



Unit 8-Due Process Litigation

Special Education Advocacy Training
A Comprehensive 3-Day Seminar Presented by Rene Thomas Folse, JD, Ph.D.

Unit 1: Introduction to special education advocacy. Demographics, glossary and acronyms. Eligibility assessment criteria. Comparisons with DSM-IV diagnostic categories.	Unit 4: De-mystifying and understanding the math, purpose and goals of psychological and educational assessment tools in educational settings.	Unit 7: The IEP team process, goals and objective writing, and measuring success or failure. Behavior problems, special discipline rules, stay put orders, and the functional assessment of behavior.
Unit 2: Free and Appropriate Public Education (FAPE), the Rowley decision, Least Restrictive Environment (LRE), Aids and Services.	Unit 5: Present and adaptive behavior assessment and	Unit 8: Dealing with due process litigation.
Unit 3: Life Span goals and objectives, developing the big picture for the child.	Unit 6: Forensic issues. Preparing your report. Testimony on direct and cross examination at hearings.	Unit 9: Integration with other systems, Regional center issues and the IPP, Section 504 of the Rehabilitation Act of 1973, The ADA, and more.



What Are Your Options?

- **Do nothing now, but aggregate** this offense with others until there is cause to proceed. In this way you can pair up good and perhaps not-as-good offenses in order to **insure the likelihood of a “prevailing party” attorney fees.**
- Request **Mediation Only.**
- If the **facts and law are not substantially in dispute**
 - Compliance Complaint with CDE.
 - Compliance Complaint with OCR.
- If the **facts and law are substantially in dispute**
 - Request a Due Process Hearing
- **Civil action for enforcement of Hearing Officer Award.**



CDE Compliance Complaint

California Department of Education
Procedural Safeguards Referral Service

REQUEST FOR COMPLAINT INVESTIGATION



PLEASE NOTE: A complaint may be filed through the use of this form or by a written letter sent by fax or postal mail. E-mails cannot be accepted as formal complaints because they do not meet signature requirements under 34 C.F.R. 300.153(b)(5). If upon analysis of a request, a complaint is opened, a complaint investigation will be completed within 60 days of receipt in the California Department of Education (CDE) Special Education Division Procedural Safeguards Referral Service (PSRS) of all required information.

The written complaint must specify at least one alleged violation of state and/or federal special education laws that occurred not more than one year prior to the date the complaint is received by the CDE. The party filing a complaint must forward a copy of the complaint to the LEA or public agency serving the child at the same time the party files a compliance complaint with the CDE. [34 Code of Federal Regulations (CFR) 300.153(d)]

Please return the completed form to: California Department of Education, Special Education Division, Procedural Safeguards Referral Service, 1430 N Street, Suite 2401, Sacramento, CA 95814; Phone: (800) 926-0648; FAX: (916) 307-3704

NOTE: Any form or request sent by an attorney or advocate sent to the LEA or SEA on any subject **should have the parents signature**, or an authorization form for the attorney or advocate to file the form or make a request.



Examples of a Compliance Complaint

1. School has IEP, promises services, and then **does not have anyone** to provide them for weeks, or months.
2. **I asked for an evaluation.** The law says the child shall be evaluated upon request of the parent or teacher. **School refuses.**
3. I attend IEP, and **school finds eligibility**, and need for residential placement. **Child is already placed** by parents in Utah. **School agrees to pick up expenses**, but hesitates about reimbursement of past expenses. **In an effort to stimulate a "complete settlement" school starts negotiating for a "global settlement" withholding payment of ongoing expenses in the process.**



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Attorney Fees for Compliance Complaints

- *Lucht v. Molalla River School District*, 57 F.Supp. 2d 1060 (D. Ore. 1999). This 9th Circuit case provides for the recovery of attorney fees for a parent who succeeds in a Compliance Complaint investigation.



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Office of Civil Rights

- If your complaint involves an issue of educational discrimination under Section 504 of the Rehabilitation Act of 1973, you can **file a discrimination complaint with the U.S. Department of Education, Office of Civil Rights (OCR).**
- The OCR will acknowledge your complaint within 15 days of its receipt. However, OCR may take up to 45 days to review your complaint to determine if additional information is necessary to process your complaint. OCR will investigate your complaint and send you a letter of finding within 120 days from the start of the investigation.
- **Example:** Allowing all students choice of schools, but SpEd students do not have that same choice.



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SEHO and OAH



- In accordance with Education Code section 56504.5, the CDE must contract with a single, nonprofit organization or entity to conduct mediation conferences and due process hearings. **Between 1989 and July 1, 2005 due process hearings were conducted through contract with McGeorge School of Law's Institute for Administrative Justice.** We referred to this tribunal as the Special Education Hearing Office or SEHO.
- As a result of litigation pending with the State Personnel Board between CDE and OAH, **CDE decided in June 2005 to award the contract to the Office of Administrative Hearings** effective July 1, 2005

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Mediation Only

Mediation...



- E.C. 56500.3. (a) It is the intent of the Legislature that parties to special education disputes be encouraged to seek resolution through **mediation prior to filing a request for a due process hearing.** It is also the intent of the Legislature that these voluntary prehearing request mediation conferences be **an informal process** conducted in a nonadversarial atmosphere to resolve issues relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education to the child, to the satisfaction of both parties. **Therefore, attorneys or other independent contractors used to provide legal advocacy services may not attend or otherwise participate in the prehearing request mediation conferences.**

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Mediation Only Time Limits



- E.C. 56500.3 (b) This part does not preclude the parent or the public agency from being accompanied and advised by nonattorney representatives in the mediation conferences and **consulting with an attorney prior to or following a mediation conference**
- (e) The prehearing mediation conference **shall be scheduled within 15 days** of receipt by the Superintendent of the request for mediation. The mediation conference shall be completed within 30 days after receipt of the request for mediation
- (g) If the mediation conference fails to resolve the issues to the satisfaction of all parties, **the party who requested the mediation conference has the option of filing for a state-level hearing** pursuant to Section 56505
- **all discussions that occurred during the mediation process shall be confidential** and may not be used as evidence in any subsequent due process hearing or civil proceeding.

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Statute of Limitations



- (l) A request for a due process hearing arising under subdivision (a) of Section 56501 **shall be filed within two years from the date** the party initiating the request **knew or had reason to know of the facts underlying the basis for the request.**
- In accordance with Section 1415(f)(3)(D) of Title 20 of the United States Code, the time period ...does not apply to a parent if the parent was prevented from requesting the due process hearing due to either of the following:
 - (1) **Specific misrepresentations** by the local educational agency that it had solved the problem forming the basis of the due process hearing request.
 - (2) **The withholding of information** by the local educational agency from the parent that was required under this part to be provided to the parent.

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Ready,
aim...
FIRE



Not Fire-Ready-Aim

- These are reasonably **expedited hearings with short time limits.**
- **Fire-Ready-Aim, will not work well,** instead use Ready-Aim-Fire.
- **You have a burden of proof** (in most instances) and will be up against experienced and knowledgeable aggressive defense attorneys.
- **Many parents approach due process with an underestimate of the task,** and assume that they can depend on the emotions and mercy of the hearing officer to just do the right thing without evidence.

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Reasonably Easy Litigation

With that being said, here is the good part.

- You will get a **quick hearing** if you do not agree to continuances, probably within 90 days.
- You **do not have to drive** to a court house. The ALJ comes to the school district office.
- There is **no real discovery,** and the other side cannot paper you to death.
- You **do not have to compete with other cases on calendar.** Yours will be the only one.
- **Statutory and Common Law Rules of Evidence do not apply** (but you cannot win on hearsay).
- In most instances your **case will continue from day to day until concluded.**
- You will have a **written decision in a few weeks after conclusion.**



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Request for Due Process



- **Use the form** on the OAH Website.
- **File it in the Sacramento Office** of OAH, serve the opposing party with the Request.
 - (A) The name of the child, the address of the residence of the child, or available contact information in the case of a homeless child, and the name of the school the child is attending.
 - (C) A description of the nature of the problem of the child relating to the proposed initiation or change, including facts relating to the problem.
 - (D) A proposed resolution of the problem to the extent known and available to the party at the time.

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Form of Papers Presented for Filing



- **§ 1006. Format and Filing of Papers** (a) After a Case has been assigned to a regional office of OAH for Hearing, all papers filed pursuant to any provision of law, regulation, or ALJ order shall be filed at that regional office within applicable time limits.
- (b) The first page of each paper filed should include the following:
 - (1) The name, address, and telephone number of the person filing the paper, including the State Bar number if the person filing the paper is an attorney;
 - (2) A caption setting forth the title of the Case, including the names of the agency and the respondent;
 - (3) The agency case number;
 - (4) The OAH Case number, if assigned;
 - (5) A brief title describing the paper filed;
 - (6) The dates of the Hearing and any future prehearing or settlement conferences, if known.
- (c) Papers should be filed on 8 1/2" x 11" stock paper of customary weight and quality, with two normal-sized holes punched at the top (centered 2 1/2 inches apart, and 5/8 inch from the top of the paper).

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Method and Time of Filing



- **§ 1006(g)** Papers may be filed with OAH by **facsimile transmission**. Unless required by the ALJ, the original paper need not be filed with OAH if the party obtains telephonic or other confirmation from OAH that a complete and legible copy of the papers was received.
- (h) Papers delivered by the **U.S. Postal Service** are filed on the date received by OAH. Papers hand delivered to OAH and complete papers received by OAH by facsimile transmission during regular business hours (8 a.m. to 5 p.m.) will be filed on the date received. Papers received after regular business hours are deemed filed on the next regular business day.

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Notice of Representation



- E.C. 56507. (a) If either party to a due process hearing **intends to be represented by an attorney** in the state hearing, **notice of that intent** shall be given to the other party at least **10 days prior to the hearing**. The failure to provide that notice shall constitute good cause for a continuance.
- (A pro-per parent may specify that they “intend” to hire an attorney with filings at the beginning, just to establish a strong position for negotiation)

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Notice of Insufficiency



- EC 56502(d) (1) The due process hearing request notice required by Section 1415(b)(7)(A) of Title 20 of the United States Code shall be deemed to be sufficient unless the party receiving the notice notifies the due process hearing officer and the other party in writing that the receiving party believes the due process hearing request **notice has not met the notice requirements**. The party providing a hearing officer notification **shall provide the notification within 15 days of receiving the due process hearing request notice**. Within **five days of receipt of the notification, the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements** of Section 1415(b)(7)(A) of Title 20 of the United States Code, and shall immediately notify the parties in writing of the determination.

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Defendant’s Answer



- EC 56502(D) Except as provided under subparagraph (B), the party receiving a due process hearing request notice, **within 10 days of receiving the notice**, shall send to the other party, in accordance with Section 300.508(f) of Title 34 of the Code of Federal Regulations, **a response that specifically addresses the issues raised in the due process hearing request notice**.

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Amending the DP Request



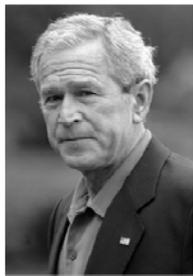
- EC 56502(e) A party may amend a due process hearing request notice only **if the other party consents in writing to the amendment** and is given the opportunity to resolve the hearing issue through a meeting held pursuant to Section 1415(f)(1)(B) of Title 20 of the United States Code, **or the due process hearing officer grants permission**, except that the hearing officer may only grant permission at any time **not later than five days before a due process hearing occurs**. The applicable timeline for a due process hearing under this chapter shall recommence at the time the party files an amended notice, including the timeline under Section 1415(f)(1)(B) of Title 20 of the United States Code.

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No New Issues

- EC 56502(i) In accordance with Section 1415(f)(3)(B) of Title 20 of the United States Code, **the party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under this section, unless the other party agrees otherwise.**



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No Mandatory Joinder of Actions



- EC 56509. This chapter, in accordance with subsection (o) of Section 1415 of Title 20 of the United States Code, **does not preclude a parent from filing a separate due process hearing request on an issue separate from a due process hearing request already filed.**

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Discovery Strategies in General



- There are these essential ways to get discovery.
 - Get all the school records within 5 days.
 - Force a Union School Offer of Placement detailed document.
 - You will be served with their documents ten days before hearing, and witness list 5 days before.
 - Subpoena and call their experts and witnesses first as adverse (hostile) witnesses.

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Discovery



- E.C. 56504. The parent shall have the **right and opportunity to examine all school records of his or her child and to receive copies** pursuant to this section and to Section 49065 **within five business days after the request is made by the parent**, either orally or in writing. The public agency shall comply with a request for school records without unnecessary delay before any meeting regarding an individualized education program or any hearing pursuant to Section 300.121, 300.301, 300.304, or 300.507 of Title 34 of the Code of Federal Regulations or resolution session pursuant to Section 300.510 of Title 34 of the Code of Federal Regulations and in no case more than five business days after the request is made orally or in writing. **The parent shall have the right to a response from the public agency to reasonable requests for explanations and interpretations of the records.**

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Defendants “Union School” Offer of Placement Response

EC 56502(2) (A) The response to the due process hearing request notice **shall be made within 10 days** of receiving the request notice in accordance with Section 1415(c)(2)(B) of Title 20 of the United States Code.

- (B) In accordance with Section 300.508(e)(1) of Title 34 of the Code of Federal Regulations, if the local educational agency has not sent a prior written notice under Section 56500.4 and Section 300.503 of Title 34 of the Code of Federal Regulations to the parent regarding the subject matter contained in the due process hearing request of the parent, the response from the local educational agency to the parent shall include all of the following:
 - (i) **An explanation of why the agency proposed or refused to take the action raised in the due process hearing request.**
 - (ii) **A description of other options that the individualized education program team considered and the reasons why those options were rejected.** (iii) **A description of each assessment procedure, assessment, record, or report the agency used as the basis for the proposed or refused action.**
 - (iv) **A description of other factors that are relevant to the proposed or refused action of the agency.**

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Exploiting the Required Union School Response



- You can possibly file a motion to compel a more complete and detailed response.
- You can call the school as your first witness to lay a foundation for what is or is not their “Offer of Placement” as a foundation for an objection of showing of a procedural violation.
- Object to the school presenting any evidence or witness that exceeds what they disclosed on this Offer.

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Resolution Meeting in 15 Days



- 56501.5. (a) Notwithstanding any other provision of law, prior to the opportunity for an impartial due process hearing under this chapter, **the local educational agency shall convene a resolution meeting with the parents and the relevant member or members of the individualized education program team** who have specific knowledge of the facts identified in the due process hearing request, in accordance with Section 1415(f)(1)(B) of Title 20 of the United States Code and Section 300.510 of Title 34 of the Code of Federal Regulations. The parent and the local educational agency shall determine the relevant members of the individualized education program team to attend the meeting.
- (1) The meeting shall be convened within 15 days of receiving notice of the due process hearing request of the parent.
- (2) The meeting shall include a representative of the local educational agency who has decisionmaking authority on behalf of the agency.
- (3) **The meeting shall not include an attorney of the local educational agency, unless the parent is accompanied by an attorney.**

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Purpose of Resolution Meeting



- (4) The **purpose** of the meeting is for the parent of the child to **discuss the due process hearing** issue, and the facts that form the basis of the due process hearing request, **so that the local educational agency has the opportunity to resolve the dispute** that is the basis for the due process hearing request.
- (b) The resolution meeting described in subdivision (a) need not be held if the parents and the local educational agency agree in writing to waive the meeting, or agree to use the mediation process as provided for in this chapter.
- (c) **If the local educational agency has not resolved the due process hearing issue to the satisfaction of the parents within 30 days of the receipt of the due process hearing request notice, the due process hearing may occur.** Except as provided in subdivision (d), **the timeline for issuing a final decision** under paragraph (3) of subdivision (f) of Section 56505 **begins at the expiration of this 30-day period.**

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OAH Mediation

- 56503. Nothing in this chapter shall preclude the parties to a hearing from agreeing to use a mediation conference or resolving their dispute in an informal, nonadversarial manner, even though a request for a state level hearing has been filed or even if the hearing has commenced.
- 56504.5. (a) The department shall enter into an interagency agreement with **another state agency or contract with a nonprofit organization or entity to conduct mediation conferences** and due process hearings in accordance with Sections 300.506 and 300.511 of Title 34 of the Code of Federal Regulations.



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Mediation Confidentiality

- 5 CCR 3086 (b) Notwithstanding any other provision of law, a communication made in mediation is protected to the following extent:
 - (1) **Anything said, any admission made, and any document prepared** in the course of, or pursuant to, mediation under this article is a **confidential communication, and a party to the mediation has a privilege to refuse to disclose and to prevent another from disclosing the communication**, whether in an adjudicative proceeding, civil action, or other proceeding. This subsection does not limit the admissibility of evidence if all parties to the proceedings consent.
 - (2) **No reference to mediation proceedings**, the evidence produced, or any other aspect of the mediation **may be made in adjudicative proceeding or civil action**, whether as affirmative evidence, by way of impeachment, or for any other purpose.
 - (3) **No mediator or interpreter or other participants are competent to testify** in a subsequent administrative or civil proceeding as to any statement, conduct, decision, or order occurring at, or in conjunction with, the mediation.



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Time and Place of Hearing

- E.C.56505. (a) The state hearing shall be conducted in accordance with regulations adopted by the board.
- (b) **The hearing shall be held at a time and place reasonably convenient to the parent or guardian and the pupil.**
- (c) (1) The hearing shall be conducted by a person who, at a minimum, shall possess knowledge of, and the ability to understand, the provisions of this part and related state statutes and implementing regulations, the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), federal regulations pertaining to the act, and legal interpretations of this part and the federal law by federal and state courts, and who has satisfactorily completed training pursuant to this subdivision.



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Administrative Procedures Act

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GJ Publications | SP Publications | GJS Publications | PWCA Publications

QUICK LINKS

- General Jurisdiction Calendar
- Special Education Calendar
- State of California Home Page
- DCS Home Page
- State Bar of California
- ALJ Biographical Information
- Retaining OAH
- Job Opportunities
- Contact Us

General Jurisdiction Publications

- Administrative Procedure Act (statutes and regulations) [current through 1/1/2009] (104 KB)
- Table of Updates to 2009 APA
- So... You're Thinking of Representing Yourself?

Currently a 119 page document

<http://www.oah.dgs.ca.gov/Publications/GJ+Publications.htm>

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Also Local Rules

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Calendar | Continuance Rulings | Teacher Layoffs | Representing Yourself | Local Rules | Retaining OAH | Court Reporter Info

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- Contact Us

OAH Local Rules

This page contains information and rules that pertain to each of the individual local OAH offices.

Los Angeles

- [Law and Motion Procedures](#)

Oakland

- [Motion to Continue for Unrepresented Respondent](#)

Sacramento

- [Motion to Continue for Unrepresented Respondent](#)

San Diego

- [Motion to Continue for Unrepresented Respondent](#)

<http://www.oah.dgs.ca.gov/GeneralJurisdiction/LocalRules.htm>

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OAH Policy on Hearing Dates

- “Upon receipt of a request for due process hearing and mediation, **OAH issues a scheduling order which identifies a mediation date, the name of the assigned mediator, a date for prehearing conference and one date for hearing.**
- These dates are set to insure compliance with federally mandated timelines, which **cannot be changed except upon a showing of good cause.** If you agree to continue the case, the federally mandated timelines to issue a decision in the case will be extended. **Every request for a continuance must be evaluated by OAH for a showing of good cause.”**

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Stay Put!

- E.C. 56505(d) Pursuant to Section 300.518(a) of Title 34 of the Code of Federal Regulations, **during the pendency of the hearing proceedings, including the actual state-level hearing, or judicial proceeding regarding a due process hearing, the pupil shall remain in his or her present placement**, except as provided in Section 300.533 of Title 34 of the Code of Federal Regulations, unless the public agency and the parent or guardian agree otherwise.



Other Rights

- E.C. 56505(e) A party to the hearing held pursuant to this section shall be afforded the following rights consistent with state and federal statutes and regulations:
- (1) **The right to be accompanied and advised by counsel** and by individuals with special knowledge or training relating to the problems of individuals with exceptional needs.
- (2) **The right to present evidence, written arguments, and oral arguments.**
- (3) **The right to confront, cross-examine, and compel the attendance of, witnesses.**
- (4) **The right to a written, or, at the option of the parents or guardians, electronic verbatim record of the hearing.**
- (5) **The right to written, or, at the option of the parent or guardian, electronic findings of fact and decisions.** The record of the hearing and the findings of fact and decisions shall be provided **at no cost to parents** or guardians in accordance with Section 300.512 (c)(3) of Title 34 of the Code of Federal Regulations. 38

10 Calendar Day List of Issues



- E.C. 56505(6) The right to be informed by the other parties to the hearing, **at least 10 days** prior to the hearing, as to what those parties believe are the issues to be decided at the hearing and their proposed resolution of those issues. Upon the request of a parent who is not represented by an attorney, **the agency responsible for conducting hearings shall provide a mediator to assist the parent in identifying the issues and the proposed resolution of the issues.**

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5 Business Day Filing of Records

- E.C. 56505(7) The right to receive from other parties to the hearing, **at least five business days prior to the hearing, a copy of all documents and a list of all witnesses and their general area of testimony that the parties intend to present at the hearing.** Included in the material to be disclosed to all parties at least five business days prior to a hearing **shall be all assessments completed by that date and recommendations based on the assessments that the parties intend to use at the hearing.**
- (8) The right, pursuant to Section 300.512(a)(3) of Title 34 of the Code of Federal Regulations, **to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing.**



5 Business Day List of Witnesses

- E.C 56043(v) Any party to a due process hearing shall have the right to receive from other parties to the hearing, at least five business days prior to the hearing, **a copy of all documents, including all assessments completed and not completed by that date, and a list of all witnesses and their general area of testimony** that the parties intend to present at the hearing, pursuant to paragraph (7) of subdivision (e) of Section 56505.

Tip: List every possible witness (including adverse) you can think of if in good faith.

LISTOGRAPHY
THE LIFE IN US

Consider experts who have authored books, or journal articles you may want to call by phone.



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Motions (Stay Put, Continuance etc.)

- 5 CCR 3083 (a) The **notice, motion,** or writing **shall be delivered** personally or sent by mail or other means **to the Hearing Office, person, or entity** at their last known address and, if the person or entity is a party with an attorney or other authorized representative of record in the proceeding, **to the party's attorney or other authorized representative.**
- (b) Unless a provision specifies the form of mail, service or notice by mail may be by first-class mail, registered mail, or certified mail, by mail delivery service, **by facsimile transmission** if complete and without error, or by other electronic means as provided by regulation, in the discretion of the sender.
- (c) Service must be made by a method that ensures receipt by all parties and the Hearing Office in a comparable and timely manner.
- **1 CCR § 1022. Motions – Provides the OAH procedure.**

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Peremptory Challenge



- **§ 1034. Peremptory Challenge**
 (a) Pursuant to section 11425.40(d), a party is entitled to one peremptory challenge (**disqualification without cause**) of an **ALJ assigned to an OAH Hearing.**
- (c) If, at the time of a scheduled prehearing conference, an ALJ has been assigned to the Hearing, **any challenge to the assigned ALJ shall be made no later than commencement of that prehearing conference.**
- (d) Except as provided in (c), if the Hearing is to be held at an OAH regional office, the peremptory **challenge of the assigned ALJ shall be made no later than 2 business days before the Hearing.**
- (e) Except as provided in (c), if the Hearing is to be held at a site other than an OAH regional office, the peremptory **challenge of the assigned ALJ shall be made by noon on Friday prior to the week in which the Hearing is to commence.**
- (f) **A party may contact OAH to determine the name of the ALJ assigned to the Hearing.**

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Hearing Officer Options

- 56505.1 ..question a witness...**have conflicting experts talk to each other...visit the proposed placement... call a witness...**
- (e) **Order that an impartial assessment,** including an independent educational assessment, of the pupil be conducted for purposes of the hearing and continue the hearing until the assessment has been completed. The cost of any assessment ordered under this subdivision shall be at public expense pursuant to subsection (d) of Section 300.502 of Title 34 of the Code of Federal Regulations and included in the contract between the department and the organization or entity conducting the hearing.



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Length of the Hearing

- EC 56505.1. The hearing officer may do any of the following
- (h) **Set a reasonable limit on the length of the hearing** after consideration of all of the following:
 - (1) The issues to be heard.
 - (2) The complexity of the facts to be proven.
 - (3) The ability of the parties and their representatives, if any, to present their respective cases.
 - (4) The estimate of the parties as to the time needed to present their respective cases.



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Rules of Evidence



5 CCR 3082 (b) The hearings conducted pursuant to this section shall not be conducted according to the technical rules of evidence and those related to witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. All testimony shall be under oath or affirmation which the hearing officer is empowered to administer.

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Hearings are Not Public

- **5 CCR 3082** ..the parties shall also have the following rights...(c)(3)Absent compelling circumstances to the contrary, and upon motion to the hearing officer to **have witnesses excluded from the hearing.**
- (f) Notwithstanding Government Code section 11425.10(a)(3) of the Administrative Procedure Act, **special education due process hearings are open/closed to the public at the discretion of the parent**



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Witnesses by Telephone



- **5 CCR 3082 (g) Notwithstanding** Government Code section 11440.30 of the Administrative Procedure Act, **the hearing officer may conduct all or part of a hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits.**
- **§ 11440.30. Conduct of hearing by telephone, television, or other electronic means**
 - (a) The presiding officer may conduct all or part of a hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits.
 - (b) **The presiding officer may not conduct all or part of a hearing by telephone, television, or other electronic means if a party objects.**

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What to Expect

- Hearing will be **at school district office.**
- No other cases, **you will start right away.**
- **Frame issues** orally, this supersedes pleadings.
- **Exhibits binders go into evidence.**
- You may do an **opening statement.**
- **Petitioning party goes first**, other side cross examines.
- **Responding party follows.**
- **May proceed from day to day, or may be given finite number of days.**
- May be asked for **closing briefs.**



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Contempt of Court

5 CCR 3088. Sanctions. (a) Provisions for contempt sanctions, order to show cause, and expenses contained in Government Code sections 11455.10-11455.30 of the Administrative Procedure Act apply to special education due process hearing procedures except as modified by (b) through (e) of this section.

- (b) **Only the presiding hearing officers may initiate contempt sanctions and/or place expenses at issue.**
- (c) Prior to initiating contempt sanctions with the court, **the presiding hearing officer shall obtain approval from the General Counsel of the California Department of Education.**
- (d) The failure to initiate contempt sanctions and/or impose expenses is not appealable.
- (e) The presiding hearing officer may, with approval from the General Counsel of the California Department of Education, **order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel,** to the California Special Education Hearing Office for the reasons set forth in Government Code section 11455.30(a).



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45 Day Reasoned Opinion

- E.C. 56505(c)(3) The hearing conducted pursuant to this section shall be completed and a **written, reasoned decision**, including the reasons for a nonpublic, nonsectarian school placement, the provision of nonpublic, nonsectarian agency services, or the reimbursement for the placement or services, taking into account the requirements of subdivision (a) of Section 56365, **shall be mailed to all parties to the hearing not later than 45 days after the expiration of the 30-day period pursuant to subdivision (c) of Section 56501.5.**



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Public Access to Redacted Findings

- E.C. 56505(e)(5)... The findings and decisions shall be **made available to the public after any personally identifiable information has been deleted** consistent with the confidentiality requirements of Section 1417(c) of Title 20 of the United States Code and shall also be transmitted to the Advisory Commission on Special Education pursuant to Section 1415(h)(4) of Title 20 of the United States Code.



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Persuasive But Not Controlling Authority

- **5 CCR 3085** - Procedural Safeguards; Precedent Decisions
3085. Precedent Decisions. Notwithstanding Government Code section 11425.10(a)(7) of the Administrative Procedure Act, **orders and decisions rendered in special education due process hearing proceedings may be cited as persuasive but not binding authority by parties and hearing officers in subsequent proceedings.**



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90 Day Right to Appeal



- E.C. 56505(k) This chapter does not preclude a party aggrieved by the findings and decisions in a hearing under this section from exercising **the right to appeal the decision to a state court of competent jurisdiction**. An aggrieved party also may exercise the right to bring a civil action in a district court of the United States without regard to the amount in controversy, pursuant to Section 300.516 of Title 34 of the Code of Federal Regulations. An appeal shall be made **within 90 days of receipt of the hearing decision**.

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Appeal Jurisdiction



- 34 CFR 300.516 Any party aggrieved by the findings and decisionhas the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under Sec. 300.507 or Sec. Sec. 300.530 through 300.532. **The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.**

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Appeal Process



- 34 CFR 300.516 (c) Additional requirements. In any action brought under paragraph (a) of this section, the court--
 - (1) **Receives the records of the administrative proceedings;**
 - (2) **Hears additional evidence at the request of a party; and**
 - (3) **Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.**

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No Administrative Exhaustion for ADA or 504 Actions on Appeal of IDEA

34 CFR 300.516 Rule of construction.

- **Nothing** in this part **restricts or limits** the rights, procedures, and **remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws** protecting the rights of children with disabilities, **except that before the filing of a civil action under these laws seeking relief** that is also available under section 615 of the Act, the procedures under Sec. Sec. 300.507 and 300.514 **must be exhausted to the same extent as would be required had the action been** brought under section 615 of the Act.



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History of Attorney Fees



- When IDEA was first enacted by Congress in **1975, there was no provision for attorney fees.** As a result, parents of children with disabilities often already burdened by the prohibitive costs of medical care and equipment, found it difficult to pursue expensive litigation against school districts.
- **The act was amended in 1986 to allow attorney fees to the parents if they were the prevailing party in a due process.** In Order to insure that children with disabilities are well served in America's public schools, and guaranteed the right to a free appropriate public education, **Congress was required to balance the competing interests of the school boards in protecting the rights of taxpayers with that of the parents of disabled child in insuring he rights afforded by IDEA are protected.**

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Attorney Fees for Settlement



- Prior to Buckhannon, a parent could recover an attorney fee for services that resulted in a settlement if the attorney was the "catalyst" that brought about the settlement.
- Buckhannon Board & Care Home, Inc., Et Al. v. West Virginia Department of Health and Human Resources Et Al. (2001) 532 U.S. 598 rejected the catalyst theory as having to statutory authority.
- **This is not a real problem. Negotiate for a fee as part of a settlement or do not settle, and if they agree to it, they must pay it.**

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Attorney Fees to Parent



- 56507(b) (1) An award of reasonable attorney's fees to the prevailing parent, guardian, or pupil, as the case may be, may only be made either with the agreement of the parties following the conclusion of the administrative hearing process or by a court of competent jurisdiction pursuant to Section 1415(i)(3) of Title 20 of the United States Code.
- (d) The hearing decision shall indicate the extent to which each party has prevailed on each issue heard and decided, including issues involving other public agencies named as parties to the hearing.

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Attorney Fees to School



- EC 56507(2) In accordance with Section 1415(i)(3) of Title 20 of the United States Code, the court, in its discretion, **may award reasonable attorney's fees** as part of the costs to a prevailing party who is a state educational agency or local educational agency in the following circumstances:
 - (A) **Against the attorney** of a parent who files a due process hearing request or subsequent cause of action that is **frivolous, unreasonable, or without foundation**, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation.
 - (B) **Against the attorney of a parent, or against the parent**, if the parent's **due process hearing request** or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

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Subsequent Fee Action



- The **hearing officer does not have jurisdiction to award a fee**. He/she is however directed to make findings as to which party prevailed on which issue.
- Subsequent to the Decision, if you are a "prevailing party" a **separate fee action is filed typically in Federal District Court**.
- Ultimately, **both parties submit briefs and declarations of "reasonable fees" from various attorneys in a summary judgment motion**. The court then awards or refuses to award a fee as the case may be.

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Add On a Fee to Get the Fee!



- *McSomebodies v. San Mateo City School Dist.*, 886 F.2d 1559, 1560 (9th Cir. 1989) (Concerning fee awards under the IDEA, the court held, “**The overwhelming majority of cases now support fees from bottom to top.**”)
- *Barlow-Gresham Union High School District No. 2 v. Mitchell*, 940 F.2d 1280, 1286 (9th Cir. 1991) (**Fees awarded** for pre-hearing work and **in connection with the fee application.**)
- **Attorneys fees for work** starting from the time of initial representation through work **on the fee petition** were awarded and affirmed in *Seattle School Dist., No. 1 v. B.S.*, 82 F.3d 1493 (9th Cir. 1996)

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Computation of the Fee



- 34 CFR 300.517 (c) Award of fees. A court awards reasonable attorneys' fees under section 615(i)(3) of the Act consistent with the following:
- (1) Fees awarded under section 615(i)(3) of the Act **must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished.** No bonus or multiplier may be used in calculating the fees awarded under this paragraph.

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Fees After Written Offer of Settlement



- 34 CFR 300.517 (2) (i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the Act **for services per the time of a written offer of settlement to a parent if--**
- (A) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, **at any time more than 10 days before the proceeding begins;**
- (B) **The offer is not accepted within 10 days;** and
- (C) **The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.**
- (3) Notwithstanding paragraph (c)(2) of this section, an award of attorneys' **fees and related costs may be made** to a parent who is the prevailing party and **who was substantially justified in rejecting the settlement offer.**

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Fee for Attending IEP Meetings



- 34 CFR 300.517 (ii) **Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding or judicial action**, or at the discretion of the State, for a mediation described in Sec. 300.506.
- (iii) A meeting conducted pursuant to Sec. 300.510 shall not be considered--
 - (A) A meeting convened as a result of an administrative hearing or judicial action; or
 - (B) An administrative hearing or judicial action for purposes of this section.

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Other Fee Reductions

$$\begin{array}{r} 5 \\ -2 \\ \hline 3 \end{array}$$

- 34 CFR 300.517(4) Except as provided in paragraph (c)(5) of this section, the **court reduces**, accordingly, **the amount of the attorneys' fees** awarded under section 615 of the Act, **if the court finds that--**
- (i) The **parent, or the parent's attorney**, during the course of the action or proceeding, **unreasonably protracted the final resolution of the controversy**;
- (ii) The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;
- (iii) **The time spent and legal services furnished were excessive considering the nature of the action or proceeding**; or
- (iv) The attorney representing the parent did not provide to the LEA the appropriate information in the due process request notice in accordance with Sec. 300.508.

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How does the Court Actually Compute the Fee to be Paid?



- A reasonable attorney's fee is determined by the "lodestar" approach, calculated by **multiplying the number of hours worked by an appropriate hourly rate**. Hensley, 461 U.S. at 433.
- The amount reached by this calculation should be paid in full where the plaintiff has obtained excellent results. Id. at 435. It **"should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit."** Id. The question is **whether the relief obtained justified the expenditure of time**. Id. at 436 n.11

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When are You a Prevailing Party?



- Shapiro v. Paradise Valley Unified School Dist., 374 F.3d 857, 865 (9 Cir. 2004).
- A party may be accorded prevailing party status by **being awarded ‘some relief by the court,’** even if only an award of nominal damages. *Buckhannon*, 532 U.S. at 603-04; see also *Me. Sch. Admin. Dist. No. 35*, 321 F.3d at 15 (stating that a prevailing party **must ‘succeed on the merits of a claim or defense,’** but that **‘a party may be considered ‘prevailing’ even without obtaining a favorable final judgment on all (or even the most crucial) of her claims.**

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Examples of Prevailing Party

- Pasatiempo v. Aizawa, 103 F.3d 796, 805 (9 Cir. 1996) (Attorney’s fee awarded when **only the relief obtained was a determination that parents must be notified of and allowed to be involved in decisions about whether to evaluate their children for special education eligibility**);
- Borengasser v. Arkansas Bd. of Educ., 996 F.2d 196 (8 Cir.1993) (Citing *Abu-Sahyun v. Palo Alto Unified School Dist.*, 843 F.2d 1250 (9th Cir. 1988), in holding that a parent **whose sole relief was an order enforcing a prior agreement requiring an IEP conference** to be held before, rather than after, the start of the school year, was a prevailing party);
- N.S. v. Stratford Board of Education, 97 F.Supp.2d 224, 229 (D.Conn. 2000) (**Relief involved blocking the district’s plan to have the student placed in its preferred program** and a determination that the district’s IEP was deficient. The parents recovered no money and did not obtain placement in their preferred school. [citing *G.M. v New Britain Board of Educ.* 173 F.3d 77 (2d Cir. 1999)].

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9th Circuit Position on Prevailing Party

- The recently-decided **Park Ex Rel. Park v. Anaheim Union High School**, 464 F.3d 1025, 1034-37 (9 Cir. 2006) demonstrates the Plaintiffs’ contentions concerning their prevailing party status, holding that:
- (1) **District courts have narrow discretion to deny fees** when “parents have been forced to litigate for years against school districts to obtain all or even part of what the Individuals with Disabilities Education Act requires in the first place;”
- (2) **Plaintiffs need only succeed on any significant issue**, which can include a determination that a district denied a student a FAPE for a period of time;
- (3) **The prevailing party inquiry does not turn on the magnitude of the relief obtained** (The only compensatory remedy ordered was a small amount of training of the student’s teacher—no services to the student or recovery of costs were ordered);
- (4) **A prevailing party must succeed on the merits of a claim or defense**, but a party may be considered “prevailing” **even without obtaining a favorable final judgment on all (or even the most crucial) of her claims;**

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De-Minimus Recovery Not Enough



- Joseph PARK, et. al. v. Anaheim Union SD 444 F.3d 1149 (2006) the District prevailed on “all significant issues” and the Appellants prevailed only “on some minor issues”.
- The court stated “**Though the district court might have been within its discretion to award Appellants attorney's fees, we cannot say the district court abused its discretion in not awarding fees.**”

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What are the Odds?



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Special Education Reports

- 2008-09 Second Quarter Report
- 2008-09 First Quarter Report
- 2007-08 Fourth Quarter Report
- 2007-08 Third Quarter Report
- 2007-08 Second Quarter Report Note: this report also amends portions of the 2007-08 First Quarter Report.
- 2007-08 First Quarter Report Note: See also 2007-08 Second Quarter Report.
- 2006-07 Fourth Quarter Report
- 2006-07 Second Quarter Report
- 2006-07 First Quarter Report

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Total Case Filings

CASE FILINGS

During the first quarter for fiscal year 2008-2009, the Office of Administrative Hearings (OAH) received 564 new case filings.

Fiscal Year 2005-2006 ¹	Filings	Fiscal Year 2006-2007	Filings	Fiscal Year 2007-2008	Filings	Fiscal Year 2008-2009	Filings
Jul, 2005	600	Jul, 2006	247	Jul, 2007	277	Jul, 2008	258
Aug, 2005	335	Aug, 2006	251	Aug, 2007	279	Aug, 2008	225
Sep, 2005	329	Sep, 2006	212	Sep, 2007	176	Sep, 2008	210
Oct, 2005	274	Oct, 2006	322	Oct, 2007	219	Oct, 2008	216
Nov, 2005	289	Nov, 2006	166	Nov, 2007	205	Nov, 2008	174
Dec, 2005	492	Dec, 2006	192	Dec, 2007	163	Dec, 2008	174
Jan, 2006	401	Jan, 2007	194	Jan, 2008	186	Jan, 2009	
Feb, 2006	266	Feb, 2007	188	Feb, 2008	180	Feb, 2009	
Mar, 2006	251	Mar, 2007	220	Mar, 2008	159	Mar, 2009	
Apr, 2006	200	Apr, 2007	206	Apr, 2008	229	April, 2009	
May, 2006	284	May, 2007	258	May, 2008	254	May, 2009	
Jun, 2006	291	Jun, 2007	292	June, 2008	299	June, 2009	
Total Filings	4012	Total Filings	2748	Total Filings	2826	Total Filings	1285

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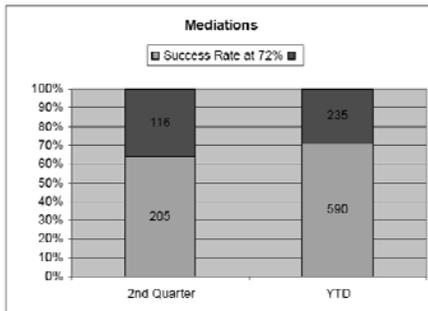


Case Dispositions

Reason for Closure	1 st Quarter	2 nd Quarter	3 rd Quarter	4 th Quarter	Year to Date
Settled at mediation ¹³	228	154			382
Settled Outside Mediation or Resolution ¹⁴	291	117			408
Settled at Resolution ¹⁵ Session	35	12			47
Failure to File amended complaint	16	6			22
Inactivity	9	21			30
Motion to Dismiss	7	7			14
Withdrawn	142	212			354
Settlement Conference	0	0			0
Other	10	11			21
Decision Issued ¹⁶	24	20			44
Total	762	560			1322

Mediation Success Rate

For the current fiscal year, OAH has conducted 825 mediations with 235 resulting in impasse. Overall for this fiscal year, the mediation success rate is 72 percent.



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Hearing Success Rate

For the decisions issued this quarter, students prevailed in three hearings (15 percent). Districts prevailed in twelve hearings (60 percent). In five cases (25 percent), the decision was split between student and district with students prevailing on 14 issues and districts prevailing on 9 issues.¹⁷ For the current fiscal year, students have prevailed in seven hearings (16 percent), districts have prevailed in 20 hearings (45 percent), and 17 cases (39 percent) resulted in a split decision. Copies of all decisions have been provided to CDE and have been posted on the OAH website.

	1 st Quarter	2 nd Quarter	3 rd Quarter	4 th Quarter	Year to Date
Student Prevailed	4	3			7
District Prevailed	8	12			20
Split	12	5			17

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Hearing Durations

On average, the due process hearings lasted four days, with students using 48 percent of the hearing for presentation of their case and districts using 52 percent of hearing time for case presentation. During case presentation, each side called an average of six witnesses per case.

Category ²³	1 st Quarter	2 nd Quarter	3 rd quarter	4 th Quarter	YTD Average
Average // days	5	4			4.5
% Time for Student	54	48			51%
% Time for District	45	52			49%
Avg student witness	6	7			6.5
Avg district witness	5	6			5.5

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Transcript Requests - Appeals

This quarter, OAH received 18 requests for transcripts. This quarter, OAH was notified that an appeal was filed on two cases.¹⁷ Data on the number of appeals and appellate outcomes is collected on an ongoing basis. It includes all cases that OAH was notified were appealed since July 2005. Based on correspondence with the parties and filings that have been provided to OAH, 149 cases have been appealed since July 2005. Currently, 49 OAH decisions are on appeal. Since July 2005, 23 decisions have been upheld, six decisions have been remanded, five decisions were reversed, 21 cases settled, 38 were dismissed, and four cases were withdrawn by the filing party without explanation.

