

SEAC



SY 08-09 DUE PROCESS REPORT





The Special Education Advisory Council

(SEAC) is mandated under the Individuals with Disabilities Education Act to advise the Department of Education on the unmet needs of students with disabilities. SEAC meetings are open to the public and we welcome input from all special education stakeholders.

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Purpose

All State Advisory Panels, like SEAC, are given the responsibility under the Individuals with Disabilities Education Act (IDEA) to review the findings and decisions of special education due process hearings. IDEA does not elaborate on what, if any, further responsibility is expected of the state panel upon review of the findings. To our knowledge, SEAC is the only state panel in the country to conduct a detailed analysis of its state dispute resolution processes and to publish a report on an annual basis.

This report is the sixth review conducted by the Due Process Committee of major dispute resolution options available to parents in IDEA--mediation, written complaints and due process hearing requests. In each of our reviews the Committee's intention has been to empower SEAC to make reasonable recommendations to the DOE that promote early conflict resolution. If implemented, we are hopeful that our recommendations 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.

SEAC is also interested in ensuring that parents of students with disabilities in Hawaii have access to the due process rights afforded to them under the law. In the past ten years a number of factors have made it potentially more difficult for families to access these rights. They include the following:

More formality in due process proceedings

In October of 2002, the Department shifted the responsibility for conducting due process hearings from independent hearing officers to the Administrative Hearings Office of the Department of Commerce and Consumer Affairs. Hearings now more closely resemble formal court proceedings, and parents who attempt to represent their own interests in the hearing (*pro se*) are far less likely to prevail in the hearing.

Schaffer v. Weast

This 2005 Supreme Court decision places the burden of proof in a due process hearing on the party that initiates the hearing request. The vast majority of hearing requests are filed by parents, so they must now be more persuasive to win their case.

Arlington Central School District v. Murphy

Another Supreme Court decision in 2006 held that witness fees paid by parents in due process hearings are not reimbursable. So while the parent's attorney fees may be reimbursed if they prevail in a hearing, the expense of proving the parent's allegation through the use of expert witnesses is borne solely by the parent. Parents who can not afford to pay for expert witnesses face the choice of presenting a less persuasive case, or not proceeding with a due process hearing.

Process

In preparing this report, the Due Process Committee undertook three distinct tasks:

Review of hearing decisions, complaints and mediation results.

The first task was a review of all available hearing decisions resulting from requests filed from July 1, 2008 to June 30, 2009. These decisions are posted on the Department of Education's website.(1) Written complaints, however, are no longer posted on the website, thus limiting the Committee's ability to comment on them other than to summarize data available in the Complaints Management Program Quarterly Reports. While the demographics and issues related to mediations within that same time frame were also not available for review, the Committee noted the number of mediations posted in the 08 Annual Performance Report and whether they resulted in an agreement.

Comparison of Local and National Data.

SEAC now has data from six school years (SY 03-04 to SY 08-09) with which to look for trends that might inform possible solutions to formalized conflicts. Some of the hearing decision data from previous reports was revised to reflect decisions that were posted after the reports were written (more than one year after the requests were originally filed). This was done to give a complete picture of the disposition of hearing requests within a given school year.

SEAC believes strongly that despite the Hawai'i Department of Education's unique unitary system, our experience with due process options must be viewed in context with national trends and statistics. Accordingly, we included a section comparing Hawai'i data with national averages and trends over time.

Review of Articles on the Incidence of Dispute Resolution.

In addition to raw data, the Committee did an Internet search of articles offering analyses of state dispute resolution utilization and complaint management systems. By far, the most pertinent information gathered by the Committee was through links on the Consortium on Appropriate Dispute Resolution in Special Education (CADRE) website.(2) CADRE is funded by the Office of Special Education Programs as the National Center on Dispute Resolution.

Analysis of SY 08-09 Disputes

SEAC has focused on the formal dispute resolution options that are required of each state by the Individuals with Disabilities Education Act (IDEA). These options include written State complaints, due process complaints, mediation and resolution sessions. States may opt to offer less formal means to settle conflicts earlier in the process, including facilitation and conciliation. Hawaii offers both facilitation and conciliation, as well as telephone complaints—an option where the Special Education Section acts as a “go

Analysis of SY 08-09 Disputes (cont.)

between” in communicating a parent’s concerns to the school and clarifying the requirements of the law.

Written complaints have a sixty-day timeline for a report to be issued by the State and resolved unless the timeline is extended because of exceptional circumstances or because the parent (or individual or organization) filing the complaint and the Department agree to extend the time to engage in mediation. Telephone complaints, by contrast,

have no requirement of timeline or report. The only information SEAC was able to gather regarding written and telephone complaints were the summaries offered in the Complaint Management Office’s quarterly reports.

In Table 1, we compare the volume of due process complaints—hearing requests, written complaints and telephone complaints—by district.

Table 1. Numbers and Percentages of Due Process Complaints by District, SY 08-09

| District | SPED* | Hearing Request | Written Complaint | Telephone Complaint | Total Complaints | % Cmpt/ SPED | 1 complaint / ___ students |
|-------------|--------|-----------------|-------------------|---------------------|------------------|--------------|----------------------------|
| Honolulu | 3,366 | 28 | 4 | 3 | 35 | 1% | 96 |
| Central | 4,042 | 10 | 0 | 3 | 13 | 0% | 311 |
| Leeward | 4,608 | 14 | 4 | 9 | 27 | 1% | 171 |
| Windward | 2,477 | 29 | 1 | 3 | 33 | 1% | 75 |
| Hawaii | 3,834 | 13 | 3 | 5 | 21 | 1% | 183 |
| Maui | 2,723 | 21 | 0 | 2 | 23 | 1% | 118 |
| Kauai | 1,141 | 3 | 1 | 2 | 6 | 1% | 190 |
| HCDB | 73 | 0 | 0 | 0 | 0 | 0% | 0 |
| State Total | 22,264 | 118 | 13 | 27 | 158 | 1% | 141 |

The last column shows the ratio of complaints of all types to the number of students in that district. Windward had the highest rate of complaints per capita with one complaint for every 75 special education students. Honolulu district follows with one complaint for every 96 students, and Maui ranked

third with one for every 118 students. These three districts have consistently outranked the other districts over the last several years in the amount of due process hearings and overall complaints. By contrast, Central District had the lowest per capital number of complaints, followed by Kauai, Hawaii and Leeward.

Table 2. Complaints by Type and Year

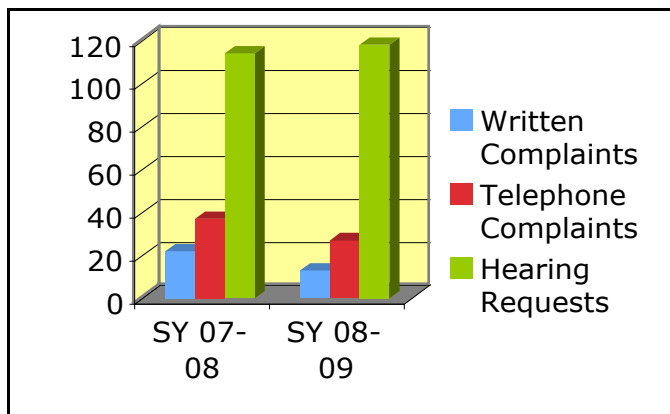
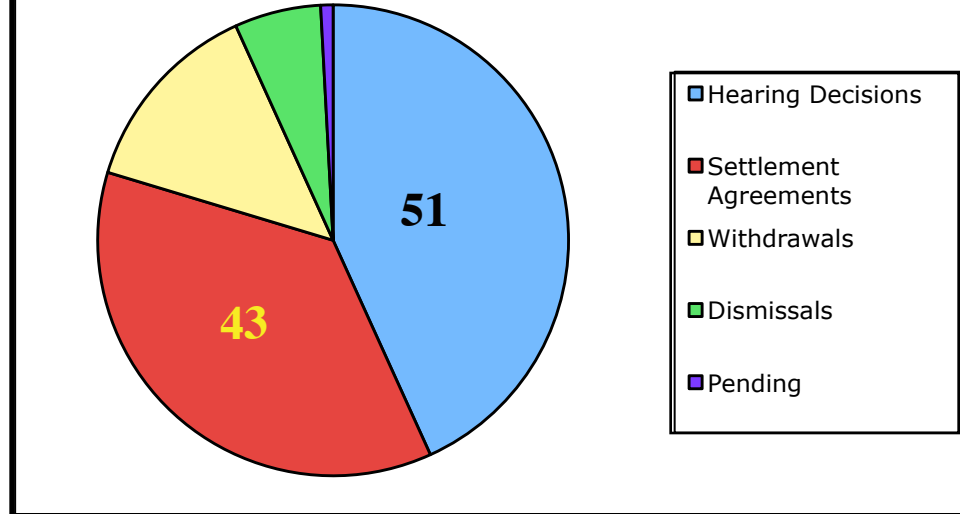


Table 2 is a graphic illustration of the types of complaints by volume for the school years 07-08 and 08-09. Hearing requests are by far the preferred option over written and telephone complaints when parents believe their child is not receiving the protections guaranteed under IDEA. Hearing requests numbered 118 in SY 08-09 and rose slightly from the previous year, while written and telephone complaints declined.

Analysis of SY 08-09 Disputes (cont.)

Table 3. Disposition of Hearing Requests



Disposition of Hearing Requests. Once a parent files a due process hearing request, there are generally four possible outcomes:

- the parent changes his or her mind and withdraws the request;
- a hearing officer dismisses the request for various reasons, including a lack of information regarding the parent's claim;
- the parent(s) settle their dispute with the Department prior to a hearing (often as a result of the resolution session); or
- the hearing officer hears the evidence and makes a decision as to whether the parent proved their case, and if so, what actions are required of the Department.

In SY 08-09, the majority of requests proceeded to hearing, and there were also a large number of settlement agreements made prior to hearing.(3) The combined total represents about 80% of the hearing requests. There was one request which was still outstanding at the time of the report--more than a year after it was filed.

Issues Included in the Hearing Requests. The table below lists the prominent issues brought to light in the hearing requests. (4)

Table 4. Issues of Requests

| Type of Issue | Number |
|------------------------|--------|
| IEP | 94 |
| FAPE | 85 |
| Private School Tuition | 79 |
| Placement | 73 |
| Other | 49 |
| Related Services | 45 |
| Support Services | 41 |
| Evaluation | 32 |
| Procedural Safeguards | 17 |
| Section 504 | 8 |
| Eligibility | 6 |
| Mental Health | 5 |
| Safety and Health | 1 |

Three-fourths of the requests argued that the Individualized Education Program offered to the student was not appropriate, in most cases because it did not offer a free and appropriate public education (FAPE). In 79 cases the parents were requesting reimbursement of private school tuition, because they had removed their child from public school and placed him in private school in an effort to meet his or her educational needs.

Analysis of SY 08-09 Disputes (cont.)

Table 5. Request by Disability

| Eligibility Category | SY08-09 |
|----------------------------------|---------|
| Autism Spectrum Disorders | 44 |
| Deaf-Blindness | 0 |
| Deaf | 0 |
| Developmental Delay | 4 |
| Emotional Disability | 11 |
| Hard of Hearing | 0 |
| Intellectual Disability | 6 |
| Multiple Disability | 7 |
| Orthopedic Disability | 0 |
| Other Health Disability | 21 |
| Specific-Learning Disability | 15 |
| Speech/Language Disability | 2 |
| Traumatic Brain Injury | 1 |
| Visual Impairment | 0 |
| Section 504 | 3 |
| Students in eval or not eligible | 4 |
| TOTAL | 118 |

Disabilities Categories in the Hearing Requests. When the SY 08-09 hearing requests were broken down into eligibility categories for special education, certain disability groups appear to be overrepresented or underrepresented in due process. Most strikingly, students with Autism Spectrum Disorders make up about 6% of the special education population from preschool through high school, **yet they represent 37% --over one-third--of the hearing requests.** By contrast, students with specific learning disabilities make up the largest percentage of the special education population--42%--but only 13% of the hearing requests. Likewise, students with developmental delays (a category that is utilized for 3 to 9 year olds) are 15% of the student population receiving services, but represent only 3% of the requests. It appears from the data that parents of students with milder disabilities are far less likely to file for a due process hearing.

Table 6. Prevailing Party

| | # of Decisions | % of Decisions |
|---------|----------------|----------------|
| DOE | 29 | 57% |
| Parents | 22 | 43% |
| | 51 | 100% |

Prevailing Party in Due Process Hearings. SY 08-09 represented a shift from an earlier trend. DOE prevailed in more of the decisions than parents, unlike the past six years of study. Since all but one of the 51 decisions represent parents as the plaintiff party, we see that in the majority of the hearings, the parent did not provide sufficient proof of a violation by the Department.

Table 7. Hearing Requests by Age Group

| Age Group | % in SPED | # of HR | % of HR |
|------------|-----------|---------|---------|
| Pre-K | 12% | 11 | 9% |
| Elementary | 39% | 52 | 44% |
| Middle | 23% | 25 | 21% |
| High | 26% | 30 | 26% |

The percentage of parents who filed a due process hearing request while their child was in preschool, elementary school, middle or high school matched up with the actual division of students by age groups. No one group was over- or under-represented.

Analysis of SY 08-09 Disputes (cont.)

Results of the Resolution Sessions.

When a parent files a due process hearing request, the resolution session must be conducted within 15 days, unless the parent and school agree in writing to waive the meeting or opt for mediation. The **Report of Dispute Resolution** submitted to the Office of Special Education Programs as part of Hawaii's Annual Performance Report for SY 08-09 shows that by June 30, 2009, 114 resolution hearings were held. (5) Presumably another three resolution hearings were held after June 30th, since only one parent opted for mediation in lieu of a resolution session. Five hearing requests were filed on or after June 17, 2009, leaving little time to hold a resolution session before the school year ended.

Of the 114 resolution sessions held, 41 or 36% resulted in written settlement agreements.

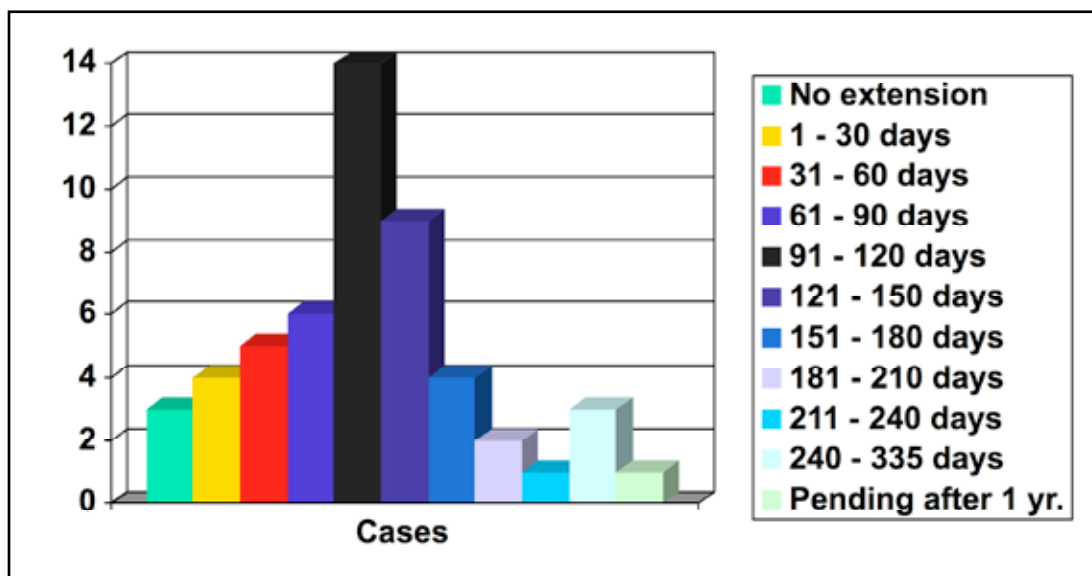
Hearing Extensions.

Table 8 below illustrates the number of hearings which extended beyond the timeline outlined in IDEA 2004:

30 days for the resolution process + 45 days for the hearing process = 75 days.

Of the 51 hearing decisions reviewed, only three were completed and the final report delivered to both parties within 75 days. All other hearings involved an extension or extensions granted by the hearing officer for reasonable cause. The average extension totaled 109 days. One hearing request was still not resolved after one year.

Table 8. Hearing Extensions



Legal representation in hearings.

All but four of the fifty-one hearing decisions involved plaintiff counsel and the Attorney General's Office. The Department was the plaintiff in one case and was represented by a District Educational Specialist. In three other cases, parents represented themselves (*pro se*), and in those cases, the Department was represented

Analysis of SY 08-09 Disputes (cont.)

Legal representation in hearings (cont.)

by a District Educational Specialist as well. It is significant to note that in the three cases where the parents bore the burden of proof of a violation of law, and in the one case where the parents defended themselves against a hearing initiated by the Department, the parents **did not** prevail in the hearing. This leads the Committee to speculate that parents who are not represented by counsel are at a distinct disadvantage in the hearing process.

Another noteworthy finding is that a total of six plaintiff attorneys represented families, with two attorneys representing over 70% of the students. In the SY 07-08, thirteen attorneys represented families in fifty hearings. It is possible that additional attorneys were involved representing families who withdrew their petitions or signed settlement agreements prior to hearing. However, there appears to be a significantly smaller plaintiff attorney pool in SY 08-09 than in past years. If this is true, it may have been more difficult for families seeking due process to retain an attorney.

Issues and disposition of written complaints.

The number of parents utilizing this formal dispute resolution option in SY 08-09 was significantly less than due process hearing requests (see Table 2 for a comparison). Of the thirteen written complaints submitted to the Special Education Section, nearly half asserted a violation related to the provision of a free appropriate public education (FAPE). The IEP, related services and/or placement issues also appeared in a third of the complaints.

Table 9 reports on the results of the investigation of the complaint. **Nearly three-fourths of the complaints found the Department noncompliant with IDEA or Chapter 56 in at least one aspect of the allegation.**

Table 9. Disposition of Written Complaints

| Disposition | # |
|---|----|
| Findings of Noncompliance | 8 |
| No violation | 3 |
| Complaint pending a due process hearing | 1 |
| Complaint withdrawn or dismissed | 1 |
| Total Written, Signed Complaints | 13 |

Mediation.

There were 15 reported requests for mediation; however, only 9 mediations were conducted in SY 08-09. The Committee was not able to ascertain why six requests did not result in a mediation session. Several possibilities include that the request was still pending on June 30th, or that the school was not willing to be a party to the mediation.

One mediation was related to a due process complaint but did not result in an agreement. The remaining 8 mediation sessions were not related to a due process complaint and agreement was reached in seven of the eight mediations. The seven of the possible nine agreements reached resulted in a 78% success rate for agreement. This fell slightly below the target the Department had set for itself of 84% agreement.

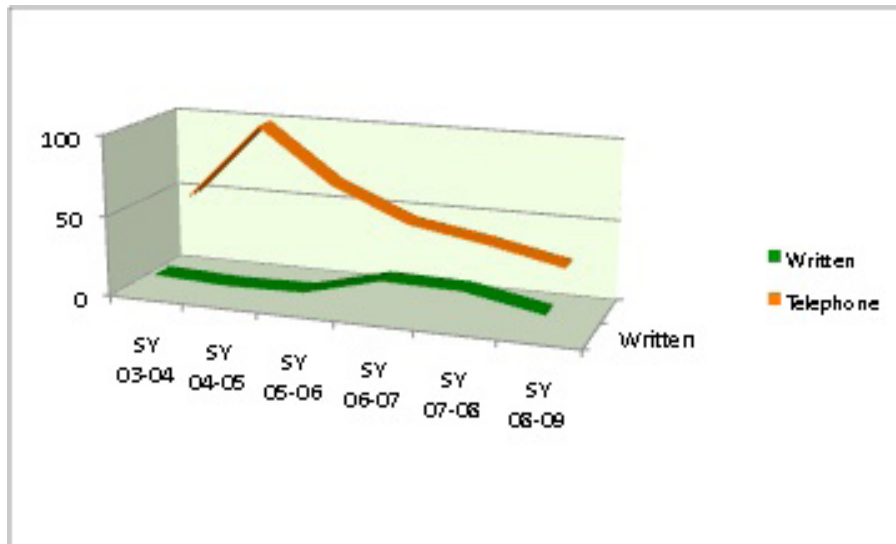
Trends in Hawaii Data Over Time

SEAC has been reporting on data since the SY 03-04, and we now have six data points for many of the issues we have studied. Looking at data over time allows us to look for trends and to provide better feedback to the Department about what is working and what is not. In this report we made year-to-year comparisons of written and telephone complaints, due process hearing requests and decisions, mediations and resolution sessions.

Written and telephone complaints.

In Table 10 we can see the use of telephone complaints declining significantly, while the use of written complaints remains relatively static with the exception of a bump in SYs 06-07 and 07-08. While the option to file a written complaint is mandated in IDEA, telephone complaints are an optional means of early dispute resolution offered by the Special Education Section. In the Complaints Management Program Quarterly Reports for SY 09-10, data on telephone complaints is no longer listed, so it is not clear whether this dispute resolution option is still available to parents, and if so, whether the Department is continuing to maintain data regarding issues and demographics.

Table 10. 6 Yr. Comparison of Written & Telephone Complaints



Agreements in Resolution Sessions.

The resolution session is a dispute resolution option added to IDEA in 2004 and required to be implemented by SY 05-06 as a further response to a parental request for due process hearing. That year became Hawaii's baseline in the Annual Performance Report. With the exception of SY 06-07 Hawaii has made progress in reaching written settlement agreements as a result of the resolution session.

Table 11. Percentage of Agreements per Resolution Sessions Held

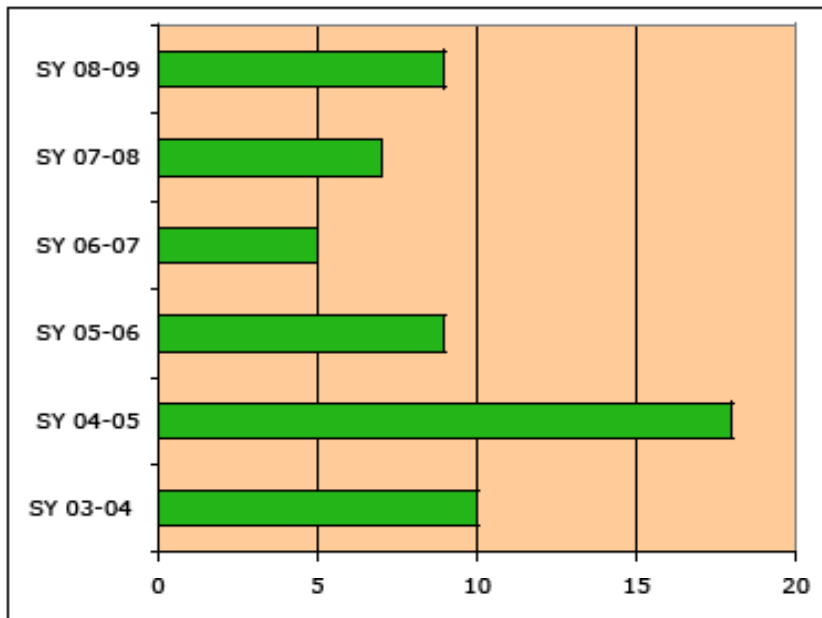
| SY 05-06 (Baseline) | SY 06-07 | SY 07-08 | SY 08-09 |
|------------------------|----------|----------|----------|
| 16 % | 6 % | 40 % | 36 % |

Trends in Hawaii Data Over Time (cont.)

Mediations.

The utilization of mediation as a means of resolving disputes between parents and schools has been disappointingly low for the period of study. As depicted in Table 12, ten or fewer parents a year have opted for mediation over other forms of dispute resolution with the exception of SY 04-05 (which also had an abnormally high number of hearing requests).

Table 12. 6 Yr. Comparison of Mediation Utilization

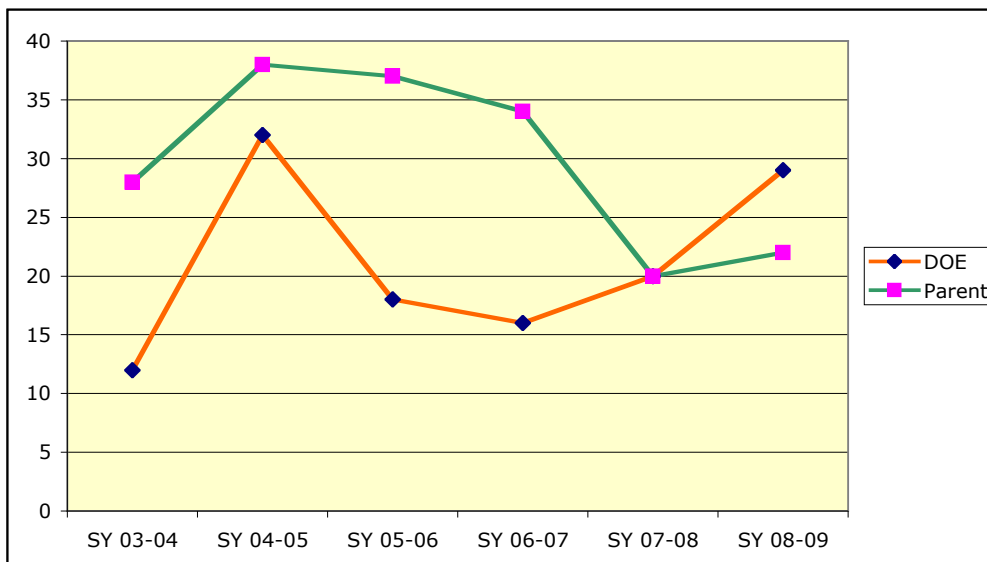


A second trend, though not depicted, is that the majority of the mediations sessions held are not related to a due process hearing request and have a high probability of resulting in a settlement agreement (75-80% on average)--significantly higher than resolution sessions.(6) Once a parent has filed for due process, however, the odds of the parent selecting to mediate in lieu of a resolution session, and of the mediation resulting in an agreement, go way down.

Due Process Hearing Requests and Decisions.

The next three tables look at trend data related to due process hearing requests and hearing decisions. Table 13 below shows an interesting trend in hearing decisions. For three of the data points, parents prevailed twice as often as the Department. In SY 07-08, the number was divided equally. For SY 08-09, however, the Department won a majority of hearing decisions for the first time in the six years of study.

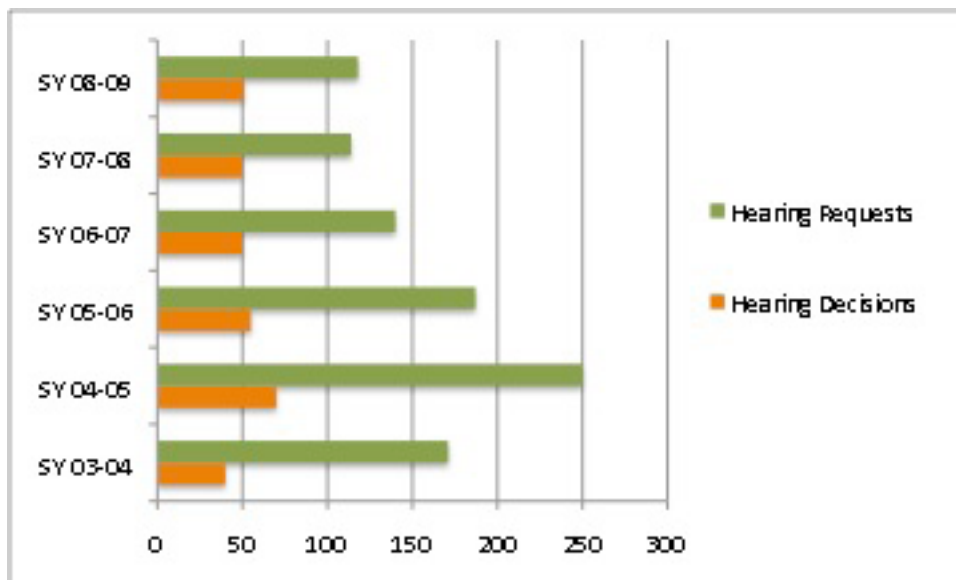
Table 13. Prevailing Party



One factor for this change in prevailing parties may have been evidenced by the four *pro se* cases where families were not represented by counsel and lost their case. Another was that many more agreements were reached in resolution sessions in SY 07-08 and 08-09. If those cases had proceeded to hearing they may have resulted in more families prevailing.

Trends in Hawaii Data Over Time (cont.)

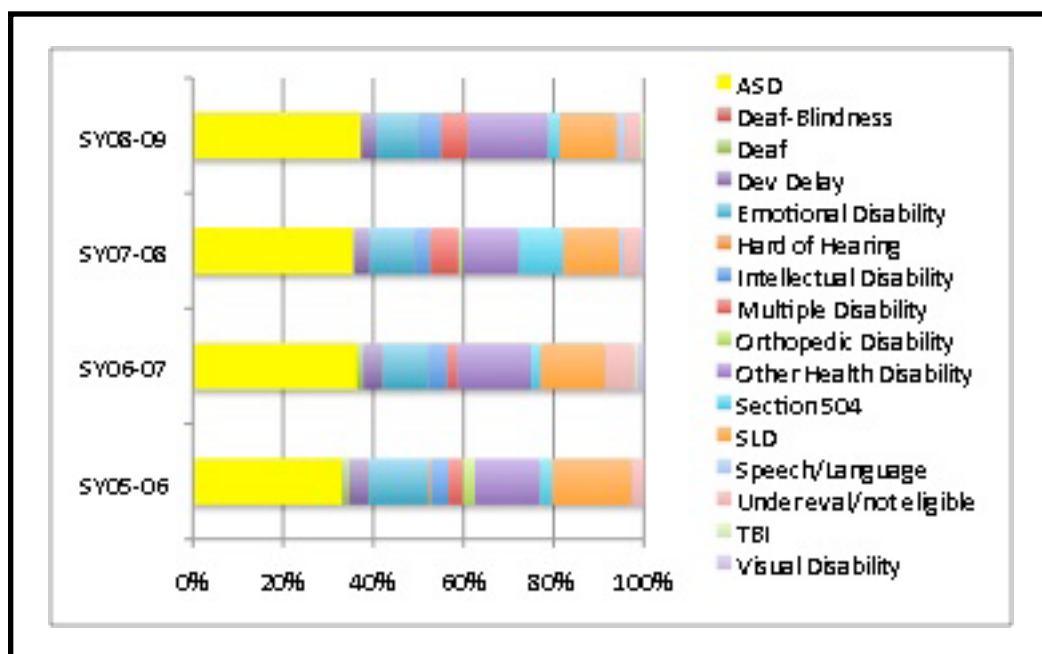
Table 14. Numbers of Hearing Requests & Hearing Decisions



Due Process Hearing Requests and Decisions (cont.)

SY 04-05 was the year IDEA 2004 was signed into law, but new requirements, such as resolution sessions, were not implemented until July 1, 2005 (the beginning of SY 05-06). Consequently there was an abnormally high number of hearing requests filed before changes in the law. In the following three years, requests steadily decreased, with a slight bump upwards in SY 08-09. By contrast, the number of hearing decisions have remained relatively static from year to year, even though the special education population has decreased by about 3,000 - 4,000 students during that time. (7)

Table 15. Disabilities in Hearing Requests



Trends in Hawaii Data Over Time (cont.)

Due Process Hearing Requests and Decisions (cont.)

Table 14 highlights the disabilities that are represented in the hearing requests. SEAC does not have disability data for due process hearings, because that information has been redacted. It is our assumption that the disability categories most often cited in the hearing requests are also representative of hearing decisions.

Parents of children with Autism Spectrum Disorders are more likely to file a due process hearing request despite the fact that students with ASD make up only 6% of the special education student population. The next most cited categories are Other Health Disability, Specific Learning Disability and Emotional Disability.

Comparison to National Data

Living in an island state, it is easy to view our dispute resolution system as unique and to avoid comparisons with other states. However, making those comparisons may provide insight into our practices and possibly suggest remedies that would help us move away from our unevitable position as one of the most litigious states per capita in the union when it comes to special education.

The following table compares Hawaii's incidence of written complaints, hearing requests and hearing decisions to a national average. The rates are calculated per 10,000 special education students, so for each Hawaii statistic, the special education population for that year was divided by 10,000 and the resulting number was used to divide the actual number of dispute resolutions. For example, in SY 08-09, the special education population was roughly 20,000 so the number of hearing requests, 118, was divided by two to get the rate 54 per 10,000 students.

The national average and three years of Hawaii data for complaints and hearing requests were taken from *Five Year State and National Summaries of Dispute Resolution Data*, prepared by CADRE. (8)

Table 16. Hawaii vs. National Data on Rates of Conflict Resolution (Per 10K Special Education Students)

| Method of Conflict Resolution | Nat'l Average* | Hawaii SY 05-06 | Hawaii SY 06-07 | Hawaii SY 07-08 | Hawaii SY 08-09 |
|-------------------------------|----------------|-----------------|-----------------|-----------------|-----------------|
| Written Complaint | 8.3 | 5.0 | 10.9 | 11.3 | 5.9 |
| Hearing Request | 28.1 | 78 | 66.5 | 54.3 | 54 |
| Hearing Decision | 4.8 | 22.9 | 21.7 | 22.9 | 23.2 |

* Taken from SY 07-08--the most recent year national rates are available.

The comparison of the rate of Hawaii to a national mean of hearing decisions is somewhat

Comparison to National Data (cont.)

skewed, in that the CADRE data is taken from each state's Annual Performance Report (APR), which often show hearing requests that are pending at the time of the report. Of those requests pending, some may result in actual hearing decisions while others are settled, withdrawn or dismissed. For example, in Hawaii's APR data submitted for the SY 08-09, only 39 hearing decisions were reported, and 30 hearing requests were pending a disposition. To date, 51 hearing decisions have been recorded for hearing requests filed in SY 08-09, and only one hearing request is outstanding.

In Table 16, SEAC compared the actual rates of hearing decisions in Hawaii to the rates reported in the APR that resulted in a national average of 4.8. Assuming that Hawaii's rate of due process hearings is 4 times greater than the national average is probably an overstatement. **However, if we allow that half the pending requests in the APR result in hearing decisions (a generous assumption), Hawaii's rate is still three times higher than the national mean. Additionally, the rate of due process hearing requests is twice the national average.**

Another confirmation of Hawaii's high rate of due process hearings came in a study by Zirkel and Gischlar.(9) Table 16 looks at their comparison of adjudicated hearings from 1991-2005, ranked by overall numbers and then by capita. When adjusted for population Hawaii ranked third in the nation behind New York and New Jersey.

Table 17. Comparison of Overall Hearings vs. Hearings per Capita

| 1991-2005 Hearing Overall | 1991-2005 Hearings/Capita |
|---------------------------|---------------------------|
| 1 = New York | 1 = New York |
| 2 = New Jersey | 2 = New Jersey |
| 3 = Pennsylvania | 3 = Hawaii |
| 4 = California | 4 = Connecticut |
| 5 = Maryland | 5 = Rhode Island |

One-Tiered vs. Two-Tiered Hearing Systems.

Under IDEA states have a choice of having a one-tier system of hearing officers or a two-tiered system that provides a second hearing officer review level. A rationale offered to SEAC to explain Hawaii's high rate of due process hearings is that Hawaii is a one-tiered state, and states that have two tiers generally have fewer decisions, as they may be dismissed or withdrawn at the State level.

This argument is not persuasive in that most states have now moved to a one-tiered system to save money and time.(10) Additionally, New York, which has a two-tiered system, leads the nation in both overall and per capital hearings.



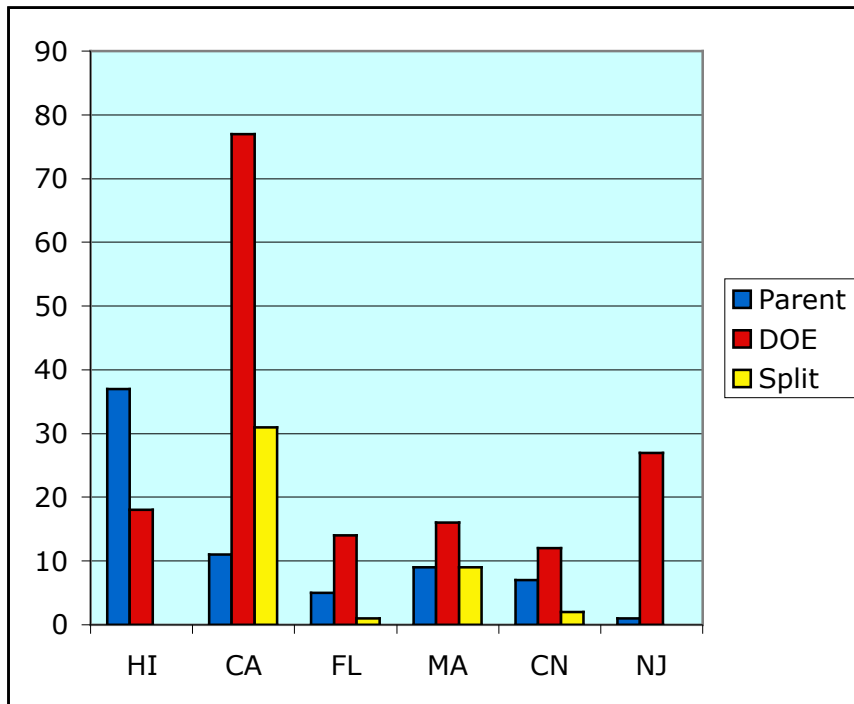
= 41 States including Hawaii



= 10 States including New York

Comparison to National Data (cont.)

Table 18. Comparison of Overall Hearings vs. Hearings per Capita

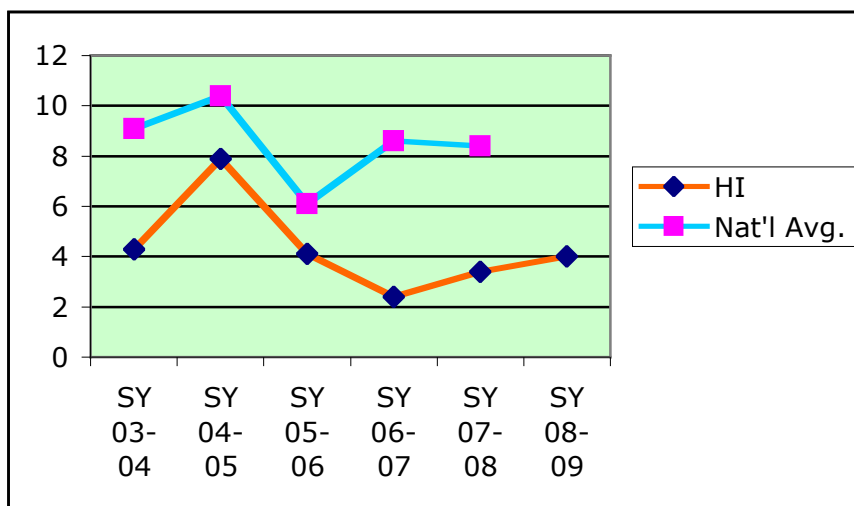


Prevailing Party.

Hawaii's pattern of a majority of parents prevailing at due process hearings in any one year is at odds with most national data showing districts prevailing in a vast majority of due process hearing decisions. A 2007 article in the Wall Street Journal cited data from CADRE for the SY 05-06.(11) It showed five states with significantly higher rates for the Department of Education (DOE) prevailing than for parents. In stark contrast, Hawaii parents that year prevailed in two out of three hearing decisions.

Another interesting contrast is that four of the states record split decisions while Hawaii does not.

Table 19. Comparison of Hawaii Mediations to National Average (Per 10,000 students)



Mediations.

Hawaii's rate for mediation is consistently below the national average. Table 17 includes all mediations, and if we were to separate out mediations that occur prior to a parent filing for a due process hearing from mediations that are hearing-related, we would see that there are fewer mediations in the latter category, and they are less likely to result in a mediation agreement. However, mediations overall have a higher agreement rate than resolution sessions.

Hearing extensions.

While IDEA encourages speedy resolution of parent/school disputes by setting time limits for resolution sessions and hearing decisions, it also allows a hearing officer to grant specific extensions of time beyond the 45 days for the hearing process at the request of either party and "for good cause." In reviewing the Annual Performance Reports for states that have significant numbers of due process hearings, it appears that many include some extensions granted legally by a hearing officer. However, in Hawaii hearing extensions are the rule rather than the exception. Table 20 on page 14 depicts the percentage of hearing decisions from 13 school years 04-05 to 08-09 that include extensions granted by hearing officers to either or both parties.

Comparison to National Data (cont.)

Table 20. Comparison of Percentage of Hearing Extensions

| School Year | Hawaii | Nat' Average |
|-------------|--------|--------------|
| SY 04-05 | 97% | 62% |
| SY 05-06 | 90% | 64% |
| SY 06-07 | 82% | -- |
| SY 07-08 | 100% | -- |
| SY 08-09 | 97% | -- |

The comparison data regarding the national average of hearings that include extensions was compiled by CADRE and includes SYs 04-05 and 05-06.

We are unable to find national data on the other three years. However, the implication is clear: **the overwhelming majority of hearings in Hawaii do not reach a decision within the targeted deadline set by Congress in IDEA.** What may be a more significant finding is that Hawaii's extensions delay the outcome of the hearing by **months**--an average of more than three months in SY 08-09 (see Table 8).

Serious Areas of Concern

SEAC acknowledges the efforts of the Department, the Attorney General's Office, and the Administrative Hearings Office of the Department of Commerce and Consumer Affairs to address the abnormally high number of formal disputes in Hawaii. There is now more "sunshine" on the issue with the posting of quarterly complaint reports and due process hearing decisions on the Department's website. Workshops have been held to explain the complexities of the due process hearing procedures and to encourage mediation and other less formal means to resolve differences. Confidentiality has been improved in the reporting of due process hearing decisions. Efforts are made to meet with schools that have been involved in hearings to brainstorm more effective ways to communicate with parents and to resolve differences early. Facilitation and conciliation contracts allow parents and schools to bring in neutral facilitators from the mediation centers as conflicts arise.

SEAC and other community agencies, including the Community Children's Councils and the Learning Disabilities Association of Hawaii, have also contributed to improvements to the dispute resolution process. Parent workshops have been held to educate families on conflict resolution and to encourage prevention and early intervention. SEAC created a parent-friendly brochure--"Handling Disagreements Early: Options for Families & Schools"--with resource information on how to utilize informal methods of alternative dispute resolution. Community partners have offered to be part of joint training efforts to educate school personnel and parents on strategies to preserve the partnership while addressing the unique needs of students.

Despite these collective efforts, SEAC has some remaining concerns over aspects of the dispute resolution process that do not appear to be improving. They include:

Underutilization of Prevention and Early Intervention Methods

Hawaii's Department of Education has an array of dispute resolution tools it can

Serious Areas of Concern (cont.)

Underutilization of Prevention and Early Intervention Methods (cont.)

draw from to help bring down the rate of due process while maintaining appropriate services for children and preserving parent trust. These include conciliation and facilitation services, mediation and effective training materials for school personnel and community members available for free from CADRE and other sources.

This report has documented how little the mediation option is employed. Likewise, there appear to be only two or three dozen facilitated IEPs conducted each year despite evaluations which highlight their effectiveness. Telephone complaints have waned annually from a high of 99 in SY 04-05 to 27 in SY 08-09. At this point SEAC and the Department are speculating as to why these informal options are not used more. Is the problem related to awareness, timing, coordination, implementation, priorities, or a combination of all these factors? SEAC is willing to participate in the quest for answers, but there needs to be a commitment by the Department to provide resources to identify and address barriers to early dispute resolution.

Extended Time to Complete Due Process Hearings

Table 20 on the preceding page documents that, on average, more than 9 out of 10 due process hearings involve time extensions that delay the final outcome. These delays are troublesome on two fronts: 1) they may be delaying needed services or supports to students with disabilities, and 2) when the issue is private school reimbursement, and the student is in “stay put” at the private school, these delays may incur unnecessary costs to the Department. If the hearing officer later finds that the Department offered FAPE and is not responsible for reimbursing the parent, the issue may be moot if the Department has already made a payment toward private school tuition.

SEAC has been concerned about this issue for several years and thus advocated through the Chapter 60 Community Work Group to insert language into the new administrative rules that would disallow extensions merely for the convenience of the parties and establish a set time frame for each extension. These rules took effect in November of 2009, so SEAC’s future examination of the SY 09-10 data will hopefully show that most hearings are resolved in less time. However, the SY 08-09 hearing data show 51 hearings being handled by only six attorneys and three hearing officers, so there may be a resource issue to resolve as well.

“Judicialization” of the Due Process Hearing System

SEAC borrowed this term from an article by Perry Zirkel that talks about a trend toward an increased use of court related activities in due process hearings.(12) Prior to 2002 and the contracting of the Administrative Hearings Office of the Department of Commerce and Consumer Affairs to conduct special education hearings, independent hearing officers often conducted hearings in their office. The current hearing process--both in Hawaii and nationally--is typically highly structured and comparable to a court hearing, with witnesses, formalized procedures and (in general) representation by legal counsel.

Zirkel’s argument is that these increasingly formal proceedings tend to benefit attorneys rather than the student who needs prompt services or the school system which has limited resources. Parents who represent themselves (*pro se*) often lose out, as well, possibly because of a lack of experience or skill in presenting more persuasive evidence.

Serious Areas of Concern (cont.)

The Overt and Hidden Costs of Due Process in Hawaii

SEAC's concern over the costs associated with due process have been voiced every year in our reports. These costs are especially problematic during our economic downturn, where almost every dollar in the Department's budget has been scrutinized, yet there has been little mention of due process expenses. SEAC has repeatedly requested information about direct costs and indirect costs. The last cost estimate we received was from a report to the Board of Education in August 2006, in which the Special Education Section reported that the direct costs for due process hearings for SY 05-06 was \$2,990,320.

That nearly \$3 million tab did not include contracts with the mediation centers, costs related to settlement agreements, expenses related to corrective actions under State complaints, expert witness fees for the Department, monies spent on appeals, or the in-kind support of the Attorney General's Office. Nor did it capture the costs to families of attorneys' fees, expert witness fees, or lost wages from having to take time off work.

Gaps in Information

Related to the concern above is information requested of the Department but not yet disclosed that would provide a more comprehensive understanding of Hawaii's dispute resolution system. This report marks the fifth year that SEAC has requested information not only on costs, but on settlement agreements and state and federal appeals.

From the Department's log of hearing requests dispositions we know that about a third of the requests result in signed settlement agreements. SEAC understands the need to keep details of individual agreements confidential. At the same time, we feel it is important to understand what kinds of issues were resolved in the agreements, how well the agreements were honored from the parent's perspective, and what factors support reaching agreement.

Another large gap in our understanding of the issues is what trends are evident in state and federal appeals. For example, how often are hearing decisions appealed? By whom? Are the decisions upheld or overturned? Federal and state appeals add to the cost of dispute resolution. This can be a particular burden to parents who may have to pay attorney retainers and expert witness fees.

SEAC is mandated under IDEA to advise the Department on the unmet needs of students with disabilities. It is difficult to provide meaningful advice without a big picture view of issues affecting these students and their families. Awareness of the problems is the first step in crafting lasting solutions.



Recommendations



1

Include key stakeholders in improvement activities.

“Stakeholder engagement is a critical, non-negotiable component of an effective dispute resolution system. It’s worth the time and effort to build trusted relationships and involve stakeholders. Engaging them in meaningful ways will increase the effectiveness of your entire system.” (12)

2

Emphasize early dispute resolution.

“A Parent’s initial contact with your dispute resolution system influences future interactions, for better or worse. The initial intake process ‘sets the tone.’ Parents can begin to engage constructively when welcomed by a neutral, knowledgeable person able to give information, present options and offer resources.” (12)

3

Expand the array of services to students with Autism Spectrum Disorders in public schools, so that families do not feel the compelling need to seek private placement.

4

Encourage more programmatic placements at private schools when the Department is unable to provide an appropriate program for a student with unique needs in a public school setting. Set criteria for private schools to facilitate these placements.

5

Improve the timeliness and effectiveness of hearings by closely monitoring the reasons for extensions and the number of extensions per individual case.

6

Partner with SEAC and other willing stakeholder groups to develop and present training to mixed audiences that focuses on special education dispute prevention and early intervention.

7

Collect and share data with SEAC on the number of state and federal appeals of due process hearing decisions and the issues decided therein.

8

Allow SEAC to assist the Department in conducting a thorough review of settlement agreements--issues, outcomes, student characteristics and geographic locale.

Reference Notes

- (1) <http://www.doe.k12.hi.us/reports/specialeducation/dueprocess/pdf0809/index.htm>
- (2) <http://www.directionservice.org/cadre/index.cfm>
- (3) Complaints Management Office Hearing Request Log (SEAC Due Process List) from 7/1/04 to 5/31/10
- (4) Complaints Management Program (Sp Ed), Quarterly Report, School Year 2008-2009, 4th Quarter
- (5) <http://www.doe.k12.hi.us/reports/specialeducation/stateperformanceplan/index.htm>
- (6) Information taken from Annual Performance Reports and Complaints Management Program (Sp Ed) Quarterly Reports
- (7) Information taken from Child Count Data (618 Data) submitted to the Office of Special Education Programs each year.
- (8) CADRE, **Five Year State and National Summaries of Dispute Resolution Data**, March 2010
- (9) Zirkel, P. A. & J. Gischlar, K. L., "Due Process Hearings Under the IDEA: A Longitudinal Frequency Analysis," *Journal of Special Education Leadership* 21(1), March 2008
- (10) Zirkel, P.A. & Scala, G., "Due Process Hearing Systems Under the IDEA: A State-by-State Survey," *Journal of Disability Policy Studies*, 21-1, 2010
- (11) Golden, D., "Schools Beat Back Demand for Special-Ed Services," *Wall Street Journal*, July 24, 2007
- (12) Zirkel, P. A., Karanxha, Z., & D'Angelo, A., "Creeping judicialization in special education hearings?: An exploratory study," *Journal of the National Association of Administrative Law Judiciary*, Spring 2007
- (13) CADRE, "Top Tips for Dispute Resolution System Managers," September 2009

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