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Timothy E. Gilsbach

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# SPECIAL EDUCATION DUE PROCESS HEARING REQUESTS UNDER IDEA: A HEARING SHOULD NOT ALWAYS BE REQUIRED

*Timothy E. Gilsbach\**

## I. INTRODUCTION

Under the Individuals with Disabilities Education Act (“IDEA”),<sup>1</sup> the parents of a student who qualifies for the IDEA’s protections may file a request for an impartial due process hearing when they disagree “with respect to any matter related to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education.”<sup>2</sup> Such hearings, even when the school entity wins the entire case, can be costly both for the educational entity, in terms of its own legal fees and time spent by staff in a hearing room rather than in a classroom educating children, and the state system tasked with hearing these case if a full blown hearing is unnecessarily required.<sup>3</sup> Not surprisingly, the filing of a special education due process hearing request or complaint under the IDEA often results in a hearing. In fact, the IDEA specifically provides that the parties “*shall have* an opportunity for an impartial due process hearing.”<sup>4</sup> Likewise, some states have similar provisions in their administrative code that appear to require a hearing on the merits rather than

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\*Associate with King, Spry, Herman, Freund & Faul, LLC in Bethlehem, Pennsylvania. J.D., The Pennsylvania State University Dickinson School of Law (2004), B.A., Messiah College (2000). Mr. Gilsbach focuses his practice on representing school districts, charter schools and other educational entities in the litigation of special education matters in administrative due process hearings and in federal court.

<sup>1</sup> 20 U.S.C. §§ 1400–1482 (2005).

<sup>2</sup> 20 U.S.C. § 1415(b)(6)(A) (2005); *see also* 34 C.F.R. § 300.507(a)(2006). In addition, a school district or other educational entity may, under certain circumstances, file a request for an impartial due process hearing. *Id.* It is important to note that parents are typically the filing party in a special education due process hearing.

<sup>3</sup> *See* Sasha Pudelski, Rethinking Special Education Due Process: AASA IDEA Re-Authorization Proposals: Part 1 (Apr. 2013)(noting costs, both financial and otherwise, incurred by school districts through due process hearings).

<sup>4</sup> 20 U.S.C. §1415(f)(1)(A) (2005) (emphasis added).

permitting pre-hearing dispositive motions.<sup>5</sup> However, whether due to specific issues raised or a backlog of cases, a trend has emerged among the hearing officers tasked with deciding these cases, to dismiss some of these complaints without a hearing. For the following reasons, this trend should be permitted and expanded in the same way as pre-trial dispositive motions have been in other areas of the law in order to allow for an efficient and cost saving means of addressing cases that do not require a full hearing.

At present, it appears that there are three basic categories for these types of cases: (1) special education due process cases in which it is permissible under the language of the IDEA itself to dismiss a hearing request without a hearing; (2) cases in which hearing officers have, with the approval of the federal courts, dismissed special education due process complaints despite a lack of clear language in the IDEA authorizing such action; and (3) cases in which the dismissal of the complaint without a hearing is deemed impermissible. It should be noted that the last species of case are cases decided wholly on fact-specific scenarios and do not, therefore, establish that a hearing is always required under the IDEA.

## II. DISMISSAL WITHOUT A HEARING IS EXPRESSLY PROVIDED FOR UNDER IDEA IN CERTAIN CIRCUMSTANCES

Although the IDEA is unclear as to whether a hearing must be held in these types of cases, there are several specific provisions in the IDEA that permit a hearing officer to dismiss a case without a hearing. For example, the IDEA explicitly allows for the dismissal of a complaint due to (1) the failure of the parents to participate in the mandatory resolution session, or (2) an insufficient complaint based upon the standards articulated in the IDEA.

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<sup>5</sup> See, e.g., 22 PA. CODE §14.162(f) (2001). It should be noted that there continues to be some dispute as to whether or not state administrative codes apply in these types of hearings, which are typically held by state agencies applying both federal and state law. However, to the extent that they are applicable, state regulations in some jurisdictions raise additional questions as to whether or not a hearing must be held.

*A. Failure to Participate in a Resolution Session as Basis for Dismissal*

The hearing officer is empowered to dismiss the complaint when the child's parents file a due process hearing request but fail or otherwise refuse to participate in a mandatory resolution session with the local school entity and the school does not waive the resolution process.<sup>6</sup> It is unclear if such a dismissal is with or without prejudice, although dismissals of this type are typically done without prejudice.<sup>7</sup> While this mechanism may serve to address passive parents, the procedural hoops that the school district or Local Educational Agency ("LEA")<sup>8</sup> must jump through to have the motion granted makes this option of limited practical use, as the parents may simply file again without forfeiting any claims.<sup>9</sup>

*B. Insufficient Complaint as Basis for Dismissal*

The other provision of the IDEA that permits the dismissal of claims on the basis of an insufficient complaint is of far more value to school districts because it may lead to an outright dismissal of the complaint with prejudice or lead to a more specific pleading by the parents, providing the LEA with more information about the dispute. The provision allows for the hearing officer to dismiss the complaint, order the filing of an amended complaint that provides more details of the allegations against the school district or deny the sufficiency challenge.<sup>10</sup> The IDEA provides that a school district may challenge the sufficiency of the complaint within fifteen days of

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<sup>6</sup> 34 C.F.R. § 300.510(b)(4) (2006); Marinette Sch. Dist., 107 LRP 8221 (Wis. SEA, Feb. 14, 2007); Kansas City Mo. 33 Sch. Dist., 109 LRP 61302 (Mo. SEA, Aug. 4, 2008); Summer City Bd. of Educ., 109 LRP 66470 (N.J. SEA, Apr. 9, 2008); In re: Student with a Disability, 111 LRP 9103 (W.Va. SEA, Dec. 14, 2010). It is important to note that prior to seeking dismissal the school district must make reasonable efforts to get the parents to participate in the resolution session and document those efforts; see also 34 C.F.R. § 300.510(b)(4) (2006).

<sup>7</sup> See Marinette Sch. Dist., 107 LRP 8221; Kansas City Mo. 33 Sch. Dist., 109 LRP 61302; Summer City Bd. of Educ., 109 LRP 66470; In re: Student with a Disability, 111 LRP 9103; Perry A. Zirkel, *Impartial Hearings Under the IDEA: Legal Issues and Answers* (2010).

<sup>8</sup> The IDEA refers to the concept of a Local Educational Agency ("LEA"), which may be a school district, charter school or other educational entity. See 20 U.S.C. § 1401(19)(2005). Throughout this article the term school district will be used, but would include all LEA's.

<sup>9</sup> See 34 C.F.R. § 300.510(b)(4) (2006).

<sup>10</sup> See 34 C.F.R. § 300.508(d)(2006).

receipt of the complaint.<sup>11</sup> While most complaints are deemed sufficient in terms of most of the IDEA's requirements,<sup>12</sup> there is much debate about what is required to be sufficient in identifying the nature of the problem, "including facts related to the problem."<sup>13</sup>

Decisions on this issue have taken differing views as to how this requirement is met. One court has opined that the IDEA's requirements "impose 'minimal pleading standards' on the parties."<sup>14</sup> However, another court has taken the position that the IDEA requires more than a "bare notice pleading."<sup>15</sup> The Third Circuit Court of Appeals has explained, "the purpose of the statute to foster cooperation between the parents and educational agency is served by a development of the factual basis for the dispute prior to the initiation of adversarial proceedings."<sup>16</sup> The court ultimately found that merely alleging the nature of the problem, without including the facts to support the claim, was not sufficient.<sup>17</sup> Moreover, the legislative intent of the sufficiency requirements is "to ensure that the other party, which is generally the school district, will have an awareness and understanding of the issues forming the basis of the complaint."<sup>18</sup>

It is clear under the IDEA that a school district may insist that factual allegations be more specific and, if not specific, the

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<sup>11</sup> 20 U.S.C. § 1415(c)(2) (2005); 34 C.F.R. § 300.508(d) (2006).

<sup>12</sup> The IDEA and its applicable regulations require that the Due Process Complaint include the name of the child, address of residence, a description of the nature of the problem, and a proposed resolution. 20 U.S.C. § 1415(b)(7)(A)(ii) (2005).

<sup>13</sup> 34 C.F.R. § 300.508(b)(5) (2006); *see also* Pottstown Sch. Dist. 110 LRP 68536 (Pa. SEA, Oct. 3, 2010); Cent. York Sch. Dist., 111 LRP 16560 (Pa. SEA, Sept. 25 2010); Norwalk Bd. of Educ. 110 LRP 57855 (Conn. SEA, Sept. 1, 2010); Farmington Bd. of Educ., 110 LRP 32033 (Conn. SEA, May 5, 2010); Norwalk Bd. of Educ., 110 LRP 32037 (Conn. SEA, Apr. 28, 2010); Wallingford-Swarthmore Sch. Dist., 110 LRP 40319 (Pa. SEA, Feb. 20, 2010); Fairfield Bd. of Educ., 109 LRP 68049 (Conn. SEA, Sept. 15, 2009); Hartford Bd. of Educ., 109 LRP 61407 (Conn. SEA, Aug. 24, 2009); Peoria Sch. Dist. 150, 109 LRP 57501 (Ill. SEA, Mar. 24, 2009); Greenwich Bd. of Educ., 111 LRP 17391 (Conn. SEA, Nov. 7, 2009) (explaining insufficient factual pleading of the nature of the problem and the facts to support the same as the basis for most sufficiency challenges).

<sup>14</sup> *Alexandra R. v. Brookline Sch. Dist.*, No. 06-cv-0215-JL, 2009 U.S. Dist. LEXIS 83481, at \*16 (D.N.H. Sept. 10, 2009) (citing *Schaffer v. Weast*, 546 U.S. 49, 54 (2005)).

<sup>15</sup> *M.S.G. v. Lenape Regional High Sch. Dist. Bd. of Educ.*, 306 Fed. Appx. 772, 774 (3d Cir. 2009).

<sup>16</sup> *Id.* at 722 (citing *Schaffer*, 546 U.S. at 53).

<sup>17</sup> *Id.* at 744.

<sup>18</sup> S. Rep. No. 108–85, at 28 (2003).

school may seek to have the complaint dismissed or a court order instructing the parents to file a more specific complaint. Both methods are beneficial to the school district and should be used more regularly as a method of having a case dismissed or obtaining more facts about the filing parties' allegations. Such requests often garner some response from the filing party, which are often beneficial to the responding party, including more factual averments as to the nature of the problem and the supporting facts. Hearing officers will typically allow a filing party to amend its complaint if the original complaint is found to be insufficient, but only within a set period of time.<sup>19</sup> However, at least one federal court has held that a hearing officer's dismissal of the complaint on sufficiency grounds cannot be appealed.<sup>20</sup> Thus, the use of this mechanism can often be fruitful and should be employed more widely as a means to either have a complaint dismissed or to narrow the issues for hearing in order to try and resolve the matter or to expedite the hearing process.

Accordingly, the IDEA, by expressly providing for the dismissal of some due process complaints without a hearing, cannot be read as requiring a hearing in every case, and it is submitted that these tools provided for under the IDEA should be used more frequently by LEAs.

### III. DISMISSAL HAS BEEN PERMITTED IN A VARIETY OF CASES THAT DO NOT FALL WITHIN THE SPECIFIC STATUTORY PROVISIONS, AN AREA THAT SHOULD BE EXPANDED

While many of the cases in which hearing officers have dismissed complaints prior to a hearing appear to involve unique factual situations that would lend themselves to this type of pre-hearing dismissal, it is clear that many hearing officers and federal courts believe such a procedure is permissible under the IDEA. Unlike other areas of the law where discovery is provided for, many cases under the IDEA,

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<sup>19</sup> See, e.g., Pottstown Sch. Dist. 110 LRP 68536 ; Cent. York Sch. Dist., 111 LRP 16560; Norwalk Bd. of Educ. 110 LRP 57855; Farmington Bd. of Educ., 110 LRP 32033; Norwalk Bd. of Educ., 110 LRP 32037; Wallingford-Swarthmore Sch. Dist., 110 LRP 40319; Fairfield Bd. of Educ., 109 LRP 68049; Hartford Bd. of Educ., 109 LRP 61407; Peoria Sch. Dist. 150, 109 LRP 57501; Greenwich Bd. of Educ., 111 LRP 17391.

<sup>20</sup> Knight v. Wash. Sch. Dist., 110 LRP 27769 (E. D. Mo. 2010), affirmed, 56 IDELR 189 (8th Cir. 2010).

for which there is no pre-hearing discovery, can only be dismissed based upon undisputed facts included in the pleadings at the administrative level, with the presumption that even if the alleged facts are true, the claim fails as a matter of law. Such motions often relate to issues such as the jurisdiction of the hearing officer to hear certain types of claims, the lack of standing on the part of one of the parties, or a failure to plead sufficient facts, rather than the substantive issue of whether a student was denied a free and appropriate public education (“FAPE”) which normally must have a hearing to create a factual record. However, as the examples below illustrate, it appears there is a certain level of creativity in these types of motions as the approach has not always been limited to specific factual patterns.

#### A. *Issue Preclusion*

One example of dismissals found to be proper are cases involving claim or issue preclusion. These cases typically involve a review of the two complaints, the one filed in the current matter and the one filed in the prior matter, and are perhaps the simplest to resolve given that they typically involve a review of the prior case to determine if the issues raised in the current case were or could have been raised in the prior one.<sup>21</sup> In the cases of *IDEA Public Charter School v. Belton*, No. 05-467, 2007 U.S. Dist. LEXIS 52042 (D.D.C. Jul. 19, 2007), and *Patricia P. v. Board of Education of Oak Park*, 8 F. Supp. 2d 801 (N.D. Ill. 1998), the hearing officer found that claim preclusion would permit the dismissal of previously raised claims.<sup>22</sup> A review of the claims raised in the two cases revealed, however, that the claims in the two matters were not the same and the claim raised in the second matter was not barred by claim preclusion.<sup>23</sup> In other cases, hearing officers have found that the same claims were essentially being reasserted in the second matter as the first and, therefore, the

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<sup>21</sup> See, e.g., *IDEA Pub. Charter Sch. v. Belton*, No. 05-467, 2007 U.S. Dist. LEXIS 52042 (D.D.C. Jul. 19, 2007); *Patricia P. v. Bd. of Educ. of Oak Park*, 8 F. Supp. 2d 801 (N.D. Ill. 1998); *Indep. Sch. Dist. of Boise*, No. 1, 111 LRP 23776 (Idaho SEA, Feb. 1, 2011); *In re: T.B.*, 111 LRP 6399 S (Pa. SEA, Nov. 11, 2010); *In re: Student with a Disability*, 57 IDELR 179 (N.Y. SEA, July 28, 2011); *Meridian Joint Sch. Dist. No. 2*, 111 LRP 51787 (*Id.* SEA, (July 1, 2011)); *In re: Student with a Disability*, 111 LRP 9103.

<sup>22</sup> *Belton*, 2007 U.S. Dist. LEXIS 52042; *Patricia P.*, 8 F. Supp 2d. at 801.

<sup>23</sup> *Id.*

claims could be dismissed without a hearing.<sup>24</sup> Typically, the hearing officer needs a copy of the complaint and/or decision in the last case, if a different hearing officer handled the review.<sup>25</sup> This type of motion can often be used to dismiss claims in which a party repeatedly files for due process.

### *B. Lack of Jurisdiction*

Complaints have also been dismissed that have been found to be outside the jurisdiction of a hearing officer. Some examples include claims for the enforcement of settlement agreements or claims that center on matters not related to special education. In the area of settlement agreements, jurisdictions are split as to whether or not hearing officers have authority to resolve such claims.<sup>26</sup> Ample authority suggests, however, that complaints predicated on a breach of a settlement agreement should be dismissed prior to the hearing because the hearing officer lacks jurisdiction over the claim.<sup>27</sup> Claims not related to special education are also frequently dismissed, and include, *inter alia*, claims of discrimination due to race, tort claims, and violations of other federal statutes.<sup>28</sup>

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<sup>24</sup> Independent Sch. Dist. of Boise, No. 1, 111 LRP 23776; In re: T.B., 111 LRP 6399; In re: Student with a Disability, 57 IDELR 179; In re: Student with a Disability, 111 LRP 9103.

<sup>25</sup> Independent Sch. Dist. of Boise No. 1, 111 LRP 23776; In re: Student with a Disability, 57 IDELR 179; In re: Student with a Disability, 111 LRP 9103.

<sup>26</sup> Upland Unified Sch. Dist., 111 LRP 13468 (Cal. SEA 2007120214, Feb. 17, 2011) (noting a lack of clarity as to whether a special education hearing officer has authority to resolve disputes regarding the enforcement of a settlement agreement); Wallingford-Swarthmore Sch. Dist., 110 LRP 26499 (Pa. SEA Mar. 14, 2010)(same); Monson Pub. Sch., 110 LRP 49101 (Mass. SEA, (Aug. 23, 2010))(noting differing views on this issue).

<sup>27</sup> *L.M. v. Lower Merion Sch. Dist.*, No. 10-4855, 2011 U.S. Dist. LEXIS 1999 (E.D. Pa. Jan. 7, 2011); *Petersen v. Cal. Special Educ. Hearing Office*, No. C 07-2400 SI, 2008 U.S. Dist. LEXIS 58532 (N.D. Cal. Aug. 1, 2008); *Linda P. v. Hawaii*, No. 05-00585 SOM-KSC, 2006 U.S. Dist. LEXIS 52096 (D. Haw. July 25, 2006); *Monson Pub. Sch.*, 110 LRP 49101; *New Britain Bd. of Educ.*, 110 LRP 57871 (Conn. SEA, Jul. 26, 2010); In re: Student with a Disability, 111 LRP 16554 (Pa. SEA, Jun. 5, 2010).

<sup>28</sup> See, e.g., *Old Rochester Pub. Sch.*, 111 LRP 66082 (Mass. SEA, Oct. 7, 2011) (finding that the hearing officer lacked authority to order district to take specific action with respect to a teacher); *Springfield Pub. Sch.*, 111 LRP 26774 (Mass. SEA, Apr. 12, 2011) (concluding that the hearing officer lacks authority to order that district provide parent with counsel for Due Process Hearing); *Boston Pub. Schs.*, 111 LRP 32124 (Mass. SEA, Apr. 4, 2011) (holding that the hearing officer does not have authority to rule on systematic complaints about school district's special education system); *Irvine Unified Sch. Dist.*, 111 LRP 6893 (Cal. SEA, Jan. 20, 2011) (finding that the hearing officer lacked authority to rule on Section 504 and 1983 claims); *Spring Lake Park Pub. Schs.*, 110 LRP 55042 (Minn. SEA, Jul. 1, 2010) (holding that the hearing officer lacked



This suggests a need for careful review of the complaint to determine if all of the claims raised are special education matters under the IDEA or not and seek dismissal of those claims that are not.

### C. *Improper Party*

Additionally, complaints are often dismissed when one of the parties named is done so incorrectly. This can occur in two different situations: either, (1) the wrong school entity is named in the complaint, or (2) the person claiming to be the parent under the IDEA lacks standing to act as the parent.

The first area in which these claims have been successfully litigated is where the LEA or school district objects to being listed as a party on the basis that it is not the proper defendant in the case. Examples of such cases include instances where a school entity is a contractor for another school and, therefore, should not be a party to the due process hearing.<sup>29</sup> Another example includes students who are in private school by parental choice and thus are not entitled to special education services from the local school district.<sup>30</sup> Other cases involve claims that the IDEA considers improper when filed against certain agencies, including mental health agencies.<sup>31</sup> Motions to dismiss have also been successful when the defendant LEA is undisputedly no longer the district of residence for the student.<sup>32</sup>

Furthermore, such motions have been granted when the parent plaintiffs do not qualify as parents for purposes of the

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authority to rule on discrimination claims, tort claims, and constitutional claims); In re: Student with a Disability, 54 IDELR 240 (Va. SEA, Jan. 23, 2010) (holding the hearing officer lacked authority to rule on claim under McKinney-Vento Homeless Assistance Act); Waynesville R-VI Sch. Dist., (Mo SEA, Mar. 2008) (finding the hearing officer had no authority to rule on school district personnel matters); L.M. v. Lower Merion Sch. Dist., 2011 U.S. Dist. LEXIS 1999 (finding the hearing officer properly refused to hear claim related to racial discrimination); In re: Student with a Disability, 111 LRP 50818 (Va. SEA, May 16, 2011) (finding the hearing officer lacked jurisdiction over state court order related to juvenile proceeding).

<sup>29</sup> Los Angeles Cnty. Office of Educ., 111 LRP 21575 (Cal. SEA, Mar. 16, 2011); Wallingford-Swarthmore Sch. Dist. 110 LRP 40290 (Pa. SEA, Apr. 13, 2010).

<sup>30</sup> Gary S. v. Manchester Sch. Dist., 241 F. Supp. 2d 111 (D.N.H. 2003).

<sup>31</sup> A.W. v. Marlborough Co. and Portland Healthcare, Inc., 25 F. Supp. 2d 27 (D. Conn. 1998).

<sup>32</sup> In re: Student with a Disability, 111 LRP 74582 (N.Y. SEA, Aug. 28, 2010); Fairhaven Pub. Sch & Acushnet Pub. Sch., 110 LRP 43882 (Mass. SEA, Jul. 16, 2010).

IDEA.<sup>33</sup> Oftentimes the parent no longer has standing to act on the student-child's behalf once the student-child turns eighteen.<sup>34</sup> Another example of this is a student who graduates or moves out of the district and who is no longer entitled to a FAPE from the district.<sup>35</sup>

#### D. Demur

There are also cases where demur has been successfully used to get a complaint dismissed where the plaintiff has failed to state a claim upon which relief can be granted. Such an approach, similar to a Rule 12(b)(6)<sup>36</sup> motion in federal court, presumes the facts in the complaint to be true, and allows for the dismissal of the complaint if it fails to state claim on that basis. While this type of approach overlaps, to some extent, with the concept of a sufficiency challenge, it is primarily used to address complaints that allege sufficient facts, but fail to state a viable claim for relief even if those facts are true.<sup>37</sup> This approach of demur has rarely been used in the context of special education complaints at the administrative level. However, this approach should be permitted and has been found to be permissible in at least two decisions.

One such case is the case of *T.S. v. Independent School District No. 54*, where the student at issue graduated from high school and, thus, was no longer entitled to a FAPE.<sup>38</sup> The allegations in the complaint were procedural in nature, namely, the failure to provide notice of the student's graduation or hold an exit meeting.<sup>39</sup> The court explained that, since the only allegations in the complaint were procedural and no harm was alleged to the student, the parents failed to state

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<sup>33</sup> See *Loch v. Edwardsville Sch. Dist. No. 7*, 327 Fed. Appx. 647 (7th Cir. 2009); *Norwalk City Sch. Dist.*, 111 LRP 50530 (Ohio SEA, Jun. 17, 2011); *In re: Student with a Disability*, 111 LRP 50818; *Lincoln Sudbury Pub. Sch.*, 110 LRP 73205 (Mass. SEA, Nov. 29, 2010).

<sup>34</sup> See *Loch*, 327 Fed. Appx. 647; *Norwalk City Sch. Dist.*, 111 LRP 50530; *In re: Student with a Disability*, 111 LRP 50818; *Lincoln Sudbury Pub. Sch.*, 110 LRP 73205.

<sup>35</sup> *T.S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1092 (10th Cir. 2001); *Smith v. Special Sch. Dist., No. 1*, 184 F.3d 764 (8th Cir. 1999).

<sup>36</sup> Fed R. Civ.P. 12(b)(6).

<sup>37</sup> See *T.S.*, 265 F.3d at 1090; *Interboro Sch. Dist.*, 109 LRP 56717 (Pa. SEA, Jun. 9, 2009).

<sup>38</sup> *T.S.*, 265 F.3d at 1092.

<sup>39</sup> *Id.* at 1093.

a claim upon which relief could be granted.<sup>40</sup> The reviewing federal court found that the hearing officer acted properly in rejecting the request for a due process hearing.<sup>41</sup>

Another example of this approach is found in *Interboro School District*<sup>42</sup>, where a parent sought to amend the complaint to add allegations of student-on-student harassment under Section 504.<sup>43</sup> Following an opportunity for a resolution session on the new claim, the school district filed a motion to dismiss. The district stated that even if the alleged facts in the amended complaint and as explained at the resolution session were true, the parents failed to state a valid claim for student-on-student harassment.<sup>44</sup> The hearing officer agreed and dismissed the amended complaint without a hearing.<sup>45</sup>

### *E. Undue Delay*

There are several cases in which hearing officers have dismissed due process hearing requests because the parents have failed to timely pursue the hearing request or have repeatedly delayed the process.<sup>46</sup> In many of these cases, the hearing officer considers the efforts made and the lack of response from the parent.<sup>47</sup> The parents are typically advised that they must take some action in order to move the hearing process forward, including exchanging documents with opposing counsel or appearing at a hearing, but then fail to do so.<sup>48</sup> Hearing officers who have dismissed a complaint on this basis typically do so on the basis that the IDEA anticipates a

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<sup>40</sup> *Id.* at 1095.

<sup>41</sup> *Id.* at 1096.

<sup>42</sup> *Interboro Sch. Dist.*, 109 LRP 56717.

<sup>43</sup> *Id.* at n. 1. It is noted that in Pennsylvania Section 504 claims can be heard by hearing officers who also hear IDEA claims. See 22 PA. CODE § 15.8(d) (1991).

<sup>44</sup> *Interboro Sch. Dist.*, 109 LRP 56717.

<sup>45</sup> *Id.*

<sup>46</sup> See *Madison Metro. Sch. Dist.*, State of Wis. Div. of Hearings and Appeals No. LEA-00-016 (Wis. SEA, 2000); *Philbin v. Bureau of Special Educ. Appeals*, No. 09-cv-30101-FDS, 2010 U.S. Dist. LEXIS 27699 (D. Mass. Jan. 6, 2010); *Albuquerque Pub. Sch.*, N.M. Pub. Educ. Dept. No. DPH 0809-28 (N.H. SEA, Aug. 2009); *Taunton Pub. Sch.*, 111 LRP 18231 (Mass. SEA, Mar. 8, 2011); *In re: Student with a Disability*, 55 IDELR 89 (Va. SEA, Jun. 3, 2010); *Distrist of Columbia*, 111 LRP 18430 (DC SEA, Feb. 2, 2010).

<sup>47</sup> See *Madison Metro. Sch. Dist.*, State of Wis. Div. of Hearings and Appeals No. LEA-00-016 (Wis. SEA, 2000); *In re: Student with a Disability*, 55 IDELR 89.

<sup>48</sup> *Albuquerque Pub. Sch.*, N.M. Public Education Dept. No. DPH 0809-28 (N.H. SEA, Aug. 2009); *Taunton Pub. Schs.*, 111 LRP 18231; *In re: Student with a Disability*, 55 IDELR 89; *District of Columbia*, 111 LRP 18430.

process that will lead to swift resolution of matters.<sup>49</sup> Accordingly, motions can be an effective way to dispose of cases in which parents fail to prosecute their case.

#### *F. Mootness*

Finally, there are several cases that have been dismissed without a hearing where the claims asserted in the complaint have become moot. Dismissal in such instances is typically due to the passage of time or an uncontested change in facts. One common example is where a parent makes a demand in the complaint and the district has unquestionably agreed to the demand.<sup>50</sup> Another common example is where the only relief sought is a change to the current IEP or program. Therefore, when the student graduates from high school, the request is moot.<sup>51</sup> While admittedly dismissal for mootness is less common because most parties will usually voluntarily withdraw under such circumstances, these cases demonstrate that school districts have the ability to seek dismissal of the complaint when an issue become moot, if the parents will not withdraw the complaint voluntarily.

There are a number of cases in which hearing officers have approved the use of pre-hearing motions to dispose of cases under the IDEA. It is submitted that such an approach is permissible under the IDEA and its use should be expanded, especially in the uncommon approach of seeking a demur to the complaint.

#### IV. CASES IN WHICH DISMISSAL HAS BEEN FOUND INAPPROPRIATE HAVE BEEN LIMITED TO THE FACTS OF THE SPECIFIC CASE – NOT ON THE BASIS OF A BROADER FINDING THAT SUCH AN APPROACH IS *PER SE* IMPERMISSIBLE UNDER THE IDEA.

Several courts and hearing officers have noted concerns about the approach of dismissing cases prior to holding a hearing, especially in light of the IDEA's explicit command that

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<sup>49</sup> See *Madison Metro. Sch. Dist., State of Wis. Div. of Hearings and Appeals No. LEA-00-016 (Wis. SEA, 2000)*.

<sup>50</sup> *Worcester Cnty. Pub. Sch., 111 LRP 57189 (Md. SEA, July 7, 2010)*; *Los Angeles Cnty. Office of Educ., 111 LRP 21575*.

<sup>51</sup> *Stamford Bd. of Educ., 111 LRP 5946 (Conn. SEA, Sept. 23, 2010)*.

such hearings should be held.<sup>52</sup> They did not, however, address the permissibility of prehearing dismissals of claims in a general sense. In other words, there is no case law that rejects the idea that of prehearing dismissals wholesale; rather, such decisions found dismissal improper because of the specific facts and circumstances at issue.

“When [a due process] complaint is filed, the IDEA unambiguously states that, ‘the parents involved in such a complaint *shall have an opportunity for an impartial due process hearing, which shall be conducted* by the State educational agency.’”<sup>53</sup> Therefore, the IDEA would appear to provide a right for a hearing.<sup>54</sup> Several courts have expressed grave concerns about practices and procedures, including prehearing dismissal of complaints, which block the ability of the parents to obtain a hearing, although no court has said such an approach violates the IDEA.<sup>55</sup> When opposing an effort to dismiss a case without a hearing, it is often argued, pointing to the cases that express this concern, that such an approach is impermissible under the IDEA. However, a closer view of the cases where dismissal has been found improper reveals that such findings are predicated upon the fact-intensive circumstances of the case and not a general finding that due process hearings must be held in all cases. Accordingly, several courts have reversed findings that have dismissed cases without a hearing because the substantive reasons for dismissal were improper. Notably, the courts remained silent on the broader question of whether the hearing officer was required to have a hearing if the substantive findings of the hearing officer had been correct.<sup>56</sup> For example, in *Cocores v. Portsmouth New Hampshire School District*,<sup>57</sup> the court determined that the hearing officer improperly found that a

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<sup>52</sup> See Zirkel, *supra*, note 7; Hazelton Area Sch. Dist., 102 LRP 1948 (Pa. SEA, Aug. 23, 2001).

<sup>53</sup> Alexander R. v. Brookline Sch. Dist., 2009 U.S. Dist. LEXIS 83481, at \*7 (emphasis added) (quoting 20 U.S.C. §1415(f)(1)).

<sup>54</sup> *Id.*; see also Patsel v. D.C. Bd. of Educ., 522 F. Supp. 535 (D.D.C. 1981); *Philbin*, 2010 U.S. Dist. LEXIS 27699; Hunt v. Bartman, 873 F. Supp. 229 (W.D. Mo. 1994); Hazelton Area Sch. Dist., 102 LRP 1948.

<sup>55</sup> *Id.*

<sup>56</sup> See *Cocores v. Portsmouth, N.H., Sch. Dist.*, 779 F. Supp. 203 (D.N.H. 1991) (finding the hearing officer improperly dismissed claim of student who was over twenty-one for claims she was denied a FAPE before she reached age twenty-one based upon the substantive law, but not upon the basis that a hearing was required).

<sup>57</sup> *Id.*

student over the age of twenty-one did not have standing to bring claims related to the student's education prior to age twenty-one without a hearing. Importantly, the court did not address the issue of whether it is improper to consider such a question without holding a hearing.<sup>58</sup>

Another example is a series of cases, prior to the amendment of the IDEA, in which hearing officers found they did not have the legal authority to award tuition reimbursement and thus denied the request for a hearing. However, a number of courts found that parents could request tuition reimbursement under the IDEA and found such claims should be heard by hearing officers.<sup>59</sup> In other cases, the issues raised in the complaint related to alleged non-compliance with a settlement agreement; the hearing officer ultimately found that it is not in his or her jurisdiction to hear such a claim.<sup>60</sup> Whether a hearing officer has the authority to enforce a settlement agreement is, as of yet, an issue not fully decided by the courts.<sup>61</sup> In several cases, courts have found that the hearing officer was incorrect in determining that he or she did not have the jurisdiction to hear such claims therefore dismissal was improper.<sup>62</sup>

Finally, a number of other cases have found the prehearing dismissal of a complaint improper because the hearing officer based his decision to dismiss on improper legal grounds. In *Lyons v. Lower Merion School District*,<sup>63</sup> the hearing officer dismissed the complaint on the basis that she lacked authority to award an Independent Educational Evaluation at public expense and could not enforce a resolution agreement.<sup>64</sup> However, the court found that the hearing officer made a legal error in her analysis and did in fact have the authority to

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<sup>58</sup> *Id.*

<sup>59</sup> *See, e.g.*, *S-1 v. Spangler*, 832 F.2d 294, 296 (4th Cir. 1987).

<sup>60</sup> *Lyons v. Lower Merion Sch. Dist.*, No. 09-5576, 2010 U.S. Dist. LEXIS 142268, at \*3 (E.D. Pa. Dec. 14, 2010); *I.K. v. School Dist. of Haverford Twp.*, No. 10-4397, 2011 WL 1042311 (E.D. Pa. Mar. 21, 2011); *Steward v. Hillsboro Sch. Dist. No. 1*, No. CV 00-835-AS, 2001 U.S. Dist. LEXIS 9887, at \*4 (D. Or. Mar. 1, 2001).

<sup>61</sup> *Lyons*, 2010 U.S. LEXIS 142268, at \*8; *I.K.*, 2011 WL 1042311; *see also* note 27 above and accompanying text discussing cases where it has been found that hearing officers lack jurisdiction to hear such claims.

<sup>62</sup> *Lyons*, 2010 U.S. LEXIS 142268; *I.K.*, 2011 WL 1042311; *Steward*, 2001 U.S. Dist. LEXIS 9887, at \*11-\*12.

<sup>63</sup> *Lyons*, 2010 U.S. Dist. LEXIS 142268.

<sup>64</sup> *Id.* at \*3.

address both issues.<sup>65</sup> In *Philbin v. Bureau of Special Education Appeals*,<sup>66</sup> the reviewing court found the dismissal of parents' due process complaint for want of prosecution to be improper. The court reached this conclusion because the hearing officer acted improperly in his application of rules related to scheduling created by the state.<sup>67</sup> In *Patsel v. District of Columbia Board. of Education*<sup>68</sup> and *Hunt v. Bartman*,<sup>69</sup> hearing officers in both cases dismissed complaints as not yet ripe, noting that the school district had not finalized the placement decision for the student.<sup>70</sup> However, in both cases, the reviewing court found that the hearing officer's findings were based upon incorrect findings of fact.<sup>71</sup>

In sum, while a number of cases have found that prehearing dismissals of due process complaints were improper, the results of those cases were based upon a legal or factual error of the hearing officer. It was these errors that forced the conclusion of improper dismissal, not that the IDEA mandates a hearing in all cases. To the contrary, there is abundance of case law in which a prehearing dismissal was found to be proper. Moreover, the need for judicial economy undercuts any suggestion that a hearing must be held in every case. This is true even in cases where a hearing officer does not have jurisdiction or the complaint fails to allege facts sufficient to support the claim. While there exist cases in which a hearing was found to be necessary, such findings appear to be limited to the specific facts of those cases rather than some broader rule.

#### V. ANALYSIS AND CONCLUSION: USE OF PRE-HEARING DISPOSITIVE MOTIONS UNDER THE IDEA SHOULD BE EXPANDED

Unless state rules provide otherwise, there appears to be a lot of room for creativity in filing of prehearing motions to dismiss due process complaints in some circumstances. The

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<sup>65</sup> *Id.* at \*7–\*11. It is important to note that the court did directly address the issue of the ability of the hearing officer to rule on the resolution agreement, but rather found the parents did not really ask the hearing officer to enforce the same and instead were seeking due process to obtain an IEE at public expense.

<sup>66</sup> *Philbin*, 2010 U.S. Dist. LEXIS 27699.

<sup>67</sup> *Id.* at \*17.

<sup>68</sup> *Patsel.*, 522 F. Supp. 535.

<sup>69</sup> *Hunt*, 873 F. Supp. 229.

<sup>70</sup> *Hunt*, 873 F. Supp. at 238; *see also Patsel*, 522 F. Supp. at 539.

<sup>71</sup> *Hunt*, 873 F. Supp. at 243; *see also Patsel*, 522 F. Supp. at 539–40.

ability to file such motions depends largely on what the filing party alleges in the complaint, which suggests a need for careful pleading by the filing party. While the IDEA appears to require a hearing, it is clear that under some circumstances it may be possible to avoid one by filing an appropriate motion early in the case. In certain cases, such motions may avoid the expense and effort required by a full hearing or, at the very least, narrowing the issues for the hearing. Prehearing motions could also serve to cut down the length of the hearing, saving time and money.

It is important to note that the number of hearings that hearing officers are being asked to handle is increasing, suggesting a need for a more efficient means of resolving these matters.<sup>72</sup> An increase in the use of the aforementioned procedures of dismissal would be an effective and appropriate means to reduce the number of cases going to hearing early in the process. One approach would be for parties to be more proactive about motions practice in this area of the law, or for states that do not already have such a procedure in place to provide a procedure for dispositive motions through the regulations related to special education due process hearings. Accordingly, the use of pre-hearing motions is permissible under the IDEA and their use should be increased.

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<sup>72</sup> See, e.g., 2010 IDEA PART B INDICATOR ANALYSIS at 171 (Aug. 2010); Special Education Today (Dec. 17, 2010).