

SEAC



SY 09-10 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

This report represents the findings of the seventh review conducted by SEAC's Due Process Committee around parental utilization of the major dispute resolution options available under the Individuals with Disabilities Education Act (IDEA). These options include mediation, written complaints, resolution sessions and due process hearing requests.

The Due Process Committee's in-depth reviews were initially prompted and have been maintained by a desire to understand the reasons why Hawaii ranks near the top amongst states and territories in the number of due process hearings per capita. In each of the reviews the intention has been to empower SEAC with knowledge to make reasonable recommendations to the Department of Education that promote early conflict resolution. If implemented, we are hopeful that our recommendations may:

- ✓ reduce the number of hearings conducted in Hawaii,
- ✓ improve school and family relationships, and
- ✓ convert the time and money spent on formal conflict resolution options into effecting improved learning outcomes for students with disabilities.

SEAC's interest in promoting early and informal dispute resolution is also motivated by the awareness that a number of factors have the potential to impinge upon parental access to due process rights as the dispute process becomes more formal, including:

- ✗ the requirement that parents who file for due process bear the burden of proof,
- ✗ the costs of legal representation when parents do not prevail in the hearing,
- ✗ the inability to recoup the expense of expert parent witness fees,
- ✗ a limited supply of plaintiff attorneys, and
- ✗ formal hearing procedures that discourage families from representing themselves.



Process

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

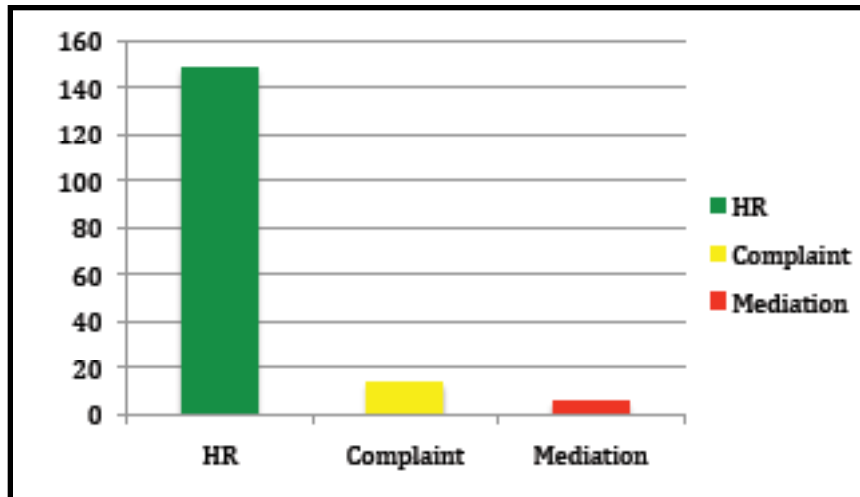
- ① Reviewing available data on written complaints, mediations and hearing requests filed or conducted from July 1, 2009 to June 30, 2010 and the resulting resolution sessions and hearing decisions that were posted by June 30, 2011,
- ② Comparing the data from School Year 2009-10 to data collected by SEAC from six previous school years to identify local trends,
- ③ Comparing Hawaii's data to national data to gain perspective on how we are alike and how we differ from our Mainland counterparts, and
- ④ Formulating recommendations based on our findings and articles offering analyses of state dispute resolution utilization and complaint management systems.

Analysis of SY 09-10 Disputes

In drafting IDEA, Congress put in procedural safeguards to ensure that parents with children with disabilities could enforce their child's right to a free and appropriate public education, including the options to file a written complaint with the State Educational Agency and to file for a due process hearing before an impartial hearing officer. Mediation was added in 1997, and the requirement of a resolution session--held before a due process hearing is conducted--was included in the 2004 IDEA amendments.

Preferential use of due process hearing requests. The IDEA dispute resolution options were not equally utilized by parents in SY 09-10. As is evident in Table 1, due process hearing requests--the most formal (and potentially expensive) option--was selected 10:1 over complaints and 30:1 over mediations as a means to resolve a dispute.

Table 1. Utilization of Dispute Resolution Options



Parents filed 148 requests for due process hearings and 14 written complaints of suspected IDEA violations. Only five mediations were conducted during the school year, two of which were related to a due process request.

Written complaints. Information about complaints filed in SY 09-10 was obtained from summary data, as the actual complaints are no longer posted on the Department's website. (1) Parents of students with Autism Spectrum Disorders filed nine of the fourteen complaints, and the issues were primarily about IEPs, the provision of a free appropriate public education (FAPE) and procedural safeguards. Only 3 of the complaint investigations turned up violations to IDEA, Chapter 60 or Chapter 63 (Section 504 eligible students) requiring corrective actions by the schools involved.

Mediations. SEAC's only data source for mediations is the Annual Performance Report (APR) sent to the Office of Special Education Programs each year. The 2009-10 APR noted seven mediation requests. Five mediations were held, one request was withdrawn, and one request was still pending at the end of the school year. (2)

Historically, Hawaii's mediations have yielded a high rate of signed agreements compared to resolution sessions. (3) However, in SY 09-10, only one mediation agreement was reached.

Analysis of SY 09-10 Disputes (cont.)

Due Process Hearing Requests by District. The Due Process Committee looked at the numbers of due process hearing requests per district compared to the number of students receiving special education services in each district. In Table 2, these calculations allowed the Committee to rank districts by the incidence of due process requests.

Table 2. Due Process Requests and Decisions by District

| District | SPED | SPED % | Hearing Request | Hearing Request % | H.R. per Students |
|-------------|--------|--------|-----------------|-------------------|-------------------|
| Honolulu | 3,138 | 16 | 48 | 33 | 1:65 |
| Central | 3,836 | 19 | 16 | 11 | 1:240 |
| Leeward | 4,478 | 22 | 10 | 7 | 1:448 |
| Windward | 2,108 | 11 | 30 | 20 | 1:70 |
| Hawaii | 3,210 | 16 | 8 | 5 | 1:401 |
| Maui | 2,296 | 12 | 31 | 21 | 1:74 |
| Kauai | 891 | 4 | 5 | 3 | 1:178 |
| State Total | 19,957 | 100 | 148 | 100 | |

Honolulu District schools as a whole ranked highest. The district contained 16% of the special education population in SY 09-10, but it represented 33% of the hearing requests filed for the year. For every 65 students in the district, there was a due process filing. Windward and Maui Districts followed close behind in the hearing request/student population ratio. By contrast, Leeward and Hawaii Districts had very low rates of hearing requests. A student in Honolulu District in SY 09-10 was seven times more likely to be involved in a due process hearing request than in Leeward District.

It is important to note that within each district there are three to ten complexes, and due process activity varies considerably from complex to complex. For example, on Maui, Kekaulike Complex accounted for 18 of the 31 hearing requests, while three complexes, Hana, Lanai and Molokai, had none. Similarly, in Honolulu District, Kaiser and Roosevelt Complexes had 15 hearing requests apiece, while Farrington Complex had just one. (4) These disparities motivate SEAC to learn more about the factors within individual schools and complexes that contribute to higher levels of formalized conflict resolution.

Table 3. Issues of Hearing Requests

| Type of Issue | Number |
|------------------------|--------|
| IEP | 110 |
| FAPE | 94 |
| Private School Tuition | 91 |
| Placement | 57 |
| Related Services | 51 |
| Support Services | 36 |
| Procedural Safeguards | 26 |
| Evaluation | 24 |
| Eligibility | 6 |
| Section 504 | 4 |
| Mental Health | 4 |
| Safety and Health | 2 |
| Other | 123 |

Issues involved in hearing requests. As one can see from Table 3, within the 148 hearing requests, a number of issues were raised. Most requests involved more than one issue. While IEP and the provision of a free appropriate public education top the list, requests for private school tuition reimbursement were present in 91 or 61% of the requests.

While it is difficult to ascertain from available data sources, SEAC believes many of these requests for private school reimbursement represent repeat due process filings from parents whose children are in private school settings at public expense.

Analysis of SY 09-10 Disputes (cont.)

Table 4. Hearing Request by Disability

| Eligibility Category | SY09-10 |
|---------------------------|------------|
| Autism Spectrum Disorders | 56 |
| Other Health Disability | 18 |
| SLD | 17 |
| Emotional Disability | 12 |
| Multiple Disabilities | 12 |
| Under eval or ineligible | 11 |
| Intellectual Disability | 9 |
| Developmental Delay | 7 |
| Speech/Lang. Disability | 4 |
| Section 504 | 1 |
| Hard of Hearing | 1 |
| Deaf | 0 |
| Deaf-Blindness | 0 |
| Orthopedic Disability | 0 |
| Traumatic Brain Injury | 0 |
| Visual Disability | 0 |
| TOTAL | 148 |

SY 09-10 hearing requests were overrepresented by parents of students with Autism Spectrum Disorders. These students make up 6% of the 3 to 20 year old special education population, **yet they are represented in 38% of the hearing requests.** By contrast, students with specific learning disabilities (SLD) make up the largest percentage of the special education population--42%--but only 11% of the hearing requests. Likewise, students with developmental delays (a category that is utilized for 3 to 9 year olds) are almost 15% of the student population receiving services, but represent only 5% 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 5. Hearing Requests by Age Group

| Age Group | % in SE | # of HR | % of HR |
|--------------------------|---------|---------|---------|
| Preschool (2-4) | 12% | 9 | 5% |
| Elementary School (5-11) | 39% | 50 | 34% |
| Middle School (12-14) | 23% | 25 | 17% |
| High School (15-21) | 26% | 64 | 43% |

Age Groupings. Table 5 compares the percentage of hearing requests for the four major age groupings to their numbers in the special education population. In

SY 09-10 preschool parents and parents of middle schoolers were less likely to file for a due process hearing, while parents of high school students were overrepresented in due process hearing requests. One contributing factor was at least 10 requests that were filed on behalf of students who had recently aged out of special education eligibility.



Disposition of Hearing Requests. Of the 148 hearing requests, sixty-six (66) resulted in hearing decisions. Another fifty (50) requests were settled during the resolution session. (5) Information regarding the disposition of the thirty-two remaining requests was unavailable to SEAC.

Table 6. Prevailing Party

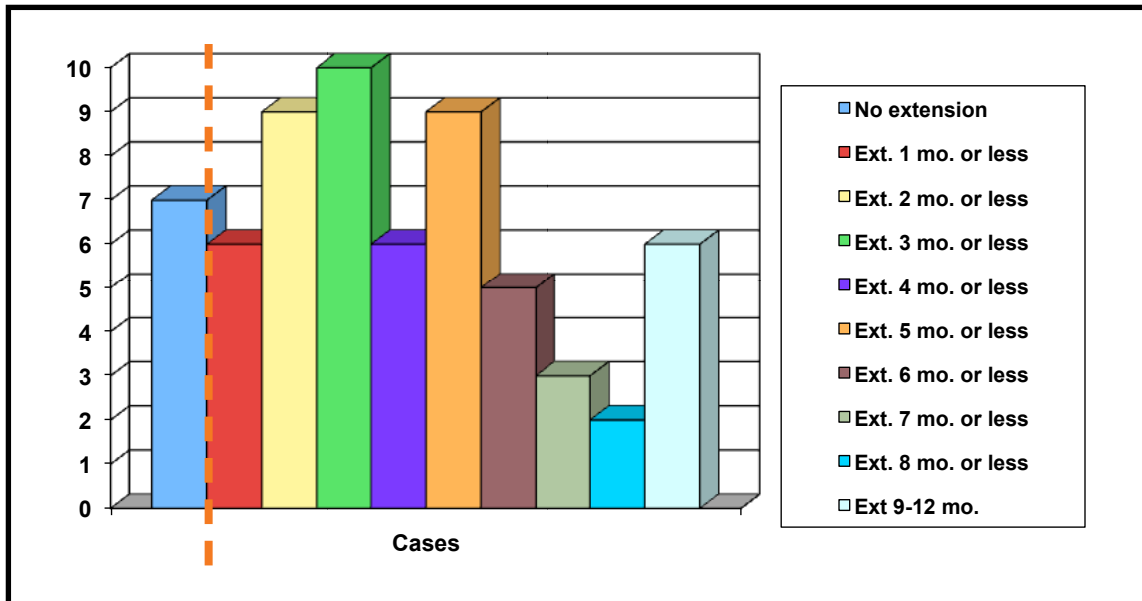
| Prevailing Party | # of Decisions | % of Decisions |
|------------------|----------------|----------------|
| Parents | 37 | 56% |
| DOE | 29 | 44% |

Prevailing Party in Hearings.

In all of the due process hearing decisions parents were the plaintiff party and therefore required to bear the burden of proof. 56% of the decisions found that parents were the prevailing party--meaning that they had proved at least one of the claims against the respondent (DOE).

Analysis of SY 09-10 Disputes (cont.)

Table 7. Due Process Hearing Extensions



Hearing Extensions. Only seven of the 66 hearing decisions were completed within the 75 day timeline set by IDEA 2004--30 days for the resolution process plus another 45 days for the hearing process. (6) In all other decisions, extensions to the timeline were granted by the hearing officer. The average extension added 110 days to the process.

Appeals of Due Process Decisions. When either party in a due process hearing disagrees with the decision of the hearing officer, they have the right to appeal the decision within 30 days in Hawaii State Circuit Court or in United States District Court, Hawaii (federal court).

Data regarding the use of appeals has been sought by SEAC for at least five years as an important component in understanding the breadth of due process activity in Hawaii. Fortunately, information has been recently been made available by the Hawaii Disability Rights Center (HDRC), so that SEAC is able to cite the following statistics regarding the use of appeals in SY 09-10:

- ▶ A minimum of 16 parent appeals were filed in U.S. District Court, Hawaii (46% of parents who did not prevail in their hearing);
- ▶ Of the 16 appeals, federal judges upheld five of the hearing officers' decisions and disagreed with all or part of six decisions, sending them back to an administrative hearing for further action;
- ▶ One parent's appeal was dismissed when the student turned 22 and aged out of IDEA eligibility and four appeals are still pending;
- ▶ The appeal process ranged from 6-17 months, with most federal decisions rendered in 7-9 months;
- ▶ Two parent appeals were further appealed to the 9th Circuit; and
- ▶ The Department filed one appeal in Hawaii Circuit Court but withdrew when the parent moved the case to federal court. (7)

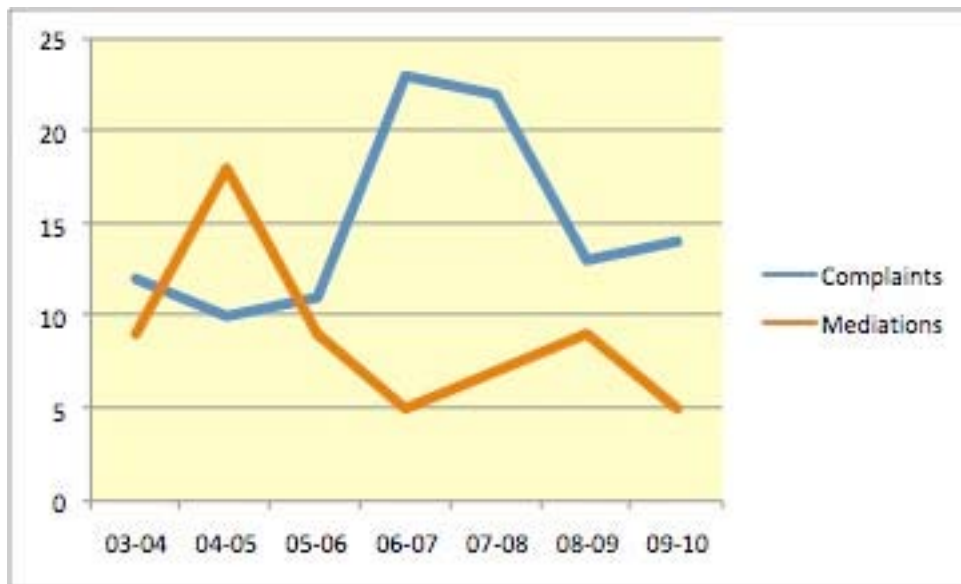
Information from Art Cernosia indicates that there were three additional appeals in federal court in 2010 over the awarding of attorneys' fees. (8)

Trends in Hawaii Data Over Time

SEAC has been reporting on data since the SY 03-04, and we now have seven data points for many of the issues we have studied. Looking at data spans allows us to look for trends over time and inconsistencies from year to year.

Written Complaints. The use of complaints to resolve perceived violations of special education law averaged around 12-13 complaints per year, with the exception of SY 06-07 and SY 07-08 when complaints nearly doubled. Unlike mediation and due process hearing requests, a complaint can be filed by an individual or organization other than a parent of a child with a disability. The department does not report the status of the party filing a complaint, but based on anecdotal information received by SEAC, we presume the majority of complaints have been filed by parents.

Table 8. 7 Yr. Comparison of Written Complaints and Mediations



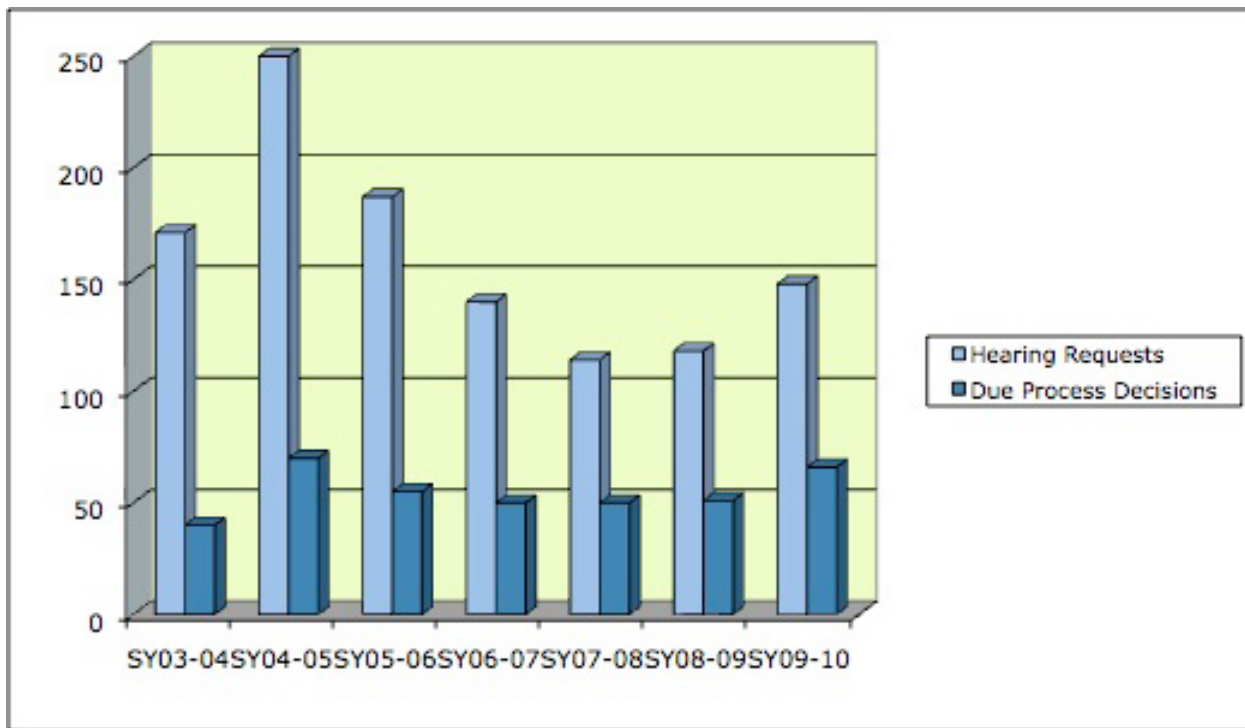
Mediations. As depicted in Table 8, fewer than ten parents a year opted for mediation over other forms of dispute resolution with the exception of SY 04-05 (which also had an abnormally high number of hearing requests). A second trend noted from a review of dispute resolution data sent to the Office of Special Education Programs each year is that the majority of the mediations sessions held within a school year are NOT related to a due process hearing request and have a high probability of resulting in a settlement agreement (75-80% on average). This agreement rate is significantly higher than in resolution sessions. 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, are significantly lower.

Due Process Hearing Requests and Decisions. The next four tables look at data related to due process hearing requests, resolution sessions and hearing decisions. Table 9 shows some interesting trends:

► The number of hearing requests were moving in a downward direction from a high of 250 in SY 04-05, but bumped back up again in SY 09-10. This increase in requests may be due in part to two new issues: furloughs and FAPE after age 20.

Trends in Hawaii Data Over Time (cont.)

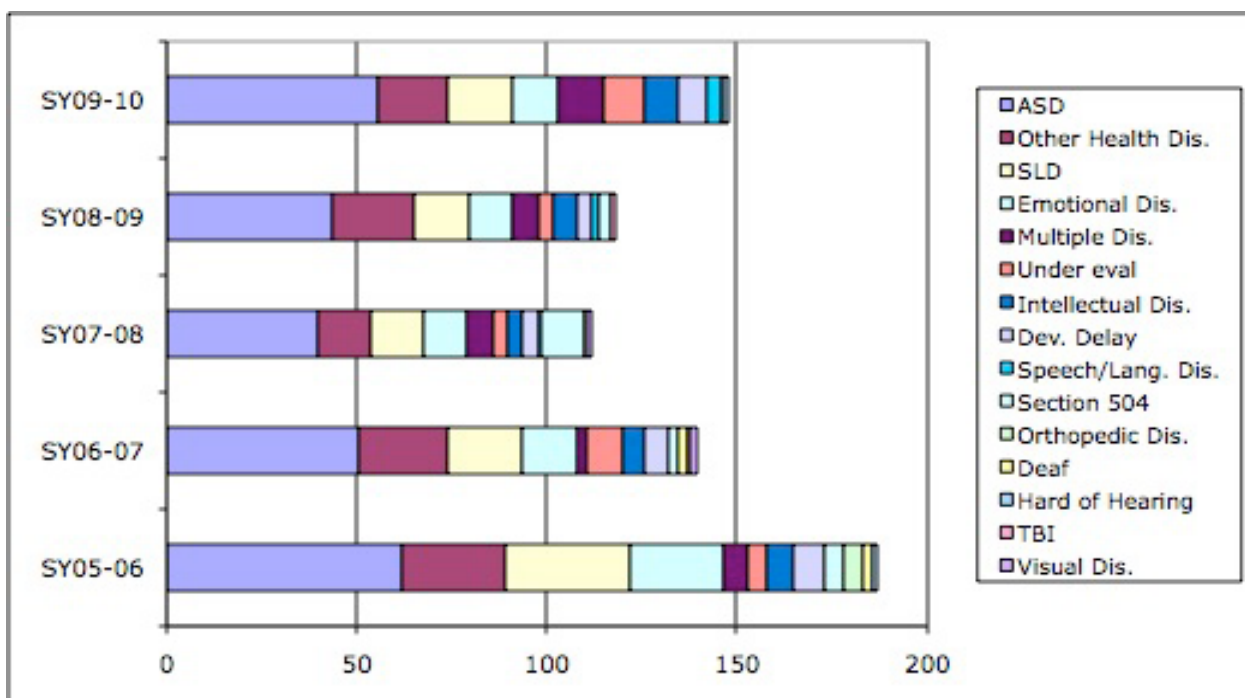
Table 9. 7 Yr. Comparison of Hearing Requests and Due Process Decisions



Due Process Hearing Requests and Decisions. Table 9 trends (continued):

- ▶ While the number of due process hearing requests sloped downward, the number of due process hearings remained about the same despite a declining special education population from 22,679 in SY 04-05 to 19,957 in SY 09-10.
- ▶ The ratio of due process hearing requests to hearing decisions moved from 4:1 in SY 03-05 to almost 2:1 in SY 09-10.

Table 10. 5 Yr. Comparison of Hearing Request by Disability Category



Trends in Hawaii Data Over Time (cont.)

Disabilities Represented in Hearing Requests. Table 10 on the preceding page reflects five years of data on the disability categories that were identified in hearing requests. For all five years, the highest number of requests represented students with Autism Spectrum Disorders. This is significant in that these students make up only about 6% of the total special education population. Students who were eligible for special education under the categories of Other Health Disability and Emotional Disability were also overrepresented for each year of data.

Resolution Session Agreements. The IDEA Amendments of 2004 require states to bring parents and relevant IEP members together within 15 days of a parent filing for due process, as one more opportunity to resolve the issues stated in the request prior to a formal hearing. SY 05-06, the first year that resolution sessions were held, resulted in a resolution session agreement rate of 16%. The agreement rate has improved significantly, beginning in SY 07-08, due in part to the Department's decision to allow attorney's fees (for services rendered prior to the resolution session) to be included in the settlement agreements. (9)

Table 11. 5 Yr. Comparison of Agreements in Resolution Sessions

| School Yr. | Resolution Sessions | # S.A. | % S.A. |
|------------|---------------------|--------|--------|
| SY 05-06 | 160 | 26 | 16% |
| SY 06-07 | 128 | 8 | 6% |
| SY 07-08 | 105 | 42 | 40% |
| SY 08-09 | 114 | 41 | 36% |
| SY 09-10 | 139 | 50 | 36% |

Prevailing Party. Parents prevailed in the majority of due process hearings for five of the seven years studied. DOE prevailed in more cases in only one year--SY 08-09--meaning that parents who bore the burden of proving their claims were unsuccessful in a majority of decisions that school year.

Table 12. 7 Yr. Comparison of Prevailing Parties



Comparison to National Data

SEAC views the comparison of Hawaii's data to data from other states and to national averages as an important tool in understanding the significance of our dispute resolution figures. In reviewing national data, we have relied heavily on the National Center on Dispute Resolution in Special Education (CADRE) for its compilation and analysis of state performance plan data. (10) CADRE is also a useful resource for information on productive and cost-effective dispute resolution practices.

Mediation. The table below depicts a consistent trend: Hawaii falls below the national average in the utilization of mediation as a means of dispute resolution. The drop in mediation utilization in SY 05-06 was most likely due to a new requirement in IDEA 2004 for a resolution session within 15 days of a parent's filing of a due process hearing request.

Table 13. Hawaii vs. National Data on Numbers of Mediations Conducted (Per 10K Special Education Students)

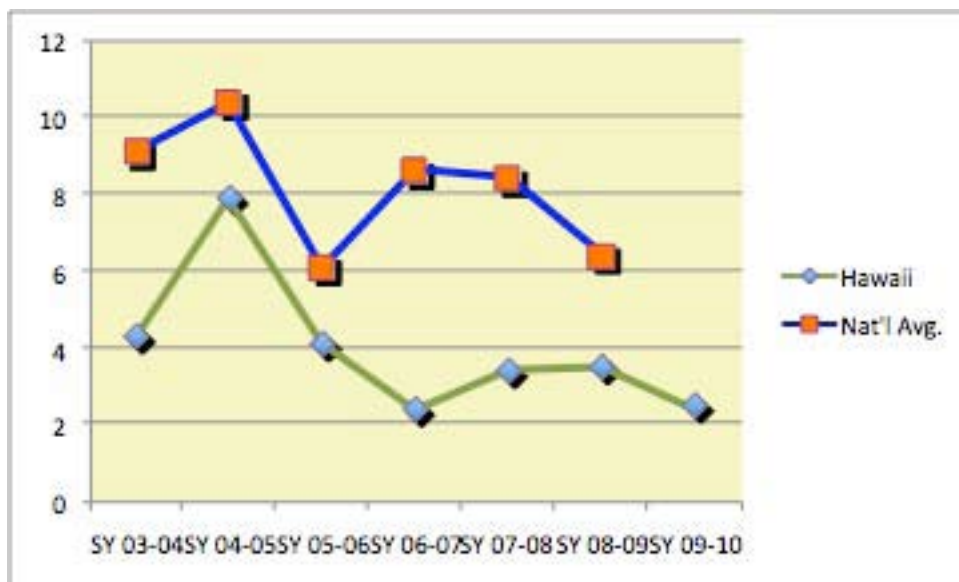


Table 14 on the following page compares Hawaii's incidence of written complaints, hearing requests and hearing decisions to a national average. The rates are calculated per 10,000 special education students, so for each Hawaii statistic, the special education population for that year was divided by 10,000 and the resulting number was used to divide the actual written complaints, requests for hearings and hearing decisions.

Written Complaints. The declining use of written complaints in Hawaii is in sync with the national trend. The national data on complaints reflected in Table 14 is from SY 08-09, the latest year that a national rate is posted by CADRE, and you can see that Hawaii's rate per 10,000 special education students is similar for SY 08-09 and SY 09-10. However, unlike the majority of states where complaints greatly outnumber hearing decisions, **Hawaii's rate of written complaints is only a half to a third the rate for due process hearing decisions.**

Comparison to National Data (cont.)

**Table 14. Hawaii vs. National Data on Rates of Conflict Resolution
(Per 10K Special Education Students)**

| Method of Conflict Resolution | Nat'l Average* | Hawaii 06-07 | Hawaii 07-08 | Hawaii 08-09 | Hawaii 09-10 |
|-------------------------------|----------------|--------------|--------------|--------------------|--------------------|
| Written Complaint | 7.6 | 10.9 | 11.3 | 6.5 | 7.0 |
| Due Process Hearing Requests | 12.3 | 61.0 | 54.3 | 58.6 | 74.2 |
| Due Process Hearings | 1.3 (c) | 21.7 | 22.9 | 19.4(a) 23.2(b) | 21.1(a) 33.2(b) |

* Taken from CADRE data for SY 08-09--the most current national rate

(a) Taken from Hawaii's APR reports (with cases pending)

(b) True rate calculated by SEAC (with no cases pending)

(c) Average of the 50 states only (excluding D.C. and U.S. territories)

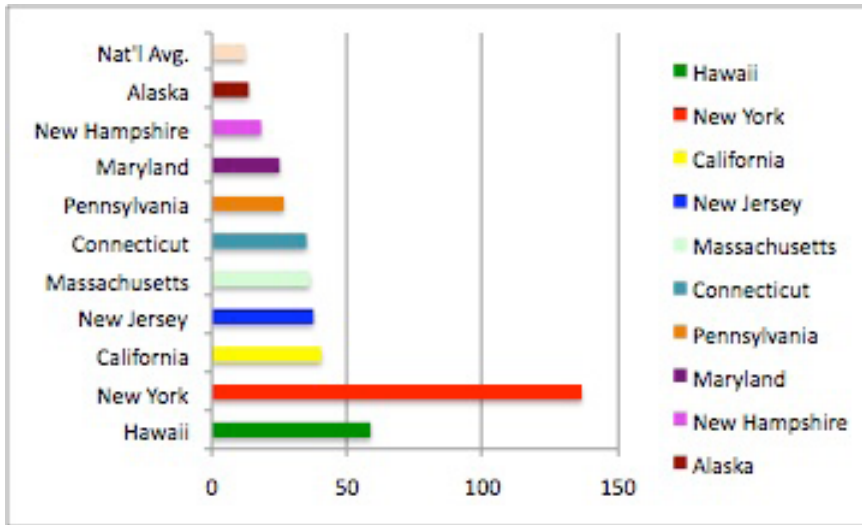
Due Process Hearing Requests and Decisions. Hawaii's numbers of hearing requests and hearing decisions far exceed the national norm. In the four years of Hawaii data in Table 14, *Hawaii's rate of hearing requests is five to six times the national average.* Even when calculated conservatively, *Hawaii's rate of due process hearings is 15 to 16 times the fifty-state mean* (see note below).

CADRE calculates its national average rate for hearing decisions using Annual Performance Report data submitted by each state. This data is often incomplete, because a number of requests are still pending at the time the report is submitted. It also includes not only the 50 states, but U.S. territories and the District of Columbia. D.C. and several territories including the Virgin Islands and Puerto Rico, have atypically high rates of hearing requests and hearing decisions, so SEAC recalculated the national average using only state data. SEAC believes this allows for a truer comparison of state systems. However, it is important to point out that this national average rate is overstating the rates in most states. For example, 26 states have hearing request rates under 5 per 10,000 students and 37 states have less than one hearing decision per 10,000 students. The relatively high rates of litigation in about 10 states skew the national average upwards.

Hawaii's position among the "top ten." In the next two tables, we compare Hawaii's rates of due process hearing requests and due process hearing decisions to nine other states with the highest rates of due process hearing requests and hearings as reported in their APR data for SY 08-09--the most recent data available.

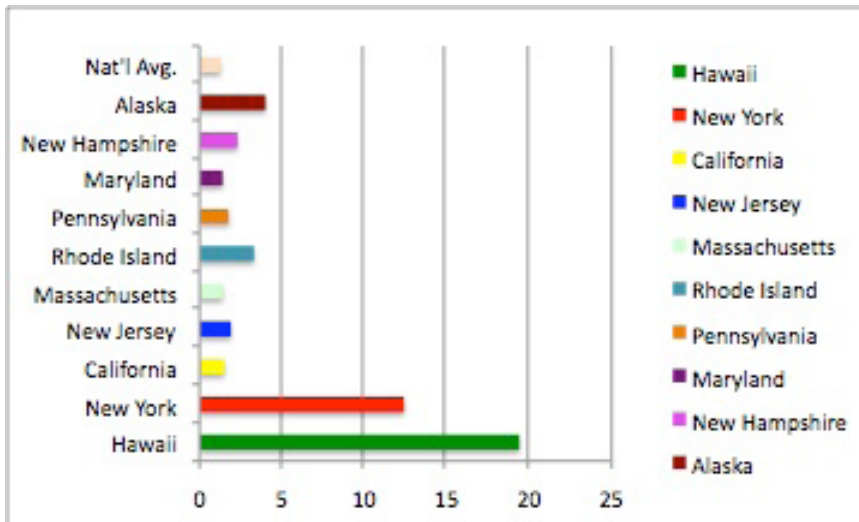
Top Ten states for hearing requests per capita. In order to compare a small state like Hawaii to a large state like California or New York, the CADRE and the U.S. Department of Education look at the amount of due process activity in relation to the size of the population. Through this measurement, two other small states--New Hampshire and Rhode Island--joined Hawaii in the dubious distinction of being among the most litigious states. Table 15 shows Hawaii in second place after New York for having the highest rate of hearing requests per 10,000 students in SY 08-09.

**Table 15. “Top Ten” States for Due Process Hearing Requests - SY 08-09
(Rates Per 10,000 students)**



Top Ten states for due process hearings per capita. In Table 16, Rhode Island replaces Connecticut among the ten states with the most hearings per 10,000 special education students. **Hawaii far exceeded all nine states in the rate of hearing requests that proceeded to a hearing in SY 08-09.** New York--the state with the highest rate of hearing requests--was able to settle its conflicts prior to hearing in 90% of its cases. However, in Hawaii only 67% of cases resolved at the time that the APR was posted were settled without a hearing. Nationally, 91% of requests are withdrawn or settled, thus avoiding a hearing.

**Table 16. “Top Ten” States for Due Process Hearings Conducted - SY 08-09
(Rates Per 10,000 students)**



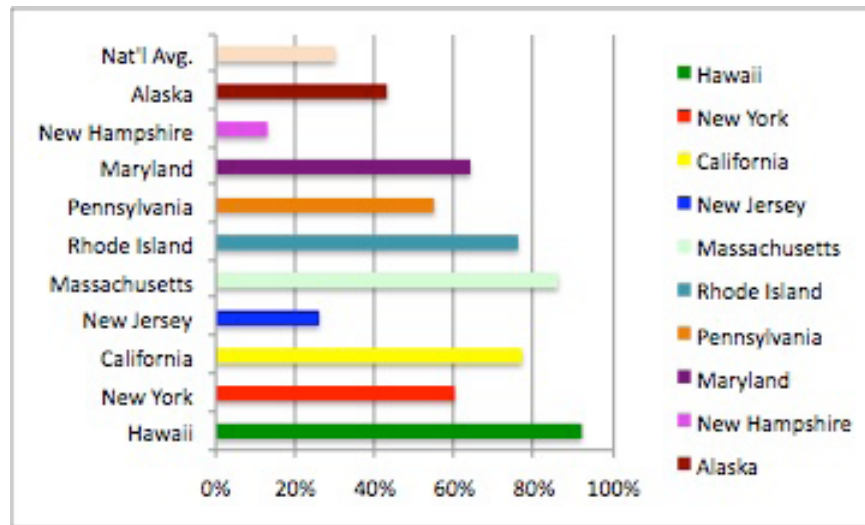
Hearing extensions utilization in Top Ten. While IDEA encourages speedy resolution of parent/school disputes by setting time limits for resolution sessions and hearing decisions, it also allows a hearing officer to grant specific extensions of time beyond the 45 days for the hearing process at the request of either party and “for good cause.” In Table 17, the use of hearing extensions is compared for the ten states with

Comparison to National Data (cont.)

Hearing extensions utilization in Top Ten states (cont.)

the highest rates of due process hearings in SY 08-09. Once again, **Hawaii leads these states in having the highest percentage of hearings (92%) that involve legal extensions to the 75 day timeline set by IDEA.** The national average is about 30%.

Table 17. % of Hearings Utilizing Extensions for “Top Ten” States - SY 08-09



Serious Areas of Concern

Before outlining SEAC’s ongoing areas of concern regarding the dispute resolution process in Hawaii, it is important to acknowledge that the Department, along with the Administrative Hearings Office, and the Attorney General’s Office and the contracted mediation centers, have made improvements to the system over the last eight years.

These include:

- ▶ utilizing neutral parties to conduct conciliation sessions, facilitation in the IEP process, and mediations as conflicts arise;
- ▶ welcoming the expertise of CADRE to develop improvement activities aimed at reducing formal complaint processes and encouraging prevention and early intervention;
- ▶ conducting workshops to explain the complexities of the due process hearing procedures and to encourage mediation and other less formal means to resolve differences;
- ▶ debriefing with schools that have been involved in hearings to brainstorm more effective ways to communicate with parents and provide FAPE to students;
- ▶ making due process decisions easily accessible to the public through posting on the Department’s website; and
- ▶ using generic terms in posted decisions to refer to non-attorney parties (for example “the student” and “the principal”), as well as schools and provider agencies, to protect the confidentiality of the student.

Serious Areas of Concern (cont.)

Councils and the Learning Disabilities Association of Hawaii, have also contributed to improvements to the dispute resolution process by holding workshops to educate families on conflict resolution and to encourage prevention and early intervention and develop parent-friendly brochures, such as "Handling Disagreements Early: Options for Families & Schools." Community partners have also 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 efforts, there remain a number of negative trends, or "red flags," that suggest more improvements are warranted.



There are few apparent improvements in Hawaii's capacity to settle parent school conflicts.

While most states have seen the number of due process hearing requests decrease over a five year period, Hawaii's number of requests have remained high. More concerning is the fact that the percentage of hearing requests that proceed to a hearing is increasing. These trends point to two weaknesses in Hawaii's due process system: 1) **an insufficiency in catching parent-school conflicts early and providing early resolution**, and 2) **an inadequacy in resolving conflicts through mediation or the resolution process once a due process hearing request is filed by parents**. Hawaii was much less successful than the most litigious states in finding agreement prior to a due process hearing.

It is important to acknowledge that many of Hawaii's schools and complexes are not part of this negative trend. They have no or very low rates of formal complaints. It is highly likely that many of these complexes employ strategies that help parents and schools work through their differences before the bonds of trust are broken, and it would be helpful to identify model practices for replication elsewhere. By contrast, there are schools in Honolulu, Windward and Maui complexes that have a higher than average amount of due process activity from year to year. These schools should be targeted first for additional supports. CADRE has helpful information about states who have exemplary programs of conflict resolution. (11) Common to these programs is meaningful stakeholder involvement and widely disseminated training on basic conflict resolution.



The Department is found to be at fault in a majority of hearings.

In five of the seven years studied, a majority of parents have prevailed in their due process hearings. This suggests a number of things including: 1) IEP teams did not understand the student's needs adequately to offer the student a free and appropriate public education (FAPE), and 2) the Department is choosing to proceed to hearing on "flawed cases"--cases where true violations of IDEA have occurred--rather than offer a settlement to parents.

SEAC is aware through references in the hearing decisions and through conversations with the Department that many of the hearing decisions represent repeat filings for students who have been receiving an education in a private school or facility at public expense. Recent legislation that strengthens the Department's ability to monitor these students and gather more accurate information about their unique needs will hopefully

Serious Areas of Concern (cont.)

result in more appropriate offers of FAPE. Additional training for IEP team members and a review of the resolution process may also be warranted.



A number of parents of children with autism do not believe the Department is able to adequately meet their child's unique needs.

For a number of years, parents of students who have a diagnosis on the Autism spectrum have comprised the largest subgroup of plaintiffs in due process hearing requests and hearings. Many of these parents and their attorneys have argued successfully that their child's home school or complex did not offer their child an adequate program, and consequently the Department has been required to reimburse the parent for private school tuition.

It is not always clear that these private programs are able to meet all of the student's IEP goals, including appropriate instruction in the least restrictive setting; however, it is apparent that 1) the Department may have failed to adequately communicate the appropriateness of its proposed program for the student, and 2) the public school program offered to the student did not match the parent's perception of his or her child's needs. Through anecdotal information given to SEAC, it appears that many home schools are either not informed of the array of evidence-based services for students with Autism Spectrum Disorders or are not empowered to recommend placements outside of their school. SEAC is hopeful that the Department's commitment to creating more and diverse options for students through its Po'okela initiative will result in more students receiving appropriate services within the public school system.



The cost of formal dispute resolution is significant and appears to be rising.

SEAC acknowledges that it does not have a complete picture of the excess costs of special education litigation due to a lack of information on fiscal outlays by the Department. Five years ago the Special Education Section reported that the direct costs for due process hearings for SY 05-06 was \$2,990,320. This figure included the costs of attorneys' fees when parents prevailed in due process hearings and the costs for related services and private placements resulting in settlement agreements and hearing decisions. This large outlay of monies did not include contracts with the mediation centers, 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.

An article in the Honolulu Star Advertiser in December of 2010 reported that \$5,590,510 (8% of the federal monies received for special education) was spent on private placements alone. (12) A large number of these placements resulted from due process hearing decisions.

Recent testimony on SB 1284, a measure to facilitate monitoring of students placed in private schools at public expense, revealed that Windward District spent approximately \$6.2 million in the last five years for payment for 19 students in two private special education placements. The concern expressed in the testimony was that not only were the fees charged by these facilities exorbitant, but the Department was not able to determine whether the services provided met the needs outlined in the student's IEPs.

Serious Areas of Concern (cont.)

It is important to acknowledge that many of the students represented in these decisions have significant needs that require intensive supports--whether in a public or private placement. However, the expense of these supports are compounded by the costs of plaintiff attorney's fees. As we noted earlier, Hawaii has a disproportionate percentage of due process hearings compared to other states and a disproportionate number of hearings decided in favor of parent plaintiffs. This points to excessive legal costs which might be avoided through better resolution of conflicts earlier in the process. By recouping these monies, more resources will be available to apply to programming for students.

In addition to significant costs borne by the Department, families are also financially impacted, sometimes dramatically. They must bear the costs of expert witness fees, suffer lost wages from having to take time off work, and pay for attorney fees when they do not prevail in the due process hearing.

"Creating Agreement", a training curriculum developed jointly by the IDEA Partnership (at NASDSE) and CADRE, highlights other costs of special education conflict which are sometimes overlooked, including:

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

(13)



Few due process hearings are concluded within the 75-day timeline designated by Congress.

Over the last five years, 9 out of 10 due process hearings have included extensions granted by the hearing officer for "good cause." These are allowable extensions under IDEA. However, Hawaii appears to utilize extensions more than other states, thereby delaying decisions and, in some cases, driving up the costs of private placements through "stay put" provisions.

SEAC was proactive in advocating that Chapter 60, Hawaii's regulations for special education, include specific language addressing hearing extensions. A 45-day limit was set for each extension, and a number of factors were introduced for deliberation by the hearing officer prior to granting an extension, including "the negative effects of extending the time in which a student's education is in abeyance." These regulations became effective in November of 2009, but they do not appear to have meaningfully affected the number of extensions granted.

While it is clear that extensions are not allowed for the mere convenience of the parties --plaintiffs, respondents and hearing officers--it is SEAC's belief that the large volume of due process hearing requests and the relatively small number of plaintiff attorneys and hearing officers are contributing to the difficulty of preparing for and scheduling hearings within the timeline set in IDEA as a means of safeguarding the rights of students with disabilities.

*** Recommendations ***

1

Emphasize early dispute resolution.

CADRE has studied characteristics of states with model conflict resolution systems. One important part of their infrastructure is a “concern system.” Parents can raise concerns they have about their child’s program through multiple channels, and responses to these concerns are timely (a day or two for the initial response; less than a week for most resolutions).

The Department no longer publishes information about informal telephone complaints, and SEAC is unsure as to whether this is still a viable option for early dispute resolution. There are a number of parent-based organizations, however, who have volunteered to help parents learn more about alternative dispute resolution options. They include SEAC, the Community Children’s Council Office, Hawaii Families as Allies, the Learning Disabilities Association of Hawaii and the Special Parent Information Network. Because many parents are unaware of these resources, SEAC suggests that the Department consider a more structured mechanism for schools to refer families to these organizations.

The Department has contracts for mediation, facilitation and conciliation, but the utilization of these options is very low. An emphasis on early dispute resolution requires a media campaign plus training for both school personnel and parents (see recommendation 6). It may also be necessary to conduct a survey of stakeholder groups to understand the reasons behind the low utilization of informal conflict resolution options.

2

Include key stakeholders in improvement activities.

Another component of proactive dispute resolution systems cited by CADRE is the active involvement of stakeholders in dispute resolution system oversight. This oversight includes holding monthly or quarterly reviews of dispute resolution activity where stakeholders help recommend actions.

SEAC has been included in annual discussions of written complaints, mediation, resolution sessions and due process hearings for the Annual Performance Report. These discussions narrowly address whether these activities were performed within proscribed timelines and whether agreements were reached. SEAC has not, however, been involved in the actual improvement activities, with the exception of developing the booklet “Handling Disagreements Early: Options for Families and Schools.”

3

Improve the timeliness and effectiveness of hearings by expanding key personnel needed.

With a large number of hearing requests and relatively small numbers of plaintiff attorneys and hearing officers, it appears almost inevitable that preventable delays to the hearing process occur due to scheduling challenges for the parties. Adding one or two additional hearing officers may alleviate some of the stress on the system. It would also be instructive to survey plaintiff attorneys who have represented families within the last five years to gain their perspective on barriers to timely hearing decisions.



Recommendations



4

Encourage more IEP recommended placements to accredited private schools when schools are unable to provide an appropriate program for a student with unique needs.

Due to the emphasis in IDEA on serving children with disabilities in their home school, if possible, some schools have interpreted their responsibility as having to meet the diverse needs of all the students in their catchment area. Feedback to SEAC has been that IEP teams are discouraged from exploring private placements or even placements in nearby districts that might provide a fit for the student's unique needs. Consequently, families who do not agree with the home school's placement offer are forced to pursue due process. When parents prevail, legal costs borne by the Department may often overshadow the cost of the private placement.

5

Expand the array of services to students with Autism Spectrum Disorders in public schools.

SEAC understands that students on the Autism spectrum have varying needs, and that the Department should not make categorical placements. That said, it is well acknowledged that students on the spectrum have educational needs in common related to social-emotional development, communication and behavior. SEAC is supportive of the Department's plan to create Centers of Excellence for serving students with Autism Spectrum Disorders. However, the pace of the Po'okela Project is not going to meet the demand for evidence-based interventions for several years to come.

6

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

SEAC has always maintained that training that includes parents, school personnel and other stakeholders increases the opportunity for shared learning experiences and greater understanding of each other's perspectives. Training can help to support greater agreement and reduce the demand for expensive, adversarial due process procedures. One example of successful training comes from California, where everyone involved in IEP meetings also receives training on how to facilitate potentially adversarial situations and find common ground. (14)

7

Allow SEAC to assist the Department in conducting a thorough review of settlement agreements.

SEAC respects the need to keep details of individual agreements confidential. At the same time, we feel it is important to understand underlying trends--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. Without additional data, it is impossible to design improvement activities that generate agreements at earlier stages of the parent-school conflict.

Reference Notes



- (1) Complaints Management Program (Sp Ed), 4th Quarter Report, School Year 2009-2010
- (2) Annual Performance Report 2009-2010, APR Indicator 19
- (3) Information taken from Annual Performance Reports and Complaints Management Program (Sp Ed) Quarterly Reports
- (4) Complaints Management Program (Sp Ed), 4th Quarter Report, School Year 2009-2010
- (5) 618 Data, Table 7, Report of Dispute Resolution under Part B, 2009-10
- (6) Complaints Management Office Hearing Request Log (SEAC Due Process List) from 7/1/09 to 6/30/10
- (7) "Decisions Issued by Hawaii Hearings Officers Under the Individuals with Disabilities Education Act," Hawaii Disability Rights Center, http://www.hawaiidisabilityrights.org/Forms/IDEA_Decisions.pdf
- (8) Special Education Law Update by Art Cernosia, Hawaii Department of Education, January 2010, http://www.doe.k12.hi.us/specialeducation/ArtCernosiaVideos/100130NatlTrendsInIdeaByArtCernosia_outline.pdf
- (9) Annual Performance Report 2007-2008, APR Indicator 18
- (10) CADRE, **Five Year State and National Summaries of Dispute Resolution Data**, Prepared by Dick Zeller, Updated February 2011, <http://www.directionservice.org/cadre/statecomprpts.cfm>
- (11) CADRE, "Four Exemplary Dispute Resolution Systems in Special Education," Profiled in June 2010 <http://www.directionservice.org/cadre/pdf/Combined%20State%20Profiles.pdf>
- (12) Honolulu Star Advertiser, "Big Gains Not Enough" by Mary Vorsino, December 13, 2010
- (13) IDEA Partnership, "Building Partnerships, Creating Agreement: Collaborative Problem Solving in Early Intervention and Special Education," <http://www.directionservice.org/cadre/CreatingAgreement.cfm>
- (14) CADRE, "Solving Problems and Resolving Conflict: Another Way," The Special EDge, Winter-Spring 2011, Volume 24, Number 2.

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Mahalo to Due Process Committee Members: Chair Martha Guinan, Deborah Kobayakawa, Dale Matsuura and Kau'i Rezentes

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