

**June 8, 2007**

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

**FROM: SEAC Due Process Committee**

**SUBJECT: REPORT ON REVIEW OF SY 05-06 DUE PROCESS HEARINGS**

## **PURPOSE**

**Legislative Charge.** The Individuals with Disabilities Education Act (IDEA) requires the State Education Agency (DOE) to transmit the findings and decisions of due process hearings to its State Advisory Panel, known in Hawai`i as the Special Education Advisory Council (SEAC). [§300.513(d)(1)] IDEA also gives SEAC the responsibility of advising DOE of unmet needs within the State regarding the education of children with disabilities. [§300.169(a)]

**Background.** In 2003, SEAC formally convened a Due Process Committee to periodically review these hearing decisions and to study the impact of having responsibility for conducting due process hearings shift from independent hearing officers to the Department of Commerce and Consumer Affairs. The Committee submitted its first report to SEAC on March 8, 2004, covering due process hearing decisions from portions of SY 2002-2003 and SY 2003-2004. It followed up with a second report March 10, 2006 that reviewed hearing decisions from SY 2004-2005.

**Intent.** In providing these reviews the Committee's intention is to present the full Council with sufficient information to make reasonable recommendations to the DOE that promote early conflict resolution and, if implemented, may: reduce the number of hearings conducted in Hawai`i, improve school and family relationships, and convert the money and attention currently paid to formal and fixed conflict resolution options into improved learning outcomes for students with disabilities.

## **PROCESS**

In preparing this report, the Committee undertook three distinct tasks.

**Review of hearing decisions.** The first was a review of all available hearing decisions resulting from requests filed from July 1, 2005 to June 30, 2006. The majority of these decisions were downloaded from the Department of Education's website, while six additional decisions were obtained from the Complaints Office. Members assumed responsibility to be the primary reviewer of a specified number of the decisions and to

contribute to editing of the final report. The information on the reviews was summarized into a 2005-06 Due Process Decisions Log that includes information the reviewers considered important for analysis (see Attachment A) such as: date of the hearing request, petitioner, date a decision was rendered, prevailing party, issues, decision, and data on the student (age, sex, and disability).

SEAC heard previous testimony from DOE that a significant number of hearings involved repeat petitioners and requests for private school reimbursement, so where possible, the log noted these additional pieces of data. Lastly, the analysis tracked the length of the process from date of hearing request to decision date, and recorded where the parties were granted extensions to the traditional 75 day timeline (30 days for a resolution period and 45 days for conducting the hearing and issuing a decision).

**Review of Literature.** While the Committee focused primarily on hearing decisions in its case review, it included the full range of conflict resolution options in its literature review. This was done in order to make recommendations regarding prevention and early intervention in resolving disputes between parents of students with disabilities and schools. A number of useful articles and statistics were gathered from the Consortium for Appropriate Dispute Resolution in Special Education (CADRE). CADRE has been contracted by the Office of Special Education Programs (OSEP) to compile and analyze statistics on dispute resolution. Other references used are noted at the end of this report.

**Comparison of Local and National Data.** The Committee compared Hawai`i data from its first two reports and the SY 2005-06 Hearing Decision data in order to look for trends that might inform possible solutions to formalized conflicts. Several adjustments were necessary for the comparisons. The first was to extract decision data from the first report that only reflected SY 2003-04. The second adjustment was to add six additional decisions to the SY 2004-05 data that were published after the 2006 report was finalized.

The Committee believes strongly that our experience with due process options in Hawai`i must be viewed in context with national trends and statistics. Accordingly, we included a section comparing Hawai`i data with national averages and trends.

## **RESULTS FROM RECOMMENDATIONS IN THE '05 & '06 REPORTS**

Since publishing our two previous reports and issuing recommendations the Committee has noted a number of changes to the process and procedures relating to conflict resolution under IDEA that coincide with our recommendations.

**Positive outcomes.** The Committee notes significant progress in the following areas of *confidentiality, consistency in reporting, consistency of interpretation, People First language and public access to information:*

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- Hearing decisions now include generic terms to refer to non-attorney parties to the hearing (for example “the student” and “the principal”), as well as schools and provider agencies, to protect the confidentiality of the student; identifying information is limited to a cover page that is not made public.
- Decisions are now organized in a consistent format that includes chronology of case, issues presented, findings of fact, conclusions of law and decision.
- The Administrative Hearings Office (DCCA) has made a concerted effort to provide consistency in its interpretation of federal and state statutes regarding special education, as well as in referencing case law.
- Written complaints and due process hearing decisions are adhering to People First language—putting the individual first and the disability second and avoiding value laden terms such as “low functioning.”
- Both hearing decisions and complaints are now posted on the Department of Education’s website, generally within thirty days of the decision or complaint report, thereby making them accessible to the general public.

**Mixed Results.** The Committee’s recommendations regarding *access to information*, *quality of case*, *partnership with families*, the *quality assurance process*, and a study of the *direct and indirect costs of conflict resolution* have resulted in partial attainment of the desired outcomes.

### *Access to information*

The Complaints Office now shares a Due Process Hearing Request Log with SEAC on a quarterly basis; the log includes the case number, its disposition, the date of decision when the request results in a hearing, and the date the decision is posted on the DOE website. While this log has been helpful in locating due process decisions, it does not include the date the hearing request was filed, issues involved in the hearings requests, or dates when settlement agreements are reached.

The Special Education Section also publishes a quarterly Complaints Management Program (CMP) report that can be found on the DOE website. This report provides useful information on telephone complaints, written complaints and due process hearing requests. The report includes data the Committee has been seeking on the disposition of the complaints and hearing requests and in which schools and complexes the complaints originated. It also lists issues, but they are in such abbreviated form as to make it difficult to discern the true nature of the complaint.

In completing this report, the Committee referred to the 4<sup>th</sup> quarter (CMP) Report and tried to link the decisions it was reviewing to issues and geographical areas.

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However, the report does not reference the date that the complaint was filed. Further, when the report was issued in July, 2006, the disposition of at least a third of the hearing requests was still pending, making it difficult to get a final tally on where there may be geographic over-representation in due process activity.

### *Quality of case*

The Committee previously cited cases that proceeded to hearing with “fatal procedural flaws.” IDEA 2004 states that hearing officers may find a denial of FAPE due to procedural errors “only if the procedural inadequacies impeded the right to a free appropriate public education; significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education; or caused a deprivation of educational benefits.” [§615(f)(3)(E)(ii)].

In our review of hearing decisions from SY 05-06 there were at least 10 decisions based on fatal procedural flaws (for example, failing to consider parent input in the development of the IEP) that should have been settled prior to a hearing. In addition, the Committee continues to be concerned that many of the hearings appear to be “repeat” hearings for the same child and family.

### *Quality Assurance Process*

In July 2004, the Superintendent issued a revised directive on “Procedures for Validating the Implementation of Agreements, Decisions and Orders.” In it she outlined specific pre-hearing interventions, instructions and timelines for handling hearing requests and specific activities that must follow a hearing to ensure timely implementation of hearing decisions. The State Special Education Section, District Educational Specialists and staff from the Attorney General’s Office have participated in debriefings of hearings with school personnel with the intent of providing technical assistance to avoid future inappropriate practices and hopefully, future conflict.

Despite these efforts, there continues to be a high number of hearing requests and a preponderance of hearing decisions decided in favor of families that suggest changes are needed to training efforts and/or the quality assurance process.

### *Partnership with Families*

The Committee commends the efforts of Kauai District, which has had an average of only four hearings requests a year for the past three years. Their success is due in large part to addressing student academic problems early, and keeping the lines of communication wide open between home and school, and between all members of the student’s support team. A number of other school complexes had no complaint activity in any of their schools in the period reviewed, hinting at the existence of strategies to intervene early in parent/school conflict. However, given the low utilization of mediation and the high number of due process hearings, it is evident that

there continues to be a strong need overall to improve relationships with parents and restore trust between families and schools.

*Direct and indirect costs of conflict resolution*

At the beginning of the SY 05-06, DOE began compiling the costs of due process hearings in four categories: attorney's fees and costs, transcription and reporting fees, the cost of the Memorandum of Agreement with the DCCA, and "other costs" (including the costs for private school tuition, related and support services, and assessments and evaluations). At the August 14, 2006 meeting of the Special Programs Committee of the Board of Education, these costs for SY 05-06 were reported at nearly \$3 million.

While these costs are important to document and track, they represent only a part of the overall cost of dispute resolution. Other direct costs not currently calculated include the cost of the time of State attorneys, district personnel, principals, expert witnesses and teachers involved in preparing for or attending due process hearings. Costs to families include loss of work time, costs of child care and transportation, expert witness fees and the costs of attorney fees when they do not prevail. Additional comments regarding direct and indirect costs and recommendation will be found under later sections.

**No Action Taken**

Two recommendations that SEAC made in the last year have not been addressed.

*Burden of dispute resolution on single parents*

The Committee's 2006 report noted that 71% of the SY 04-05 hearing decisions listed a single parent (either "mother" or "father") as the Petitioner. Given State and national data showing families of special education students as poorer and less educated on a whole compared to their general education counterparts, the Committee asked DOE to study whether there was a differential impact of dispute resolution on low income and single-parent families. As part of the review, the Committee requested that the availability of attorneys willing to represent families be studied.

At the May 8, 2006 Special Programs Committee of the Board of Education the Special Education Section, in response to SEAC's 2006 Due Process Report, agreed to research the sixty-eight hearing decisions in the report and determine the impact of marital status and income of petitioners. To date, the Committee is unaware of any results of this research.

*Information on Appeals*

Since the Committee formed in 2003, it has sought relevant data to help establish a more complete picture of dispute resolution in Hawai'i. One specific request—for information on appeals (numbers filed, issues and outcomes)—has not been provided to date. The Committee has been told that the information is public, but the process of extracting the

data is time-consuming and onerous at best and would be duplicative of efforts already made by DOE and DCCA.

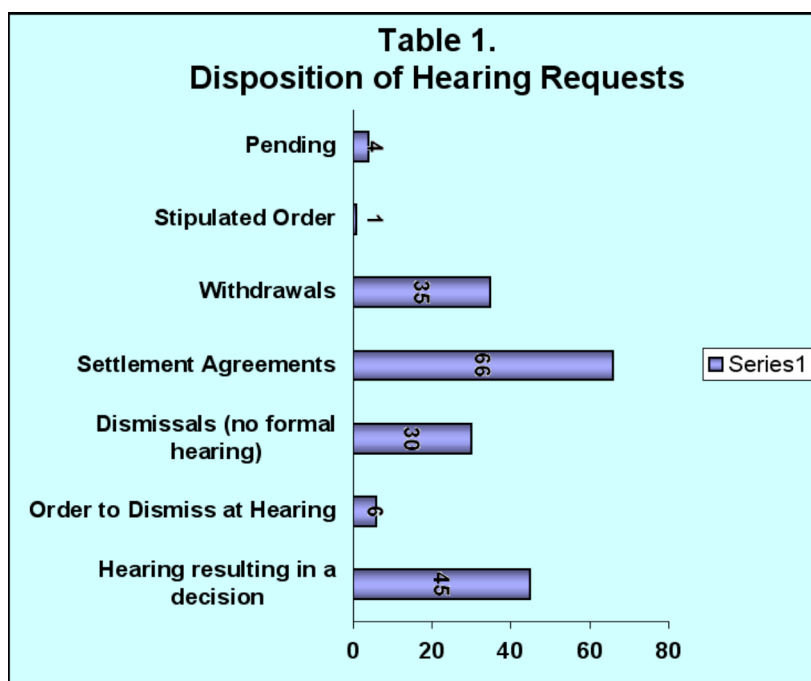
### ANALYSIS OF 2005-2006 HEARINGS

In reviewing the hearing decisions for SY 05-06, the Committee faced a dilemma on what to report. Our initial review encompassed forty-six decisions coinciding with notations in DOE's Due Process Log that a decision had been made in favor of the parents or in favor of the Department. Of those hearing decisions #0505-82A was an amendment of the original decision, so the Committee chose to view the two together as one decision, bringing the number to forty-five. In mid-May we received six additional decisions that differ from the other forty-five in that they are "Motion and Order" rulings.

Chapter 56 defines a due process hearing decision as including Findings of Fact and a decision [§8-56-75(f)(3)]. The "Motion and Order" cases do not include these provisions; however they represent hearings convened by DCCA and an order granted on a Respondent's Motion to Dismiss (the case). In all six cases the Respondent was the Department of Education.

The Committee has decided to present the data categorically, where possible, both with and without the the six "Motion and Order" cases. Because the latter do not contain student characteristics or issues, we will exclude them from those data tables.

**Overall Results.** 188 hearing requests were received between July 1, 2005 and June 30, 2006. Table 1 shows the disposition of the hearing requests.\*



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\*Two hearing requests from the same family resulted in a decision followed by an amended decision. The Committee consolidated the decision and amended decision into one, so the data above reflects 187 dispositions.

**Prevailing Party.** As shown in Table 2, of the 45 Due Process Hearings reviewed, 24% (11) resulted in a verdict in favor of the DOE and 76% (35) in a verdict in favor of the family.

**Prevailing Party in Due Process Hearings, 2005-2006  
Table 2.**

<b>Prevailing Party (with* and without Motion &amp; Order Rulings)</b>						
	DOE	Family	Total	DOE*	Family*	Total*
Number	11	34	45	17	34	51
Percent	24%	76%	100%	33%	67%	100%

\*When the additional seven cases are added in Table 2, the percentages change to 33% (17) in favor of the DOE and 67% (34) in favor of the family. **Even taking the more conservative number, families prevailed in 2 out of 3 hearings.**

**Characteristics of Students in Due Process Hearings**

**Sex of Student.** The sex of the student was not reported for the majority of the cases. Only 4 cases indicated that the student was female and 5 cases indicated that the student was male.

**Age of Student.** The age of students ranged from 4 years to 18 years. In 9 cases, the age of the student was not reported. A frequency count was done to determine the distribution of cases by preschool, elementary, middle, and high school. These data are shown in Table 3.

**Table 3.  
Age Group of Students in Due Process Hearings**

<b>Age Group</b>	<b>No. of Hearings</b>	<b>% of Due Process</b>	<b>% in SPED*</b>
Preschool	6	13%	11%
Elementary School	10	22%	28%
Middle School	9	20%	23%
<b>High School</b>	<b>16</b>	<b>36%</b>	<b>38%</b>
Unknown	4	9%	-
<b>Total</b>	<b>45</b>	<b>100%</b>	<b>100%</b>

\*Taken from Hawai'i Child Count Data as of December 1, 2005.

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For purposes of compiling data in Table 3, 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 highest number of due process hearings involved high school students, although the percentages of students from the four age groups who were involved in due process hearings corresponds closely to their actual percentage of the total special education population.

**Eligibility Category of Student.** The data were also examined by the eligibility category of the student under IDEA. For 8 (18%) students, the disability eligibility category could not be easily discerned from the report. Table 4 shows data on Due Process Hearings by disability category. Data for four disabilities—autism, specific-learning disability, mental retardation and emotional disturbance—are shown for those disabilities. Data for all other disabilities are shown in the category “All Other.”

**Table 4.**  
**Due Process Hearings by IDEA Disability Eligibility Category**

IDEA Disability Eligibility Category	Total Enrolled*		Due Process Hearings	
	Number	Percent	Number	Percent
Autism	960	5%	15	33%
Specific-Learning Disability	9470	43%	8	18%
Emotional Disturbance	2352	10%	4	9%
Mental Retardation	1665	8%	4	9%
All Other	7516	34%	6	13%
Category Unknown	-	-	8	18%
<b>TOTAL</b>		<b>100%</b>	<b>45</b>	<b>100%</b>

\*Taken from Hawai'i Child Count Data as of December 1, 2005.

The obvious disparity in the disability category data is the percentage of students with autism involved in due process hearings (33%) compared to their actual percentage of the overall special education population (5%).

**Petitioner in Due Process Hearings**

Twenty-one of the petitioners filing due process hearing requests in SY 05-06 were DOE representatives. The remainder were filed by one or both parents. For those requests that resulted in a hearing, only two were filed by DOE. Table 5 shows this data.

As in the 2006 report, single parent petitioners make up the majority of petitioners (55.5% and 53% respectively).



**Table 5.**  
**Petitioner in Due Process Hearings**

<b>Petitioner(with* and without Motion &amp; Order Rulings)</b>		
Mother	18 (40%)	18* (35%)
Father	2 (4.5%)	2* (4%)
Parent	5 (11%)	7* (14%)
Parents	18 (40%)	22* (43%)
DOE	2 (4.5%)	2* (4%)
Total	45(100%)	51 (100%)

**Issues.** A useful system of categorizing the most frequent issues underlying due process requests was found in *Beyond Mediation: Strategies for Appropriate Early Dispute Resolution in Special Education* (2002). The authors describe disputes over design, delivery or relationships. **Design** issues include differing ideas about special education services or about the needs of the student. They generally involve matters of eligibility, placement and the methods used to address the student’s needs.

**Delivery** issues are seen when problems arise over implementing an IEP that has already been agreed upon by the parents and the school. They include the provision of related services, including transportation, procedural requirements, confidentiality, and the competence of providers. The last category, relationships, is not often cited as an issue in due process hearing requests, but often underlies the conflict and affects resolution.

**Relationship** issues typically result from breakdowns in communication, cultural misunderstandings and a loss of trust. Parents rationalize that schools are trying to deny their child’s rights, while the view of school personnel is often that parents are asking for “Cadillac” services, or they are not realistic about their child’s disability.

In its review of individual SY 05-06 hearing decisions, the Committee found a number of design issues, particularly those where parents were seeking reimbursement for private school, because they believed the services offered at the public school did not match the needs of their child. Several factors that may be influencing the large number of requests for private school are the range of interventions that have emerged in the last ten years or so that offer extraordinary outcomes for the student (for example, Discrete Trial Training or Linda Mood Bell) and the parent’s access to information about these interventions through the Internet. Parents tend to be a lot more aware of scientific advances regarding educational interventions for children with disabilities, and they may seek them out in private school placements when not offered at the home school.

Delivery issues were evident as well, in cases where the disputes were over transportation services or non-delivery of agreed upon supports, such as Skills Trainers.

**Table 6. Issues Presented in Due Process Hearings**

Issues	Number*	%
Private school placement	29	57%
Appropriate evaluations	15	29%
Delivery of related services other than transportation	11	22%
Least restrictive environment	10	20%
Transportation services	7	14%
Appropriate IEP Goals	7	14%
Extended School Year	6	12%
90-Day Timeline	5	10%
Failure to include input from parents & others in IEP	4	8%
Transition planning	4	8%
Identification	2	4%
Independent Educational Eval	2	4%
Discipline - Suspension	1	2%
Late offer of FAPE	1	2%
Incomplete Hearing Request	1	2%

\*Many cases presented more than one issue.

**Time Frame.** IDEA 1997 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.” (34 CFR 300.511) A specific time extension of this 45-day timeline may be granted for “good cause” by the Hearings Officer at the request of either party. [20 USC 1415 subsection 615(f)(B)(ii)]

IDEA 2004 made a significant change to this timeline by adding a 30-day resolution period prior to the 45-day timeline. [20 USC 1415 subsection 615(f)(B)(ii)] Thus, now 75 days are permitted. The hearing decisions for the SY 05-06 are the first to reflect the longer timeline.

In only 12 (24%) of the hearings was the hearing completed and the final decision reached within 45 days. One or both parties in the remainder of cases (76%) were granted extensions by the Hearings Officer. Of these extensions, the shortest time frame was two weeks, and the longest was more than 5 months. It should also be noted that at the time this report was written, four hearing requests are still pending a final outcome. At least two of these requests date from December 2005—**eighteen months from the date of this report**. While these extensions are allowed under the law, they delay, in some cases, the provision of needed services to the student. In cases where one of the issues is private school reimbursement, long delays in reaching a decision may also cost

the State additional dollars. Protracted hearings may also add to legal expenses that are paid when families prevail.

**Impact of *Schaffer v. Weast***

On November 15, 2005, the Supreme Court handed down an important decision regarding due process hearings in special education. In *Schaffer v. Weast*, the Court decided that the burden of proof in an administrative hearing challenging an IEP is placed on the party seeking relief. Since parents are most often the party that files a due process complaint, they now have the responsibility of proving that the IEP offered by DOE is incomplete, inappropriate or untimely.

SEAC had expressed concern prior to the Supreme Court’s decision that requiring parents to bear the burden of proof would place them in a position of disadvantage. Schools as a rule have greater access to information and expert witnesses, and they have more experience in litigating due process hearings. In reviewing the decisions, the Committee anticipated a negative impact on parents’ rate of prevailing in due process hearings due to shifting the burden from DOE to families four and a half months into the year. We looked at hearings held before November 15, 2005 and compared them to hearings held after that date. Table 7 shows the result of that comparison. While it is difficult to draw conclusions from the data, one-third of the cases where parents bore the burden of proof resulted in dismissals, whereas the first six hearings where DOE bore that burden resulted in decisions for the parent.

**Table 7. Impact of Having Parties Who File Due Process Request Bear Burden of Proof\***

Date of Hearing	Parent as Plaintiff		DOE as Plaintiff	
	Prevail	Dismiss	Prevail	Owe Relief
Prior to 11-15-05	6	-	-	-
After 11-15-05	28	9	2	-

\*For this table we counted only the 45 decisions containing Findings of Fact.

**Impact of Resolution Sessions**

When Congress amended the due process provisions of IDEA in 2004 they added a new option for conflict resolution—the resolution session. Their intent was clearly to add one more opportunity for parents and schools to settle their differences prior to a formal due process hearing. Beginning in SY 05-06, any parent who filed a due process hearing request was required to attend a resolution session, unless the parent and school agreed in writing to waive the meeting or opt for mediation.

If a school is unable to obtain the participation of the parent, it may petition the Hearings Officer to dismiss the parent’s complaint. Conversely, if the DOE does not hold the

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resolution session within the fifteen-day timeline from date of hearing request, the parent may ask the Hearings Officer to begin the 45-day timeline.

When DOE is the party filing the due process hearing request, it is not required to hold a resolution session (OSEP, 2007). In SY 05-06 DOE filed 21 requests. Of the 166 remaining requests filed by parents, 163 resolution sessions were held and 3 parents and their schools opted for mediation. Table 7. shows the disposition of the resolution sessions.

**Table 7. Disposition of Resolution Sessions**

Resolution	Number	%
Settlement Agreement	27	17%
Partial Settlement Agreement	4	2%
No Agreement	132	81%

Partial Settlement Agreements mean that agreement was reached on some but not all issues in the due process complaint. The remaining issues then proceed to a due process hearing for a decision. **The resolution sessions appear to have had the impact of resolving disagreements in less than one-fifth of the cases.**

### **Impact of the 90-day timeline**

During the 2005 Session of the Hawai`i State Legislature, a bill was passed that required parents who sought reimbursement for their child's private school placement to file a due process hearing request within 90 days of the day they placed their child in the private school setting. [HRS §302A-443(a)] SEAC expressed concern over this abbreviated timeline citing instances where parents were unaware of the statute or confused over their options and needed more time to retain counsel and complete the necessary paperwork. Neither IDEA 97 or IDEA 2004 impose this time limitation on parents who place their children outside of the public school system and seek reimbursement based on violations of FAPE. The federal timeline for filing a due process complaint on any issue is *within two years* of the date the parents knew about the action that forms the basis of the complaint (for example, an IEP offering which the parent finds inappropriate).

Decisions where the 90-day timeline may have had a negative impact would be decisions where the parent's complaint regarding private school reimbursement was dismissed. Two Orders Granting Respondent's Motion to Dismiss (0505-058 and 0506-062) are based on the fact that the parent's complaint was outside the 90-day window. In another case (0506-112) where the parent failed to prove that the student was denied FAPE, the Hearings Officer also noted that the parents' claim for reimbursement would have been denied because it did not fall within 90 days of the student's enrollment in private school.

Finally, the 90-day statute of limitations was a factor in two cases where the parent prevailed. In 0506-063, DOE argued unsuccessfully that because the father filed a due process hearing request in October 2005 and had notified DOE in May 2005 that his child would be attending private school for the 10<sup>th</sup> grade, his claim for reimbursement fell outside the 90-day requirement. However, the Hearings Officer found this statute of limitations defense not applicable, because it could not clearly establish the date when the student was actually enrolled at the private school. In 0506-082, the Hearings Officer initially ruled that the parent failed to file within the timeline. The case was appealed by the parents and sent back to the Hearings Officer by District Court to decide when the parent knew about the new requirement. It was determined in 0506-082A, that even though an IEP meeting in which a copy of procedural safeguards was given to the parent had been held more than 90 days from the filing of the complaint, the parent was not actually aware of the new timeline until later. The parent was granted reimbursement for private school tuition.

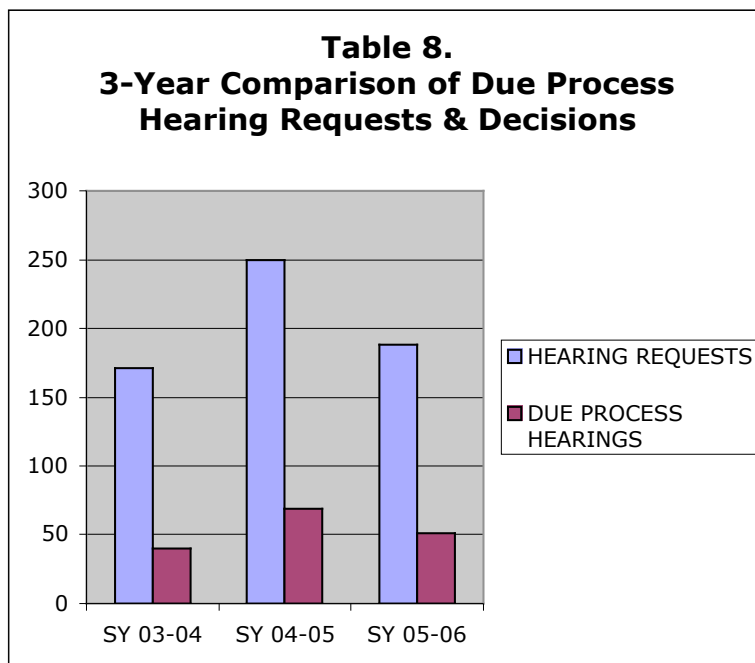
The Committee only has access to the detailed issues of the due process complaint in the decisions it reviews. There is a strong likelihood that the 90-day timeline factored into other hearing requests resulting in withdrawals, dismissals or settlement agreements.

**The Committee has grave concerns that this timeline is overly restrictive and unfair to parents.** IDEA 2004 already requires parents to provide written notification ten (10) business days prior to removing their child from public school of their intent to reject the school's offer of a free and appropriate public education (FAPE) and place their child in a private school. If the parent neglects to provide this written notice and later requests reimbursement for the costs of the private placement, the hearing officer may reduce or deny their claim. This clause also allows schools an opportunity to try to resolve problems prior to the child's departure.

## **COMPARISON OF DATA FROM SY 03-04, SY 04-05 AND SY 05-06**

**Number of Hearing Requests and Hearings.** The Committee first compared the numbers of due process hearing requests for the school years 03-04, 04-05 and 05-06, and those requests resulting in a hearing decision. For SY 05-06 the Committee included the Motion & Order rulings, as a review of past years included similar rulings.

As evidenced in Table 8, School Year 04-05 contained the highest number of hearing requests (250) and the highest number of hearing decisions (69). DOE speculated in its October 24, 2005 presentation to the Board of Education that the increase in filing of due process hearing requests in the last quarter of SY 04-05 were likely due to the perception of the plaintiff that IDEA 2004 changes effective July 1, 2005 would be less favorable to students. If this is indeed the case, then complaints that were filed in the last months of the SY 04-05 might otherwise have been filed in SY 05-06.



**Prevailing Party in Due Process Hearing.** Table 9 shows the comparison of prevailing parties in the due process hearing decisions.

**Table 9. 3-Year Comparison of Prevailing Parties**

	Prevailing Party					
	By Number			By Percent		
	DOE	Family	Total	DOE	Family	Total
SY 03-04	12	28	40	30%	70%	100%
SY 04-05	32	37	69	46%	54%	100%
SY 05-06	17	34	51	33%	67%	100%

**In every year of the comparison, parents prevailed in a majority of the decisions, and in SY 03-04 and SY 05-06 the ratio was 2:1 in favor of parent plaintiffs.** The Committee is concerned that despite the efforts made by DOE to provide oversight, and despite the options of mediation and settlement agreements from resolution sessions prior to hearing, there is a pattern of cases rising to the hearing level that contain violations of FAPE that could be addressed earlier at less cost (both in dollars and relationships).

### COMPARISON TO NATIONAL DATA

Comparing Hawai'i's experience to that of other states on the Mainland helps to put our data in perspective. In essence, all states must follow the procedural safeguards embedded in IDEA; however, the structure and policies around conflict resolution system may look different from one state to another. In the past, the Committee heard concern

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expressed that comparing Hawaii’s data to national norms produced false comparisons given that some states have a two-tiered system of conflict resolution while Hawaii has a one-tiered system. Ahearn (2001) reported that in 2001 only 17 states were using a two-tier system and this number has been declining due in part to concerns about duplicative costs.

**Rates of Requests/Decisions per student population.** In September 2003 the Government Accounting Office (GAO) published its report to Congress regarding the rates of conflict resolution--*SPECIAL EDUCATION: Numbers of Formal Disputes are Generally Low and States are Using Mediation and Other Strategies to Resolve Conflicts*. The report studied data from all states from 1996 through 2000 and found that dispute resolution activity was generally low compared to the number of students with disabilities. On average, **5 due process hearings were held per 10,000** students with disabilities. An estimated **7 mediations per 10,000** students were conducted and about **10 written complaints per 10,000** were received.

More recent data obtained by the Committee from CADRE (2006) summarized dispute resolution data from the 2004-05 State Performance Plan submitted by all 50 states. The summary statistics showed that the average of **due process hearings had dropped to 2.3 per 10,000** special education students, **2.5 mediations (related to due process) per 10,000** were conducted, and **8 per 10,000 written complaints** were received.

Table 10 compares Hawaii’s rates compared to these two national summaries. Since the Complaints Office lists both 504 and IDEA students in its due process student population, the Committee used this larger number, as well. The Committee acknowledges that using special education student counts only would slightly inflate Hawaii’s rates of conflict resolution usage.

**Table 10. Comparison of Hawaii to National Data on Rates of Conflict Resolution  
(Per 10,000 Special Education Students)**

Method of Conflict Resolution	GAO 96-00	CADRE 04-05	Hawaii 03-04*	Hawaii 04-05**	Hawaii 05-06***
Written Complaint	10	8	4.6	4	4.6
Mediation	7	2.5	?	4	2.5
Due Process Hearing	5	2.3	15.4	27.6	21.2

\* Based on a 504/IDEA student enrollment of 26,019

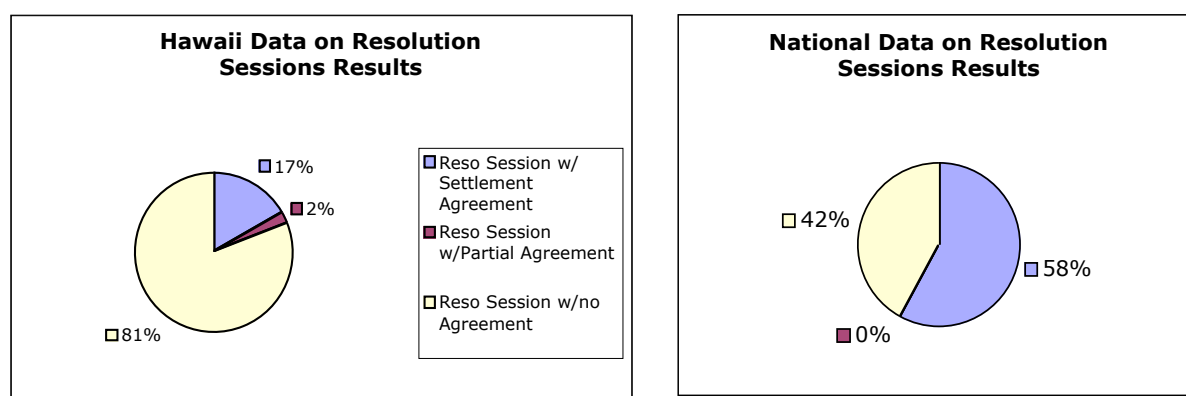
\*\* Based on a 504/IDEA student enrollment of 25,019

\*\*\* Based on a 504/IDEA student enrollment of 24,085

**Using the more conservative rate in the GAO report, Hawaii's due process hearings were as much as five times above the national norm.**

### **Results of Resolution Sessions**

In a recent presentation--“From Resolution to Resolution: Emerging Practices in Special Education Dispute Resolution” –made to three OSEP Regional Implementation Meetings audiences, CADRE presented its “rough sample” data on resolution meetings from 22 states. The average percentage of resolution sessions resulting in settlement agreements from this sample was 58% (Cadre, 2006). By contrast, Hawaii had a settlement agreement rate of 17%. Partial agreements comprised another 2% of the total.



In setting its targets for increasing the numbers of resolution sessions that result in settlement agreements, DOE is aiming for a modest 26% by SY 2010-2011. In the Committee's estimation, this target is too low. The Committee offers a recommendation to improve resolution session outcomes later in this report.

### **SERIOUS AREAS OF CONCERN**

#### **Costs of Due Process**

“Creating Agreement”, a training curriculum developed jointly by the IDEA Partnership (at NASDSE) and CADRE, highlights the many costs of conflict. Beyond the obvious and more measurable financial costs (direct and indirect) are the following:

- Educational costs = energy taken away from instruction,
- Human costs = stress and burnout for all parties involved,
- Relationships = damaged relationships among people who have to work together,
- Societal costs = bad press for special education; families and schools divided

One of the Committee members ran into an exemplary preschool teacher several years ago and was dismayed to find she had left the classroom and was working in retail sales. Asked why she left special education, she replied, “two due process hearings.” Here the effect of dispute resolution was the loss of a highly qualified and dedicated educator.



While differing opinions on the education of students with disabilities is inevitable, to some extent, between parents and schools, the Committee asserts that proactive steps can be taken to reduce the negative and secondary effects of unresolved conflicts. Three million dollars is merely the tip of the iceberg.

### **Underutilization of Prevention and Early Intervention Alternatives**

The Committee would like to commend DOE for going beyond the dispute resolution requirements of IDEA to also offer Conciliation and Facilitated IEPs. These strategies are part of an array of early intervention services that help to settle disagreements before they evolve into conflict. CADRE has developed a very useful chart (Appendix 2) that outlines the stages of conflict and includes specific interventions that target each stage -- from prevention (Stage I) to legal review (Stage V). As one moves from disagreements to conflict to procedural safeguards, one moves away from decision making by both parties to decision making by a third party. The outcomes become win/lose rather than win/win.

It is obvious from our multi-year review of due process hearings that more needs to be done in the area of prevention and early intervention. Conciliation and Facilitated IEPs appear to be underutilized, and it would be important to explore the factors contributing to low usage. Prevention strategies also need to be considered and implemented. One prevention strategy, stakeholder training, will be discussed under Recommendations.

Another useful study that DOE might consider would be to look at barriers to the use of mediation, both before and after the filing of a due process hearing request. In *Beyond Mediation: Strategies for Appropriate Early Dispute Resolution in Education*, authors Feinberg, Beyer and Moses offer one possible explanation: mediation is generally offered too late in the dispute resolution process. "Because considerable time can pass between the emergence of a disagreement and the filing of a request for a due process hearings...parents and educators can become hardened in their positions, making a successful mediation outcome far more difficult to achieve. If mediation occurs only after a request for hearing has been filed, the process may be viewed as merely a prelude to litigation." (Feinberg, 2002)

### **Extended Time to Complete Due Process Hearings**

IDEA offers parties in a due process hearing the right to request extensions and the Hearings Officer the right to grant a specific extension of time. The Committee understands that given the multiple individuals that may be involved in a hearing and the complexity of the issues, there may be times where it is impossible to reach a hearing decision within the 45-day timeline. However, the Committee is concerned that the significant length of some due process hearings is infringing on the rights of some students by delaying services or supports.

While Hawai`i's ratio of decisions with extended timelines to decisions within the 45-day timeline is similar to the national average of 2.5:1, the Committee would like more comparative data on the length of an average extension. The Committee noted 11 hearings in SY 05-06 that exceeded the 45-day timeline by three months or more. One hearing took 10 months to resolve—in essence a full year of instruction. Four hearing requests from SY 05-06 are still pending, up to a year and a half after they were filed. The Committee finds these long delays are counter to IDEA's intent of safeguarding the parent and student's rights by providing timely dispute resolution, and they have a negative impact on school personnel.

## **RECOMMENDATIONS**

### **Impartial Resolution Session**

Given Hawai`i's relatively low success rate in securing settlement agreements from resolution sessions, the Committee recommends the **use of external facilitators to conduct the resolution session**. Some of the potential functions and benefits of the use of impartial facilitators include:

- Improving relationships
- Balancing power and supporting participation of the parties
- Modeling effective, respectful communication
- Keeping the discussion student-focused
- Encouraging new options/solutions
- Saving dollars spent on more formal procedures
- Reducing stress on the participants, and
- Normalizing and depersonalizing conflict. (*From Regulation to Resolution*)

According to James Gerl (2006), a handful of states are now trying out the use of a trained facilitator at state expense for resolution meetings. Preliminary feedback is that the resolution meetings are working well.

### **Greater involvement of stakeholders in all aspects of system improvement**

The Committee recommends that the DOE make much **greater use of stakeholders (SEAC, family members, attorneys, school administrators and parent advocates) in all aspects of improving Hawai`i's system of dispute resolution**. As demonstrated in this report, stakeholders can help define system problems, enhance public awareness, provide guidance on the selection of dispute resolution strategies and review data. Other states such as California have found that working collaboratively with stakeholders to improve the delivery of conflict resolution options improves the transparency of the system and contributes to a win/win experience for all involved.

### **Use of Prevention and Interest Based Problem solving strategies**

In researching this report, the Committee found a wealth of materials regarding prevention programs that have proven successful in other communities. We recommend

that DOE **implement some of these prevention strategies** locally. At the same time the Committee advises that **local models of prevention and early intervention that have proven successful** (for example, the aforementioned efforts on Kauai) **be highlighted and replicated wherever possible**.

Most, if not all, prevention strategies emphasize the power of listening in preventing and resolving conflicts, echoed in a quote by Mary Rowe: “*Listening is probably the most cost effective element of a conflict management system.*” The materials jointly developed by CADRE and IDEA Partnerships also utilize a technique called Interest-Based Problem Solving or Negotiation. It shifts the focus in a disagreement between parents and schools from “your position versus mine” to “you and I versus the problem.” Greater awareness and usage of these strategies in schools could result in significantly fewer disagreements rising to the formal dispute level.

#### **Greater publicity of prevention/early intervention options**

The Committee would like to see **greater public awareness and outreach regarding the availability of all dispute resolution options, particularly those that emphasize early conflict resolution**. We suggest that **public awareness materials be developed to address the interests of various stakeholder groups** (teachers, families, non-English speakers, etc.) and be written in clear, reader-friendly language. The Committee further suggests that **DOE partner with SEAC and other entities** (the Learning Disabilities Association of Hawaii, Community Children’s Councils, Hawaii State Teachers Association, the Special Parent Information Network, Hawaii Families as Allies, etc.) **to ensure a wide distribution of these materials**.

#### **Use of satisfaction surveys to evaluate results of dispute resolution options**

Much more light could be shed on the problems relating to informal and formal dispute resolution by simply asking the parties involved. DOE and the Attorney General’s Office routinely debriefs schools and district personnel regarding mediations, resolution sessions and due process hearings. The Committee recommends that **DOE develop and distribute satisfaction surveys to all parties engaged in mediations, resolution sessions, settlement agreements and due process hearings**.

Recognizing the importance of this feedback for system improvement, the Committee developed a survey in June 2006 for families who had experienced a recent due process hearing (Attachment C). The Committee attempted to distribute the survey through the plaintiff attorneys who had represented families in SY 04-05. Unfortunately, we did not receive a single response. However, the Committee is confident that DOE has the opportunity and the ability to contact plaintiffs directly to obtain this valuable feedback.

#### **Joint training to diverse groups regarding conflict resolution.**

The CADRE/IDEA Partnerships training curriculum, “Creating Agreement”, has demonstrated that providing training to a diverse group of stakeholders enhances their

capacity to engage in collaborative problem solving and shared learning. The Committee recommends that **DOE partner with SEAC and other willing parties to develop and present workshops that focus on special education dispute prevention and early resolution.** The Committee asserts that joint training by parent and school personnel is necessary in order to model partnership and enhance the credibility and openness of the training. We further recommend that **training materials be developed in consultation with key stakeholders.**

### **Re-examination of Hawai`i's interpretation of the FERPA standard in reporting due process decisions**

Access to information continues to be an issue for the Committee as it attempts to put pieces of the dispute resolution puzzle into a broader picture. SEAC is keenly aware of the importance of maintaining confidentiality when it applies to matters involving students with disabilities. SEAC maintains, however, that DOE has interpreted the Family Educational Rights Protection Act (FERPA) definition of "personally identifiable information" too stringently. In addition, there is inconsistency in the redaction of due process hearing decisions, in that some decisions omit the child's age and disability while others do not.

In April 2006, SEAC conducted a random survey of eleven states that posted their due process hearing decisions on their Department of Education website (Appendix D). Most of these states routinely listed the student's age, sex, disability/eligibility category, and his or her school district. Given that these states are following the same FERPA requirements for confidentiality, the Committee recommends that **Hawai`i's due process decisions uniformly include the student's age, sex, eligibility category and school district.**

## **SUMMARY**

The Committee undertook this study of dispute resolution for the SY 05-06 in an effort to understand the reasons for Hawai`i's significantly high rate of due process hearings and to offer recommendations to DOE on what steps might be taken to improve the dispute resolution system. The Committee concurs with the words of Gail ImObersteg, a former Hawai`i attorney and consultant to DOE on due process matters:

*"The hearing and mediation systems cannot be viewed in isolation. It is about relationships in the classroom, the school and the district, the level of trust and the need for a shared partnership. Disputes are not always about the stated issue, rights and responsibilities. Often, the real issues are ones of respect, communication and the perception of fairness. These are the keys to the effective resolution of the disputes."* (ImObersteg, 2000)

## *SEAC Due Process Committee Report*

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Committee Members:                   Jasmine Williams, Chair  
  Sue Brown  
  Susan Cooper  
  Martha Guinan  
  Evan Matsushima

Committee Staff:                       Susan Rocco

### **Appendices:**

- A – Summary Chart of Due Process Hearings
- B – CADRE Continuum of Conflict Resolution Options
- C – Due Process Committee Family Survey
- D – Confidentiality Comparison

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