 other cases that should be included in the reviews. Although a number of these cases represented ones that should have been included in any 2004-2005 SY review, some of the cases were those from the 2003-2004 SY in which decisions were not rendered until 2004-2005 SY.

These new reports created a dilemma for the Committee in determining what to include and what to exclude, and when to finalize its report. The dilemma can be stated as follows. On one hand, a valid argument can be made for reporting the data on a school year basis as the DOE does to the OSEP. However, that means that if cases remain pending (as is likely) when the "report" is completed, a complete picture is never provided of the Due Process results for that year. Thus, when cases are decided in subsequent school years, previous reports cannot be amended, and the data never are reviewed and accounted for unless reported in a subsequent report. Yet on the other hand, neither is it an accurate representation to add decisions from previous years to those in a subsequent year. The Committee has not fully resolved this issue. Conversations will be ongoing with CADRE to consider how to most fairly resolve the issue.

Additionally, on March 7, the Chief Hearing Officer indicated that even when two Hearings are combined, they remain two Hearings and are counted as two. The Committee had been unaware of this method and had counted combined Hearings as a single hearing decision. Thus, reconfiguring the data in this report at some future date may be necessary. Similarly, the Committee may decide to review at a future date those 17 additional cases received on March 7, and issue an amended report.

In the following paragraphs the Committee will seek to make clear how it handled each of the data elements in this report. Table 2 is an effort to reflect Due Process Rate for Hawai`i for SY 2004-2005.

While the Official Enrollment for the 2004-2005 SY included 21,461 students served under IDEA, from preschool through Grade 12, the official December 1, 2004, Child Count listed 22,711 students, ages 3-21, being served under IDEA. The data presented in the following tables, unless otherwise specified, will be based on the December 1, 2004 Child Count, not the Official Enrollment for the year.

Table 2.
Hawaii's Due Process Rate
Rate per 10,000 IDEA Enrollment
(Based on 12-1-04 Child Count of 22,711)

Indicator	Number of Hearings	Rate
GAO Average	11.4	5.0
2004-2005	63***	27.7
2003-2005*	68***	30.0
2003-2005**	85***	37.4

*Including 5 Big Island Cases
**Including 17 additional cases referred to the Committee on 3-7-06
***All combined cases are counted as a single case instead of two cases

Obviously, none of the three rates are an absolutely accurate rate for the 2004-2005 SY. The 27.7 rate is not accurate, because additional cases are pending and because combined cases were counted as a single case. The rates of 30.0 and 37.4 are also not accurate because they cover other school years in which IDEA Child Counts may have differed. However, since the other cases were decided in the 2004-2005 SY, they were not reviewed as part of the Committee's March 8, 2004 Report, and are likely not included in the data being analyzed by the CADRE for rates.

The actual rate for Hawai`i for the 2004-2005 SY is probably somewhere between 27.7 and 30-something per 10,000 students served under IDEA. This rate places Hawai`i's rate of Due Process Hearings Held between five and six times the national average of 5 per 10,000 students as reported by the GAO.

ANALYSIS OF 2004-2005 HEARINGS (Including 5 from SY 2003-2004)

The data analysis in the following tables includes information on the SY 2004-2005 Hearings, the 63 filed and decided from the 2004-2005 SY, and the five (from the Big Island) decided from the 2003-2004 SY. It was simply not possible to read and complete an analysis of the additional 17 cases referred on March 7 before March 10, 2006 (the due date for this presentation). An exception to this decision refers to Table 3 and will be described below.

Overall Results. As shown in Table 3 on the following page, of the 68 Due Process Hearings reviewed, 41% (28) resulted in a verdict in favor of the DOE and 59% (40) in a verdict in favor of the family. In at least one of the cases in favor of the DOE, (2005-112) the Hearings Officer determined he lacked jurisdiction to decide this issue and granted the Respondent's motion to dismiss. However, when the 17 additional cases were referred by the Chief Hearing Officer, the family was the prevailing party in twelve of those cases, compared with five for the DOE. Thus, this table was configured to represent the two sets of data.

Table 3.
Prevailing Party in Due Process Hearings

Prevailing Party						
	DOE	Family	Total	DOE*	Family*	Total*
Number	28	40	68	33	52	85
Percent	41%	59%	100%	39%	61%	100%

*Includes the additional 17 cases referred to the Committee on 3-7-06.

Characteristics of Students in Due Process Hearings

Gender of Student. Students for whom Due Process requests were filed (and for which the gender of the student was identified) were 45 (74%) male students and 16 (26%) female. The gender of the student was not reported for two cases. This ratio is consistent with the overrepresentation of males in special education.

Age of Student. The age of students ranged from 4 years to 18 years, with an approximate average age of 11.6 years. In six reports, the age of the student was not reported. In a number of other cases, while the exact age was not identified, it was possible to determine, for example, whether the student was a preschooler or a high school student. A frequency count determined the distribution of cases by preschool, elementary, middle, and high school. Table 4 shows these data.

Table 4.
Age Group of Students in Due Process Hearings

Category	Total Enrolled		Due Process Hearings	
	Number	Percent	Number	Percentage
Preschool	1,288	6%	7	10%
Elementary School	8,333	39%	14	21%
Middle School	3,759	17%	17	25%
High School	8,081	38%	23	34%
Unknown			7	10%
Total	21,461	100%	68	100%

For purposes of compiling data in Table 4, children under age 6 were classified as preschoolers; children from age 6 through age 10 were classified as elementary school students, children from age 11 through age 13 were classified as middle school students, and children age 14 and older were classified as high school students.

The Committee examined Official DOE 2004-2005 Enrollment data for age breakdown to determine the relationship of these percentages to the percentage of children eligible under IDEA at the various age groups (the data were not available based on the December 1, 2004, Child Count). Thus, in comparison with the group percentage enrollment, while elementary school students were considerably under-represented and high school students slightly under-represented, preschool students and middle school students were over-represented.

Of interest was that the percentage of students for whom Due Process Requests are filed under IDEA increases with the age group of the child. One possible explanation is that at the elementary ages, a closer partnership may exist between schools and families. Another explanation is possibly the continued late identification of students with special needs. One committee member felt the increasing percentage at the middle and high school level might reflect frustration that reached the breaking point after years of inadequate services.

Eligibility Category of Student. The data were also examined by the eligibility category of the student under IDEA. For 12 (18%) students, the disability eligibility category could not be easily discerned from the report. Table 5 shows data on Due Process Hearings by disability category. Data for three disabilities—autism, specific-learning disability, and emotional disturbance—are shown for those disabilities. Data for all other disabilities are shown in the category "all other."

Table 5.
Due Process Hearings by IDEA Disability Eligibility Category

IDEA Disability Eligibility Category	Total Enrolled		Due Process Hearings	
	Number	Percent	Number	Percent
Autism	868	4%	23*	34%
Specific-Learning Disability	9,810	43%	9	13%
Emotional Disturbance	2,680	12%	10	15%
All Other	9,353	41%	14	21%
Category Unknown			12	18%
TOTAL	22,711	100%	68	100%

* For three of the students with autism, a reading of the reports suggested multiple additional disabilities.

Collapsing a number of categories into the "all other" was necessary because determining what percentage the group represented out of the total special education population was not possible. For example, nine students with attention-deficit, hyperactivity disorder filed Due Process hearings. However, the students are usually eligible under the "other health impairment" category, which also includes students with a number of other health conditions. Thus, it was not possible to tease out their percentage from the population number.

Although students with autism constitute only 4% of the total special education population, this population accounts for more than one-third of all Due Process Hearings. The data in Table 4 are consistent with national data (Feinberg & Vacca, 2000; Yell & Drasgow, 2000). Nationally, students with autism or autism spectrum disorders contribute to a disproportionately high percentage of Due Process Hearings.

The Office of Special Education Programs, in its *Twenty-Fifth Annual Report (*the most recent available online) *to Congress on the Implementation of the Individuals with Disabilities Education Act,* reported that the population of students diagnosed with autism had increased more than six-fold over a decade. There were fewer than 10,000 students with this diagnosis in 1992, but more than 65,000 with this diagnosis in 2002.

Petitioner in Due Process Hearings. Unlike in previous years, all the petitioners for this period (2004-2005) were families, except for one combined case in which the DOE was listed as the petitioner. Almost two-thirds of petitioners (64%) were mothers, and another 7% were fathers. From the data, it was not possible to discern if only one or both parents were involved. Table 6 on the following page shows the data.

Data consistently show that special education students are, as a group, of lower income than the general education student body (Felix Monitoring Reports; *Twenty-Fifth, Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act).* The data may reflect an increase in single parent families being involved in dispute resolution. The implications of this situation for the cost and stress involved in Due Process Hearings will be addressed later in this report.

Table 6.
Petitioner in Due Process Hearings

Petitioner	
Mother	44 (65%)
Father	5 (7%)
Parents	15 (22%)
Grandmother	2 (3%)
Grandfather	1 (1%)
DOE	1 (1%)
Total	68 (102%)

Results by Hearing Officer. Hearing Officers are part of the Office of Administrative Hearings within the Department of Commerce & Consumer Affairs. The Committee chose to examine if there appeared to be any bias by the various Hearing Officers toward deciding cases for the DOE (a sister-state agency) instead of in favor of families. Table 7 shows the results of the analysis by hearing officer.

Table 7.
Due Process Hearings by Hearing-Officer Decision

Hearing Officer	For: DOE		For: Parent(s)		Total
Haunani Alm	8	35%	15	65%	23
Rodney Maile	3	23%	10	77%	13
Sherly Nagata	1	50%	1	50%	2
Craig Uyehara	6	86%	1	14%	7
Richard Young	10	43%	13	57%	23
Total	28	41%	40	59%	68

An analysis of the data reveals that two of the five hearing officers heard one-third of the cases each. Two Hearing Officers heard only a minimal number of cases. Parents re-

ceived more favorable decisions from three of the officers; for one Hearing Officer the ratio was almost equal. One Hearing Officer found for the DOE in six of the seven Due Process Hearings to which he was assigned. However, in the Committee's 2003-2004 SY analysis, that same Hearing Officer found for the family in five of eight hearings.

Results by Petitioner Attorney. Similarly, in this analysis, data were analyzed by Petitioner attorney on whether the Hearing resulted in a decision in favor of the family or the Department of Education. Table 8 displays these data.

Table 8.
Due Process Hearing Results by Petitioner Attorney

Attorney	For: DOE		For: Parents(s)		TOTAL
Matthew Basset	1	50%	1	50%	2
Jerel Fonseca	1	50%	1	50%	2
Ramona Hussey	2	40%	3	60%	5
Stanley Levin	1	10%	9	90%	10
Keith Peck	12	48%	13	52%	25
Eric Seitz	0	0%	1	100%	1
Carl Varady	4	40%	6	60%	10
Irene Vasey	2	40%	3	60%	5
Eric Krening	0	0%	1	100%	1
Shawn Luiz	1	100%	0	0%	1
Cynthia Nakamura	1	50%	1	50%	2
Hayden Burgess	0	0%	1	100%	1
Self-represented	3	100%	0	0%	3
TOTAL	28	41%	40	59%	68

The data show that three attorneys represented parents in two-thirds the total number of cases heard. Some attorneys appear to be more successful than others. What is apparent is that families are at great risk when they are self-represented without an attorney. Two of the three who were self-represented were Mothers.

Results by Respondent Attorney. For this current report, the Committee also reviewed cases by the DOE Attorney. These data are shown in Table 9 on the following page. Of-

ten the DOE used more than one attorney. For purposes of Table 9, only the first attorney listed was included in the Table.

Table 9.
Due Process Hearing Results by Respondent Attorney

Attorney	FOR: DOE		FOR: Parent(s)		TOTAL
Lono Beamer	9	75%	3	25%	12
Laura Kim	0	0%	3	100%	3
George Hom	5	28%	13	72%	18
Joanna Fong	0	0%	3	100%	3
Arron Schulaner	3	30%	7	70%	10
Joelle Chiu	0	0%	2	100%	2
Gary Kam	3	50%	3	50%	6
Lane Tsuchiyama	2	67%	1	33%	3
Jerold Yahsiro	1	25%	3	75%	4
Ryan Ota	2	50%	2	50%	4
Elise Tsugawa	1	100%	0	0%	1
Self-represented	2	100%	0	0%	2
TOTAL	28	41%	40	59%	68

Time Frame. IDEA 1997 (34 CFR 300.511) required that the DOE "ensure that not later than 45 days after the receipt of a request for a hearing that the final decision is reached and a copy mailed to each of the parties." Since IDEA 1997 was the legislation under which these hearings were held, the Committee decided to review decisions within a timeline framework. For three cases, the date of the filing was not in the document; the earliest date indicated was the pre-hearing conference.

In only three (4%) of the hearings was the hearing completed and the final decision reached within 45 days. Of the others, the shortest timeframe was three months, and the longest was 17 months, for an average of 5.1 months.

The Committee also reviewed which party requested the extension. In 30 cases (44%) the petitioners requested an extension; in 30 cases (44%) both parties requested an extension; and for 5 cases (7%) the source of the request could not be determined. (As stated above, three (4%) of the hearings was the hearing completed and the final decision reached within 45 days.)

The Committee is aware that IDEA 2004 [20 USC 1415 subsection 615(f)(B)(ii)] made a significant change to this timeline by adding a resolution period prior to the 45-day timeline. Thus, now 75 days are permitted. The Committee's concern is whether this change will extend even further the period of indecision. Under both IDEA 1997 and 2004, the hearing officer, before granting specific extensions of time at the request of either party, must give serious concern to the student's status.

SERIOUS CONCERNS IDENTIFIED BY THE COMMITTEE

Since this is the second time these same committee members have spent many long hours carefully reading and analyzing reports, four areas of serious concern emerge. These include information on appeals, lack of good faith, unnecessary hearings, and concerns about data.

Information on Appeals. In its March 8, 2004, report, the Committee requested information on the number of appeals, who made the appeals, and the outcome of those appeals. That information has never been provided. However, in the course of these reviews, some information did become available.

The first four cases reviewed [2003-122; 2003-126; 2003-148; 2003-149] all involved the same issue—the change in contracted provider of community-based instructional (CBI) services. Additionally, members of the Committee became aware of one other case in this group [2003-127] that was not resolved until August 2005. All five students were Felix Class Members with complex mental health and behavioral challenges. One student was in foster care, two other students had a history of placement in a therapeutic foster home. One student had a history of nine out-of-home placements. All cases were initially filed in 2003, some were resolved in 2004-2005 and one is still on appeal.

Initially, four of those cases were decided for the family and one for the DOE. From one of the attorneys representing the parents it was learned that the DOE appealed the Hearing Officers' decisions to Federal Court. DOE lost in Federal District Court in December 2005, when Judge Samuel King affirmed the Hearing Officer's decision in Case 2003-149. Two more cases were scheduled for hearing in January 2006. After the December loss before Judge King, the DOE finally settled the remaining two cases, reaching a global settlement for the three cases that had been appealed.

The final outcome or current status of these cases is as follows:

2003-122	Still on appeal in Federal Court
2003-126	DOE appealed, settled in January 2006

2003-127	Attorney fees and costs awarded by Federal Magistrate, August 2005
2003-148	DOE appealed, settled in January 2006
2003-149	DOE appealed, lost on December 7, 2005, settled attorney fees and cost in January 2006

As the group responsible under IDEA for advising the DOE on matters regarding the education of children with disabilities, it is not clear why the DOE did not provide this information to the committee.

While there may have been valid reasons for considering a change in provider agency, it was obviously done at tremendous cost. The five hearings were conducted on the Big Island for a total of 17 days. State attorneys and the Hearings Officers had to be flown to the Big Island to hear each case. The Committee is interested in dialogue with the DOE on how the decision is reached to appeal the case after the Hearing Officer finds for the Petitioner. Obviously, the results of those appeals will be spread throughout the "coconut wireless" and will not improve the credibility of the DOE within the parent community.

Lack of Good-Faith. Cases were reviewed that were refiling of the same issue because the DOE had failed to implement an agreement resulting from a previous Due Process Hearing. For example, Case 2005-094 was filed based on a "breached Settlement Agreement." Although the Respondent (DOE) is listed as the prevailing party, the Hearing Officer indicated that he lacked jurisdiction over failure to implement a settlement agreement.

This failure appears to be a violation of the July 1, 2004, memorandum from the DOE Superintendent on this subject. When families have encountered the expense, stress, and trauma of a Due Process Hearing and have been deemed the prevailing party, failure of the DOE to implement the order within a reasonable time (thus, necessitating filing of yet another Due Process request) is unconscionable.

A closely related issue was brought to the attention of the SEAC in a December 15, 2005, letter from Ramona Hussey, Attorney at Law. In that letter Ms. Hussey alleged that the DOE engages in bad-faith practices by offering to settle at the "eleventh hour," thus removing the case from the hearing calendar, then failing to finalize the settlement, forcing the case to be brought back to the Hearing Officer.

Similar complaints have been voiced by another attorney (Sinclair, 2006). Carl Varady reported that the DOE agrees to a settlement just before the deadline for the hearing. The parents agree to the terms of the settlement, and the hearing request is taken off the calendar. The settlement is not honored by the DOE, forcing the parents to again request a hearing. Mr. Varady has had to go to Federal Court to get settlement agreements enforced and has experienced situations where the DOE has not implemented the Hearing Officer's decisions. Names of other attorneys who have experienced similar situations were shared by Mr. Varady.

Unnecessary Hearings. As professionals, advocates, parents, and taxpayers, the members of the Committee continue to be concerned that the DOE could have avoided many Due Process Hearings by settling prior to Hearing. The following cases are suggested as examples of cases that should have been settled before hearing.

2004-105, 2004-118, 2004-168. In these cases, the parties agreed at the pre-hearing conference that Free and Appropriate Education (FAPE) had not been offered. The only question left to be decided was whether the DOE was responsible for paying for tuition for private placement. In each case, the decision was for the petitioner. So, why should the petitioners in these cases have to incur the expense and stress of a Due Process Hearing? Why were these cases not settled prior to Hearing?

2004-115. An IEP meeting on March 15, 2004, found the Student eligible under IDEA, but then apparently no IEP meeting was held to develop an IEP. The Respondents claimed that an IEP was developed and FAPE offered. However, page 7 of the report reads as follows:

> *"Respondent's witnesses, however, were unable to recall the specific goals and objectives discussed for the Student. There was no testimony regarding a discussion of Student's placement, the amount of special education and related services Student was to receive, or that anyone at the meeting had offered Student a FAPE. The Special Education Teacher testified that he could not recall whether an IEP had been developed for Student on March 15, 2004, how the IEP process had occurred, or how the goals listed in the March 15, 2004 IEP had been developed. The Special Education Teacher also testified that he was required to have a draft IEP prepared before he went to an IEP meeting. The Special Education Teacher did not recall whether his draft IEP of March 15, 2004 contained goals or a PLEP for student."*

Why was this case permitted to proceed to Hearing? Was the questionable quality of the testimony not obvious to the Respondent's attorney and DOE administrators?

2004-122. In part, this case involved a controversy over payment for the CARD home program. The "Conclusions of Law" for this case resulted in a loss of credibility for the DOE. The DOE's position was that it had not approved the program. The meeting notes for the April 13, 2004, IEP meeting do not even mention the CARD home program and do not state that it was approved. However, the audio tape of the April 13, 2004, meeting shows that the team had agreed to consider the CARD home program at a subsequent meeting, and agreed to request authorization for the clinical social worker and skills trainers to implement the CARD home program."

2004-146. This Hearing was for a student who had attended Private School since the 4th grade and was now in the 11th grade. The IEP in question was for the student's 10th grade. An examination of the PLEP indicated that it did not say where the student was academically in English. Her strengths and weaknesses were described in such vague terms that even the Home School's Vice Principal "agreed that it was not much to go on." Thus, the Hearing Officer found that the Student's PLEP did not include a statement of her present levels of educational performance, including how Student's disability affected her involvement and progress in the general curriculum. The Hearing Officer concluded that Free and Appropriate Education had not been offered. The respondent was ordered to reimburse Petitioners for the actual costs incurred for the private school enrollment for the year.

2004-152. This case questions the respondent's credibility. It includes an admitted backdating of an offer of Free and Appropriate Education after the filing of the Request for Due Process Hearing by the petitioner. In its closing brief, the respondent agreed that the student was not provided an offer of Free and Appropriate Education and that no written offer was produced and no program was created. The respondent went on to claim that this was because the mother made the unilateral decision to continue "home schooling" the student. The respondent raised the issue of whether a Hearing Officer had jurisdiction over home-schooled students. The Hearing Officer concluded that the student was not home-schooled, noting that the DOE has a form that must be completed if parents desire home schooling for their child, and no such forms were produced. Additionally, the DOE had continued to look for placement alternatives for the student. This would not have been done if the student was home schooled.

Cases such as this damage the DOE's credibility with families and the community. While the DOE may maintain confidentiality of the proceedings, the family is under no such obligation. As these proceedings are discussed in the community, trust in DOE decision-making is not enhanced.

2004-155. This case went to Due Process Hearing despite the fact that an IEP meeting had never been held. Only one attempt was made to schedule an IEP meeting while the mother was in Texas. The mother gave the Principal her return date and willingness to attend an IEP meeting. However, no further correspondence or communication from the High School Principal or the respondent occurred during the 2004-2005 SY.

2004-162. The record indicated that the mother (of a son with autism) had had an ongoing problem with the respondent about receiving timely IEP meeting agendas, meeting notices, and meeting notes. Since September 2003, the mother repeatedly requested that the respondent not send correspondence to her PO Box because she is unable to pick up her mail there promptly. However, the respondent continued to send her mail to the PO Box. In addition, the following quotation is taken from page 12 of this record.

> *"Mother's opportunity to participate in the creation of the IEP was severely curtailed on July 14, 2004. She was the only person present at the meeting who had first-hand knowledge of Student's educational, mental health, and behavioral needs, however, Respondent refused to acknowledge, consider, or discuss the option of residential placement. Student had exhibited severely challenging behaviors at home, at school, and after school, since Fall 2003, but Respondent did not respond to the letter from Student's Psychologist or his behavioral issues. Respondent also denied Mother's request for an IEE for a behavioral assessment without an explanation, even though no behavioral assessment has been previously completed for Student."*

2004-167. This case involves another example of delayed identification. The Hearing Officer states, "Nevertheless, this is again evidence that Student had emotional and behavioral problems and that the DOE had knowledge of these problems." Respondent was found in violation of HAR Sections 8-56-4 and 8-56-5 for failing to identify the student under the child find provisions of IDEA.

2005-023. This is a very complex case (29 pages) with 107 Findings of Fact. Some of these went back to the 2000-2001 SY. Those findings include the following comments.

- The Home School Special Education teacher informed the mother that the Home School was full and that the mother should try the Alternative Public School. The mother met with the previous Home School Principal who confirmed that the Home School had no vacancies at that time.
- The mother was subsequently informed by previous Home School Principal that the Alternative Public School would be the student's placement.
- The Alternative Public School had no knowledge of the student's placement at the Alternative Public School, and when the mother went to the Alternative Pub-

lic School, she was not allowed to register the student because the Alternative Public School had not yet received the required notice from the Home School.

- The student's placement for SY 00-01 was never resolved, and the Home School did not offer the student a placement for SY 00-01. Consequently, the student remained at home.
- ***Under the circumstances, it appears incongruous that the Home School reported the parents to Child Protective Services (CPS) for education neglect. That referral was subsequently dismissed by the CPS.***

This case is an example of a continuing controversy that lingers year after year. In this decision, the Hearing Officer determined that "Respondent did not prove by a preponderance of the evidence that Free and Appropriate Education was offered to Student for SY 03-04, because the respondent did not present any evidence regarding any IEPs for SY 03-04. The Hearing Officer concluded that "placement in a fully self-contained special education classroom was not an appropriate placement for Student for SY 03-04."

2005-044. The Hearing Officer found that "the DOE denied Student a Free and Appropriate Education by not allowing parental input for both the March 4, 2005, and May 13, 2005 meetings." In this case, the father informed the school he would be flying home from the mainland and would be unable to attend the March 4 meeting. The meeting was held anyway. Another meeting was held on May 11, and during the meeting the parties agreed that the meeting would be continued on June 6. Then after the meeting ended, the SSC met the father and parent advocate, in the school's parking lot, and informed them that the meeting would be continued on May 13, 2005. This change of dates was a dogged attempt to meet an annual-review deadline that the testimony revealed could be changed. Why was this case allowed to go to Hearing?

2005-114. The respondent started to implement the student's March 15, 2005 IEP, after the mother filed the request for a Due Process Hearing on June 29, 2005. Assuming there were valid reasons for the delay, why was a settlement not reached before going to Hearing?

2005-121. This case continues to highlight the issue of lack of least restrictive environment (LRE) available for many of the preschool children served under Section 619 of Part B. It would be interesting to do an analysis of all these cases that have been heard through the years to determine how many were decided in favor of the petitioner when parents were seeking a more inclusive setting for their preschool child.

Summary. Among other issues, the foregoing highlighted cases include issues of obvious violations of timelines, changes to meeting notes, unreliable departmental wit-

nesses, notification of a changed hearing date in a parking lot, and admissions of failing to provide Free and Appropriate Education. These examples are quickly relayed via the coconut wireless and do not contribute to improving relationships to build partnerships with families.

Concerns Regarding Data. Data coming from the DOE must be accurate and timely, and must be presented in a fair and unbiased manner. In its Annual Performance Report of the Year Ending June 30, 2004, cluster Area I, on Hearing Resolutions, the following statements are made.

> "Hawaii is unique in that a large percentage of students attend private schools. Approximately 15% of compulsory education-aged students attend private schools. Parents in Hawaii value private education. Private school attendance is often seen as a symbol of status and not necessarily a result of dissatisfaction with the provision of services at the public school. In addition, there is a large attorney per capital ratio in Hawaii. The ratio is approximately 1 attorney to 260 residents. Those factors coupled with a metropolitan city atmosphere give rise to a population that seeks private school placements in 33% of the due process hearings."

This is an inadequate and inaccurate explanation for the large number of Due Process Requests in Hawai`i. A reading of the reports (including those previously referenced) suggests a different picture. These are not parents asking for the state to pay their child's tuition to Punahou. These are families whose children have complex needs and who are generally trying to do the best for their child. Many parents sought private school placement only after their child had failed to make progress in the public schools over a number of years, or because the placement offered was in a self-contained classroom not appropriate to the needs of the child.

Also, it is difficult to picture how those five costly cases from the Big Island resulted from "a metropolitan city atmosphere."

Hawai`i's ratio of private attorneys to the populations of 1,275,194 state residents on July 1, 2005, was closer to 1:375, not 1:260. The reality is that only 12 attorneys are identified as having represented parents at hearings. And, in reports received during the SEAC meetings, parents have difficulty finding an attorney willing to take a case. Perhaps a more accurate ratio would be to describe 12 attorneys to 22,711 students served under IDEA, which is 1:1,893.

Another area of data concern arose from the Annual Performance Report (APR) for the 2002-2003 SY. The DOE reported 179 hearing requests and stated that 131 were withdrawn or settled prior to the hearing. Only 23 hearing decisions are reported as final in the APR with 25 "still pending." Yet this report was not submitted until the fourth quarter of 2003. The web report shows a revision date of 02-05-04. More accurate information reflective of the outcome of those 179 requests was available by that time.

The Committee recommends that, in reporting data to the public, especially to the Board of Education, the DOE use standard reference points. The numbers of hearings per 10,000 students served under IDEA has become an accepted reference standard. The data must be placed in a frame where the number can be compared relative to other states.

The Committee recommends that SEAC as the Special Education Advisory Body to the Department of Education, bring these issues to the attention of the Superintendent: information on appeals; lack of good faith; unnecessary hearings; and concerns about data.

OTHER AREAS OF CONCERN

Late Identification. Although case 2004-117 was decided in favor of the respondent, the testimony in this case raised troubling issues about continued instances of late identification. The student had attended his home school from kindergarten through the fifth grade. By the fourth grade his mother realized he was behind his class and could barely read. Although the Findings of Fact are not very clear, apparently the student was finally tested in the fifth grade, with findings of cognitive levels above average, but reading and math skills below the second-grade level. After continued difficulty in the sixth grade, the mother moved the student to a private school where he was diagnosed with dyslexia and attention deficit disorder. The Committee wonders why this student was not diagnosed much earlier and provided services that might have precluded the mother seeking private school placement.

In case 2005-071, the Hearing Officer found that "Student has had reading difficulties since his early elementary school years. His dyslexia was never discovered by Respondent and an appropriate program was not developed for him. This resulted in the denial of educational opportunity for Student for many years. As a result, Student was denied a FAPE."

Further, on page 9 of case 2005-071, the following statement is made:

> *"According to the Substitute Multi-Agency Care Coordinator, the IEP did not discuss re-evaluation because it was not time for Student's triennial evaluation and reassessment information was not needed at this time, in spite of the fact that Student was depressed, sleeping excessively, had problems with tardiness or not coming to school at all, was not doing his homework, was not doing his class work, was receiving very poor grades in his regular education classes, and was not progressing in his special education classes."*

Refusal of Services. A case [2004-097] that has had multiple past hearings included testimony that raises questions about the DOE's provision of mental health services. On page 7 of the report is the statement, "While at the Elementary Home School, Student started showing signs of depression because Student was not able to read and perform like other students in his class. Student also expressed a desire to harm himself. Consequently, Parents requested Respondent to provide mental health services for the student, but the request was declined."

While there may have been valid reasons for that denial, based on the information as presented in the case, the denial appears to not have been in the best interest of the student or the system and raised concerns on the part of the reviewers.

Meaningful and Comparable. At what point, when it is obvious that the proposed placement is not "comparable" to the present placement, does this become meaningful? Some attorneys are more successful in establishing this distinction than others. In [case 2004-097] the offer of Free and Appropriate Education included moving the student to a fully self-contained classroom. The Principal opined that after-school LRE opportunities would be available because the school was close to a park where the student would be able to interact with his classmates and non-disabled peers. [Unstated was that those same after-school opportunities would exist with the continued private placement.] The Hearing Officer appeared to have some doubts as expressed in the following comment, "*It is hoped that this will be the case."*

Similarly, in case 2004-169, the Hearing Officer acknowledged the tremendous gains in five years of private placement. And, further acknowledged that "No doubt Petitioners will be disappointed in the decision supporting the DOE's offer to move Student from a place where she has made significant gains." But the Hearing Officer went on to state, "If, after a reasonable time, it becomes apparent that the home school has not been providing Student with meaningful educational gains, *Petitioners are free to again request a due process hearing."* The Committee wonders whether it might not have been in the best

interest of the Student to leave her where she is doing well instead of waiting for her to possibly fail in the new setting. And, further, whether it might not be more cost effective for the system to expend resources on education rather than legal proceedings.

Publicly Funded. This term, "publicly funded," appears to be used prejudicially to suggest that somehow funding a placement at a private school is very different from funding placement within the Department of Education. All placements are "publicly funded"—some in private settings and some in public settings. A cost analysis might find that private placements can be equally costly or less costly than public placements.

Mainland Placement. Although the usual understanding is that parents seek private school of mainland placement, in a reversal of these expectations, and in the only case [combined 2004-077 & 2004-128] in which the DOE was identified as the petitioner, the DOE was asking that the student be returned to a mainland facility for placement. In the initial decision, the mother was "ordered to return Student" to the mainland facility. This phrase ("ordered to return Student") was deleted in a Clarifying Findings of Fact, Conclusions of Law and Decision.

RECOMMENDATIONS

During the analysis and discussion of the Due Process Hearings, two issues arose that need further study. The Committee strongly recommends that the Department of Education seek an independent source to study these issues.

Cost of Due Process Hearings. At a national and local level, little attention has been directed toward the direct and indirect cost of dispute resolution. Data were presented to the Board of Education on December 12, 2005, indicating that the Department costs related to due process (attorney fees) was $344,793 for SY 2003-2004 and $462,962 for SY 2004-2005 (data for SY 2005-2006 are still very limited). The note on this chart indicated that "data for the associated costs such as payment for related services and reimbursements are not available at this time." It is assumed, but not certain that "attorney fees" related only to fees paid for petitioner attorneys when they prevailed.

However, these costs are only one portion of the total cost of the dispute resolution process. Cost of the time expended by Hearing Officers, state attorneys, district personnel, teachers, related service personnel, and transportation cost are other direct costs that must be carefully calculated. Parents also incur a heavy cost through the investment of their time, loss of work, cost of child care, costs of transportation, and payment of attorney fees when they do not prevail.

In addition to the direct cost, members of the SEAC have long been concerned about the cost that dispute resolution has wrought in the relationships between schools, families, and communities. This cost, while more difficult to measure, is a cost that requires careful consideration. Survey instruments are available that can provide some insight into the impact of this process on relationships.

The Committee recommends that the SEAC formally ask the Superintendent to fund a study to carefully and fully assess the direct and indirect costs of dispute resolution in Hawai`i.

Burden of Dispute Resolution on Single Parents. The Committee is increasingly concerned about the impact of dispute resolution on single-parent families, especially mothers. For the 2004-2005 SY, mothers were the petitioner in almost two-thirds (64%) of the cases, and fathers were the petition in another 7%. Aware that data from Hawai`i and the nation showing that special education students as a group come from poorer families than general education students, the Committee is concerned about the impact of this process on women who are already bearing a heavy burden for the financial, physical, medical, and educational well-being of their children and their families. Not only are families poorer, on the average, but they tend to be less educated than parents of students in the general population.

The Beach Center on Disability addressed this issue in their Summer 2004 Newsletter. The newsletter stated that without adequate access to the courts through affordable and competent representation, families cannot take advantage of the fundamental rights afforded to them under the due process clause of the 14th Amendment to the United States Constitution and re-affirmed by the IDEA. These rights mean little to families unless they can secure representation in forums where their rights and their children's rights are adjudicated.

According to research carried out by the American Bar Association, 70%-80% of low or middle-income households are unable to obtain legal counsel when they need advice or representation (Beach Center on Disability, 2004). This issue has already come before the SEAC. During the December 2005 meeting, the issue of the difficulty that families in Hawai`i face in finding local attorneys to represent them in dispute resolutions with the DOE was raised.

The Committee recommends that the SEAC ask the Superintendent to investigate this issue and, through case studies, surveys, or other means, take an in-depth look at the differential impact of dispute resolution on low income and single-parent families. And, as part of that review, it is requested that the availability of attorneys willing to represent families be studied.

FURTHER RECOMMENDATIONS

The following recommendations are made for consideration by the DOE and by the Office of Administrative Hearings.

People-First Language. As official state documents, these reports should conform to recommendations concerning people-first language (CDS reference). A child is not "autistic" but is a child with autism, or with an "autism-spectrum disorder."

Confidentiality. As acknowledged earlier, this aspect of the reports has improved tremendously since the first reports were reviewed by the Committee. However, it is still not clear to the Committee why the names of schools, school personnel, and evaluators need to be removed since they do not infringe on confidentiality for the student or family. *This is not a decision that provides confidentiality to the student, but rather to school personnel and providers.* The decision of what to redact has been made by the DOE without input from its advisory group. Similarly, it is not clear why "private schools" are not identified. It would likely be helpful in the analysis process if the Committee had knowledge of the private schools referenced in the hearings.

But whatever is removed should be removed consistently and in the same manner. It is a small community, using the initials "M.K." for a psychologist or "J.O." for a developmental pediatrician in no way disguises the identity of that individual. The recommendation from the Committee is to either use all names other than that of the child and family or no names at all. Simply refer to Psychologist #1, or pediatrician without initials.

Of greater concern was the one report that described the occupation of the father of the child. It was probably the only one in which the father's occupation was specifically referenced. The description was sufficient to clearly identify the father. It is doubtful that there is ever a need to identify the occupation of the parent.

Consistency in Reporting. First, it was appreciated that no IEPs were appended to the current set of reports. But two other concerns did emerge. In recent reports, lengthy reporting from the transcript was included. While this provided helpful information, it is not clear why some transcripts are referenced and others not, or why only portions of the transcripts were selected for inclusion.

Hearing Officers Alm, Maile, Nagata, and Uyehara organized their reports into five headings: Chronology, Issues Presented, Findings of Fact, Conclusions of Law, and Decision. The committee found that the inclusion of "Findings of Fact" was helpful in reviewing the cases. Nagata especially broke these headings into subheadings, which again increased the readability and understanding of the issues.

The Committee again pleads that to be able to have an ongoing analysis, it is important to have consistent reporting of certain information on all cases. In all cases, this should include the age and sex of the student, the grade level, and the eligibility category of the child under IDEA. It would also be helpful if there were some listing on the face sheet of whether this was the first Due Process Hearing or one of a series for this child.

Also be helpful would be formatting the reports to ensure that the case number appeared as either a header or footer on each page of the document. These reports are often lengthy and, should pages become separated, it is almost impossible to match them with the appropriate report.

Lack of Partnership. Evident from a reading of the hearings is a continuing lack of partnership between some schools and families. The "coconut wireless" continues to be a powerful source of continuing distrust between families and schools. Cases such as those previously referenced contribute to continuing sources of friction and distrust. 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.

Lack of Information. The Committee, as an official part of the SEAC, which was established under IDEA, continues to be concerned that its requests for information have been unaddressed. Specifically, the Committee has requested the following:

- A web-based log would be helpful to determine the status of all hearing requests. For example, from the data available, it is not possible to determine whether the rates for the 2004-2005 SY will increase as other cases that may be pending are held with decisions rendered. A web-based log would help improve the "trans-

parency" of data and make it easier for the Committee to review status of Hearings.

- Any data or information that the DOE receives from national studies or information from other states that would assist the Committee in its deliberations. [Currently members of the Committee, who are volunteering their time, have to hunt down resources that are provided routinely to the DOE.]
- A copy of the information submitted by the DOE to the OSEP under the performance reporting requirement.
- Comparable information on the hearing settlement agreements (separate from those that are dismissed).
- Additional information, such as the number of decisions that are appealed, by whom, and with what results. To date, the only information on appeals, results of appeals, and costs of appeals has been provided by Petitioner Attorneys.

SUMMARY

For the period reviewed, Hawai`i continues to possibly have one of the nation's highest rates of Due Process Hearings. This process is detrimental to family-professional partnerships, costly to the system, and counterproductive to the best interests of children. Recommendations were included in the report for action by the Superintendent, the DOE, and the Office of Administrative Hearings. Additionally, SEAC needs to address these issues on a regular basis. Also, the Committee needs to review and issue reports on at least an annual basis. The Committee seeks opportunities to work collaboratively with the DOE to improve this situation.

Committee Members: Jasmine Williams, Chair

Sue Brown

Jean Johnson

Ivalee Sinclair, Ex-Officio
SEAC Chair

Attachment:
A – Summary Chart of Due Process Hearings

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