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## The Sanctioning Authority of Hearing Officers in Special Education Cases

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# The Sanctioning Authority of Hearing Officers in Special Education Cases

By Salma A. Khaleq\*

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*Under the Individuals with Disabilities Education Act (IDEA or the Act), children with disabilities are entitled to a free, appropriate public education (FAPE). The Act provides a procedural safeguard for children and their parents seeking to challenge a state or local educational agency's educational plan for the child in the form of a due process hearing presided over by a hearing officer or an administrative law judge (ALJ). This article describes the current case law concerning the authority of ALJs to sanction parties and attorneys for misconduct during these special education proceedings. Due to the limited number of cases available on the topic and the lack of analysis in literature, this article seeks to offer perspective on the types of cases in which sanctions were used and against whom the officers issued them, in attempt to provide practitioners and pro se petitioners guidance on how to prevent the issuance of a sanction against them.*

## I. INTRODUCTION

This Article is a descriptive assessment of the current case law concerning the power of hearing officers and administrative law judges (ALJ)<sup>1</sup> to sanction parties and attorneys for misconduct in the context of special education proceedings conducted under the Individuals with Disabilities Education Act (IDEA or the Act).<sup>2</sup> These proceedings are termed “due process hearings” under IDEA.<sup>3</sup> Given the number of cases discussed herein, the variations in state administrative law and procedure, and the fact that many special

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<sup>1</sup> In some states, hearing officers are referred to as administrative law judges (ALJs). For the sake of simplicity, this Article will utilize the term ALJ to refer to both hearing officers and ALJs.

<sup>2</sup> 20 U.S.C. § 1400 (2005).

<sup>3</sup> *Id.* § 1415(f).

education opinions are unpublished, it is difficult to ascertain a trend in the ways in which ALJs have used their discretionary authority. However, understanding the precedents in this area of law can aid in determining one's obligations as a practitioner in the field of special education, as a parent party bringing a claim *pro se*, or as a student of special education law.

The sanctioning authority of judges sitting in federal or state court is unquestionable. However, federal district courts have cast doubt on the authority of ALJs to impose sanctions.<sup>4</sup> Although sitting in a quasi-judicial capacity, ALJs have been delegated specific statutory authorities, whether under state or federal law, which specify the extent to which they may act as "judges" in hearings or proceedings. Few states have explicitly extended sanctioning authority to special education ALJs operating under state law.<sup>5</sup> There is an immense amount of variation from state to state in this regard, and a comprehensive review of the sanctioning authority of state ALJs in general is beyond the scope of this article. Instead, this article focuses on the authority of ALJs in special education. As of the date of this article, the only writing available on the topic is a 2006 article by Professor Perry A. Zirkel on remedial authorities of hearing officers under IDEA, which includes a section on sanctioning powers but offers no conclusions.<sup>6</sup>

This article intends to offer perspective on the factual circumstances surrounding the application of a sanction in special education cases and attempts to delineate certain categories of sanctions employed as well as the parties against whom they have been granted. Part II of this article will discuss the relevant portions of the federal law pertaining to education of individuals with disabilities and the authority of hearing officers under the Act. Parts III through VI will look at the types of sanctions imposed by ALJs, specifically the application of monetary penalties, dismissals of cases

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<sup>4</sup> GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES, AND PREVENTATIVE MEASURES* 130 (Richard G. Johnson ed., 3d ed. 2004) (citing case law from the Fifth, Sixth and Ninth Circuits).

<sup>5</sup> See MICH. ADMIN. CODE r. 340.1725e(1)(e) (1994); CAL. GOV'T. CODE § 11455.30(a) (Deering 2010); 19 TEX. ADMIN. CODE § 89.1170(b) (2001).

<sup>6</sup> Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act*, 58 ADMIN. L. REV. 401, 421-22 (2006).

with or without prejudice, refusal to admit evidence, refusal to allow representation, and contempt sanctions. Part VII will provide an evaluation of the case law, focusing on measures practitioners and *pro se* petitioners can take to prevent the issuance of sanctions against them.

## II. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

Under IDEA, children with disabilities are entitled to a free, appropriate public education (FAPE).<sup>7</sup> State education agencies (SEAs) are charged with ensuring that local education agencies (LEAs or school districts) and other state agencies receiving federal funding for special education through IDEA comply with the Act's statutory requirements.<sup>8</sup> Among those requirements is that an individualized education plan is put in place for each disabled child with the participation of his or her parent(s) or guardian(s).<sup>9</sup> This plan is subject to periodic review and requires parental consent.<sup>10</sup> Numerous procedural safeguards exist to ensure that parents can fully utilize their rights under the Act.<sup>11</sup>

One of these rights is that parents may request a due process hearing when a dispute arises between parents or guardians of an eligible child and the local school district regarding the individualized education plan or other facets of the child's entitlement to a FAPE under the Act.<sup>12</sup> The SEA or LEA must conduct an impartial due process hearing in which each party may be represented by counsel and has the opportunity to present evidence and witnesses on its behalf.<sup>13</sup> IDEA permits each state to create its own hearing procedures and choose the review process. The limits placed on the selection of a hearing officer in the federal statute include that he/she not be an employee of the state or local educational agency, not have a "personal or professional" conflict of interest, possess the requisite knowledge of IDEA and state special

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<sup>7</sup> 20 U.S.C. § 1412(a)(1).

<sup>8</sup> *Id.* § 1412(a)(11).

<sup>9</sup> *Id.* § 1412(a)(4), § 1436(a)(3).

<sup>10</sup> *Id.* § 1436(b), (e).

<sup>11</sup> *Id.* § 1412(a)(6).

<sup>12</sup> 20 U.S.C. § 1415(b)(6).

<sup>13</sup> *Id.* § 1415(f).

education regulations, and possess the ability and know-how to conduct hearings and write decisions in accordance with standard legal practice.<sup>14</sup> Other procedural considerations for these hearings are a matter of state law. For example states can choose either a one-tier review process or a two-tier review process.<sup>15</sup> In a one-tier process there is a single review by an administrative law judge or hearing officer appointed by the SEA, and then any appeal is filed in state or federal court.<sup>16</sup> In a two-tier process, there is an appeals-level review officer or panel provided by the SEA that reviews the lower-tier decisions if they are appealed.<sup>17</sup> These review decisions may be appealed to court.<sup>18</sup> For the purposes of this article, the sanctioning authority of both types of hearing officers is treated in concert.

Like any legal proceeding, the special education hearing process may be subject to abuse by either of the parties involved. Strategic legal maneuvering or neglect by attorneys may lead to waste of time and resources and require disciplinary action. IDEA is silent regarding the sanctioning authority of the individual hearing officers. The United States Department of Education, which administers IDEA, has declared that state law dictates whether hearing officers can issue sanctions and penalties.<sup>19</sup> This article's review of the case law examines state-specific precedents allowing hearing officers to sanction one party or another in special education cases. The sanctions range from monetary fines and fees to dismissal of a case with prejudice or exclusion of evidence.

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<sup>14</sup> *Id.* § 1415(f)(3)(A)(i)-(iv).

<sup>15</sup> NATIONAL DISSEMINATION CENTER FOR CHILDREN WITH DISABILITIES (NICHCY), THE DUE PROCESS HEARING, IN DETAIL, <http://www.nichcy.org/EducateChildren/disputes/pages/hearings-details.aspx> (last visited Jan. 26, 2012); *see also* 20 U.S.C. § 1415(g) (allowing for review of finding by a local education agencies to a state education agency).

<sup>16</sup> *Id.* § 1415(g)(1).

<sup>17</sup> *Id.* § 1415(g)(2).

<sup>18</sup> *Id.* § 1415(i)(2)(A).

<sup>19</sup> Letter to Armstrong, 28 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 303 (OSEP June 11, 1997).

## III. MONETARY PENALTIES AS SANCTIONS

Of the fourteen cases discussed in this article, seven concern the use of monetary penalties. IDEA allows courts to award attorney's fees to the prevailing parent in a hearing and SEAs if the hearing request is frivolous or brought for an improper purpose,<sup>20</sup> but ALJs in the cases discussed here were not exercising this authority. Instead, in each case in which sanctions were imposed, the ALJs took it on themselves to award the school districts payments either as a general penalty for the parents' conduct or as reparation for wasted attorney time.

*A. Sanctions Imposed Against Parents' Representatives*

In a special education decision in Michigan, the parents of a student were ordered to pay the opposing counsel's costs of \$308.86 based on the parents' counsel's "unexcusable failure to communicate with the [School] District's counsel in a timely fashion," and the state hearing officer dismissed their case with prejudice.<sup>21</sup> The parents' counsel attempted to withdraw the due process hearing request two days before the deadline for exchange of witness and exhibit lists, and failed to return calls from the district's counsel the following day requesting clarification regarding the scope of the withdrawal.<sup>22</sup> The school district's counsel had prepared witnesses and exhibits for the hearing by the deadline and provided them to parent's counsel. Counsel for the parents defended his actions by saying he was "busy with other work."<sup>23</sup> In issuing the monetary sanction, the hearing officer relied on the state administrative code giving him the authority "to control the conduct of the parties or participants in the hearing for the purpose of ensuring an orderly procedure"<sup>24</sup> as well

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<sup>20</sup> 20 U.S.C. § 1415(i)(3)(B).

<sup>21</sup> Bd. of Educ. of Hillsdale Cmty. Schs., 32 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 162, 510-11 (Mich. SEA 1999).

<sup>22</sup> *Id.* at 508.

<sup>23</sup> *Id.* at 509.

<sup>24</sup> MICH. ADMIN. CODE r. 340.1725e(1)(e) (1994).

federal guidelines in IDEA which give hearing officers broad authority over the hearing process.<sup>25</sup>

In Indiana, a second-tier review officer upheld a first-tier hearing officer's decision to issue a financial sanction of \$500 payable to the school district for "sham objections" and egregious delays by the petitioner's attorney.<sup>26</sup> Counsel for the petitioners had failed to comply with discovery requests, causing unnecessary delay of discovery proceedings.<sup>27</sup> The first-level hearing officer believed this conduct was an attempt by the lawyer to hide information about the recent hospitalization of the attorney's clients' child.<sup>28</sup> The reviewing officer relied on statutory authority,<sup>29</sup> which allows for imposition of sanctions as well as the Indiana Administrative Procedures Act (IAPA). IAPA states that discretionary decisions by administrative law judges cannot be reversed without a showing that the decision to issue a sanction was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."<sup>30</sup> Based on this standard, the reviewing officer found that the first-tier hearing officer's discretionary imposition of the monetary sanction was reasonable.<sup>31</sup> The reviewing officer clarified that the \$500 sanction was to be paid by counsel and not the petitioners because the attorney in this case was the child's stepfather.<sup>32</sup>

A hearing officer in Minnesota relied on the Indiana decision above and ordered a student's attorney to pay \$2,000 to the school district as a disciplinary sanction for pursuing a summary judgment motion "without factual basis, upon unsupported and distorted facts and upon illogical arguments."<sup>33</sup> The officer reasoned that he

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<sup>25</sup> *Bd. of Educ. of Hillsdale Cmty. Schs.*, 32 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 510 (relying on 20 U.S.C. § 1415(f)).

<sup>26</sup> *Indianapolis Pub. Sch. 21 INDIVIDUALS WITH DISABILITIES EDUC. L. REP.* 423, 426 (Ind. SEA 1994).

<sup>27</sup> *Id.* at 425.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 426 (citing IND. CODE § 4-21.5-3-8 (1991)).

<sup>30</sup> *Indianapolis Pub. Sch. 21 INDIVIDUALS WITH DISABILITIES EDUC. L. REP.* at 426 (citing 511 IND. ADMIN. CODE 7-15-5 (repealed 2000)).

<sup>31</sup> IND. CODE § 4-21.5-3-8 (1991).

<sup>32</sup> *Indianapolis Pub. Sch. 21 INDIVIDUALS WITH DISABILITIES EDUC. L. REP.* at 426.

<sup>33</sup> *Dist. City 1 & Dist. City 2 Pub. Sch.*, 24 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 1081, 1886 (Minn. SEA 1996).



derived his authority to impose sanctions, similar to those imposed pursuant to Rule 11 of the Minnesota Rules of Civil Procedure, from the “implied authority” that hearing officers have “to control the conduct of the hearing and persons appearing there.”<sup>34</sup>

This authority was upheld in another Minnesota case where a hearing officer ordered a parent's attorney to pay \$5,000 as a sanction for filing a frivolous fourth hearing request and to compensate for the school district's costs in defending the action.<sup>35</sup> The hearing officer found that plaintiffs had previously brought three hearing requests on matters that were already under administrative review or had been fully litigated.<sup>36</sup> A second-tier reviewing officer affirmed the dismissal and the award of sanctions but reduced the monetary penalty to \$2,432 because those were the actual costs incurred by the defendant.<sup>37</sup> The case went before a federal magistrate judge, which issued a report and recommendation finding that the reviewing officer had the authority to assess sanctions against the plaintiff.<sup>38</sup> The district court adopted the magistrate judge's report and recommendation upholding the sanction and ruled for the school district.<sup>39</sup> The court cited the state regulation giving hearing officers their sanctioning authority, which also allowed them to “do the additional things necessary to comply” with special education rules.<sup>40</sup>

In an unpublished California appellate decision, *Poway Unified School District v. Stewart*, the court affirmed an order by a hearing officer granting a motion to sanction the parent-party for improper notice of her withdrawal of a request for a hearing.<sup>41</sup> The California Special Education Hearing Office (SEHO) ordered the parent to pay \$3,091.25 in sanctions and costs.<sup>42</sup> On appeal, the Court of Appeals relied on a state statute that authorizes an

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<sup>34</sup> *Dist. City 1 & Dist. City 2 Pub. Sch.*, 24 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 1886.

<sup>35</sup> *Moubry v. Indep. Sch. Dist. No. 696*, No. 98-2246, 32 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 90, 283 (D. Minn. 2000).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 284.

<sup>40</sup> MINN. R. 3525.4100 (2000) (repealed 2004); *Moubry v. Indep. Sch. Dist. No. 696*, 32 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 284.

<sup>41</sup> No. D048901, 2007 WL 1620766, \*1 (Cal. Ct. App., Jun. 6, 2007).

<sup>42</sup> *Id.*

administrative officer to “order a party . . . to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay . . . .”<sup>43</sup> The court dismissed the totality of the parent’s arguments and affirmed the award of sanctions.<sup>44</sup>

Another California case, appealed to federal district court, involved an ALJ’s monetary sanction of the petitioners’ attorneys for filing a motion that was “completely without merit” and in “bad faith.”<sup>45</sup> The attorneys for the student’s parents had filed a Motion for Clarification Regarding the Date of the Hearing after refusing to acknowledge that opposing counsel for the school district had not waived the resolution session<sup>46</sup> since the parties had not executed a written waiver as required by IDEA.<sup>47</sup> Finding that the motion was without merit for having misinterpreted the governing law and neglecting to cite to authority or make good faith arguments, the ALJ awarded sanctions in the amount of \$300.<sup>48</sup> On appeal to the federal district court, the court upheld the award of sanctions as “supported by a preponderance of the evidence” and denied the petitioner’s request to reverse.<sup>49</sup> The court did not expressly discuss the sanctioning authority of the ALJ, but its decision to deny plaintiff’s

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<sup>43</sup> CAL. GOV’T CODE § 11455.30(a) (Deering 2010).

<sup>44</sup> *Poway*, 2007 WL 1620766 at \*2. *See also* *Poway Unified Sch. Dist. v. Stewart*, No. D050202, 2008 WL 607530 (Cal. Ct. App. Mar 06, 2008) (case was subsequently appealed and came before the same court again after a bench warrant was issued due to the parent’s failure to pay the necessary fees. The court again affirmed its previous ruling and dismissed the parent’s appeal).

<sup>45</sup> *K.S. ex rel. P.S. v. Fremont Unified Sch. Dist.*, 545 F. Supp. 2d 995, 1009 (N.D. Cal. 2008).

<sup>46</sup> *See* 20 U.S.C. § 1415(f)(1)(B) (2006) (Requiring that a local education agency convene a meeting between parents and relevant IEP team members before conducting a due process hearing). A resolution session is to be scheduled by the school district within fifteen days of the filing of a due process complaint. At the session, the parents, school district and other individuals familiar with the child’s IEP meet in an effort to resolve the dispute. This is conducted unless both parties agree in writing to waive the session. If the school district fails to resolve the dispute within 30 days of the filing of the complaint, the due process hearing may then take place.

<sup>47</sup> *K.S. ex rel. P.S. v. Fremont Unified Sch. Dist.*, 545 F. Supp. 2d at 1009.

<sup>48</sup> *Id.* at 1001, 1009.

<sup>49</sup> *Id.* at 1010.

request to reverse sanctions implies that it found that the ALJ had the requisite authority to sanction parties in the proceeding.<sup>50</sup>

*B. Rejecting the Imposition of Monetary Sanctions*

Monetary sanctioning authority was rejected in New Mexico where an administrative law judge had ordered parents to make their child available for a medical evaluation, and the parents continued to refuse and delay evaluation.<sup>51</sup> Although the parents eventually complied, the ALJ granted a school district motion for summary judgment and recommended that the district's attorney's fees be paid by the parents as a sanction, even though the hearing officer concluded that hearing officers do not have the authority to award fees.<sup>52</sup>

On review, the administrative appeals officer noted that the IDEA provides the statutory authority for a "court of competent jurisdiction" to award attorney's fees to the prevailing party.<sup>53</sup> Neither federal nor New Mexico laws governing due process hearings give hearing officers or ALJs the authority to award attorney's fees.<sup>54</sup> The appeals officer conceded that some states have allowed this practice, but stated that New Mexico has not chosen to give its administrative officers this power.<sup>55</sup> The officer went on to state that a hearing officer does not even have the authority to make the recommendation that a court award monetary sanctions.<sup>56</sup> Thus, the appeals officer vacated the recommendation as inappropriate.<sup>57</sup> However the officer made a cautionary note for parents who disobey orders issued in the administrative process, stating that the 2004 Amendments to IDEA, although inapplicable to the case at bar,

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<sup>50</sup> The implication is derived from the court's review of the proceedings and the arguments made by the parties, and its ultimate conclusion that sanctions were supported by the evidence.

<sup>51</sup> *Las Cruces Pub. Sch.*, 44 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 205, 1070-71 (N.M. SEA 2005).

<sup>52</sup> *Id.* at 1071.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1072.

<sup>56</sup> *Las Cruces Pub. Sch.*, 44 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 1072.

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

permit courts to award attorney's fees if the parent uses the administrative or court process for any "improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation."<sup>58</sup>

#### IV. DISMISSALS OF PROCEEDINGS AND DISMISSALS WITH PREJUDICE AS SANCTIONS

In four cases surveyed below, the hearing officers dismissed special education proceedings in order to sanction attorneys for filing the same complaint multiple times and for various types of behavior that caused delays, such as refusals to authorize a release of information for a child's records, cooperate in the proceedings, or honor requests for information. Dismissals with prejudice, whereby a future hearing request is disallowed, were also considered in two of these cases.

##### A. *Sanctions Imposed Against Parents' Representatives*

In an examination of sanctioning power, a Texas hearing officer looked at state and federal law to determine whether dismissal of a case with prejudice was within his authority.<sup>59</sup> In this case, the officer found that a parents' counsel engaged in "sanctionable conduct" by filing and dismissing the same special education due process request four times so as to "manipulate the hearing settings and abuse the hearing process."<sup>60</sup> After the third dismissal request, counsel for the parents explained to the hearing officer that the dismissals and re-filings were due to counsel's inability to locate an expert witness for the hearing. The attorney was warned that if there were a fourth instance of re-filing and request for dismissal, sanctions would be imposed.<sup>61</sup> The hearing date was pushed back to allow counsel to locate an expert, but a day before the scheduled hearing the parents' counsel filed another request for dismissal.<sup>62</sup> A hearing

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<sup>58</sup> *Id.* at 1073.

<sup>59</sup> Ingram Indep. Sch. Dist., 43 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 124 (Tex. SEA 2004).

<sup>60</sup> *Id.* at 554.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

on sanctions was held and the hearing officer dismissed the case with prejudice, finding that this would be an appropriate sanction to impose, given counsel's abuse of the system.<sup>63</sup>

In support of this decision, the hearing officer cited a provision of the Texas Administrative Code that granted him the authority to apply sanctions "as necessary to maintain an orderly hearing process."<sup>64</sup> The hearing officer reasoned that since the Administrative Code failed to provide guidance on the nature of the sanctioning authority, the hearing officer could rely on the Texas Rules of Civil Procedure, which the state agency for special education has made applicable to these hearings.<sup>65</sup> The officer stated that Texas Rule 215 makes a wide variety of sanctions available to judges in Texas, such as orders denying further discovery, orders striking pleadings, orders for contempt of court, and orders awarding attorney's fees.<sup>66</sup> The officer turned to case law to find that hearing officers act in a "quasi-judicial capacity", and thus, like courts, they have inherent powers necessary to protect the integrity of the hearing process.<sup>67</sup> However, the officer rejected a hearing officer's authority to issue most of the Rule 215 sanctions in special education proceedings.<sup>68</sup> Instead, the officer concluded that an appropriate and "just" sanction within his authority would be dismissal with prejudice.<sup>69</sup>

In a Michigan case, a hearing officer granted a school district's motion to dismiss the case with prejudice due to the parent's delays and refusal to cooperate in the proceedings.<sup>70</sup> The case involved parties that previously entered into a settlement agreement regarding a child's IEP ("Individualized Education

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<sup>63</sup> *Id.*

<sup>64</sup> *Ingram Indep. Sch. Dist.*, 43 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 555; see 19 TEX. ADMIN. CODE § 89.1170(b) (2001).

<sup>65</sup> *Id.* at 555 (relying on 19 TEX. ADMIN. CODE § 89.1185(d) (2001) for the proposition stated).

<sup>66</sup> *Ingram Indep. Sch. Dist.*, 43 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 555; Tex. R. Civ. P. 215.

<sup>67</sup> *Ingram Indep. Sch. Dist.*, 43 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 555.

<sup>68</sup> *Id.* at 556.

<sup>69</sup> *Id.* at 557.

<sup>70</sup> *Okemos Pub. Schs.*, 29 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 677, 683 (Mich. SEA 1998).

Program”), and the parent requested a due process hearing on issues not included in the settlement.<sup>71</sup> Unrepresented by counsel, the parent refused to participate in pre-hearing conferences, ignored filings or sought extensions at the last minute, and offered no explanations for her failure to make deadlines or retain counsel.<sup>72</sup> The officer looked to federal and state court rules to find instances where dismissals were warranted, but ultimately, relied on a Michigan state regulation,<sup>73</sup> which allows hearing officers broad discretion over the conduct of a special education hearing, as well as on IDEA, to issue the dismissal with prejudice in this case.<sup>74</sup>

In an Ohio state appellate case, the court reviewed a hearing officer’s decision to dismiss, with prejudice, a parents’ claim to review their child’s IEP because they failed to provide their child’s medical and psychological records.<sup>75</sup> Although the Ohio Administrative Code<sup>76</sup> does not include express provisions authorizing a hearing officer to dismiss an action, the appellate court found that an administrative hearing officer “is vested with implied powers similar to those of a court” since the proceeding is “quasi-judicial in nature and consists of a hearing resembling a judicial trial.”<sup>77</sup> However, even though a court would have the authority to dismiss a complaint as a sanction, the appellate court noted that a dismissal with prejudice is an “extremely harsh sanction” and held that lesser sanctions should be used when possible in light of the facts of this case.<sup>78</sup> The court overturned the sanction and remanded the case for further proceedings.<sup>79</sup>

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<sup>71</sup> *Id.* at 677.

<sup>72</sup> *Id.* at 683.

<sup>73</sup> MICH. ADMIN. CODE r. 340.1725e(1)(c) (1994).

<sup>74</sup> *Okemos Pub. Schs.*, 29 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 683 (referring to IDEA provision 20 U.S.C. § 1415(f) (2005)).

<sup>75</sup> *Stancourt v. Worthington City Sch. Dist. Bd. of Educ.*, 841 N.E.2d 812, 816 (Ohio Ct. App. 2005).

<sup>76</sup> OHIO ADMIN. CODE 3301-51-08(F), (H) (2002).

<sup>77</sup> *Stancourt*, 841 N.E.2d at 830.

<sup>78</sup> *Id.* at 830-31 (quoting *Schreiner v. Karson*, 369 N.E.2d 800, 803 (Ohio Ct. App. 1977)).

<sup>79</sup> *Stancourt*, 841 N.E.2d at 831.

*B. Warning Parents' Representatives of Future Sanctions*

In a case from New Hampshire, a hearing officer ordered the parents of a child to execute forms authorizing a release of records about their child.<sup>80</sup> The district had requested the parents to release documents regarding their child, who had been evaluated by a number of professionals and agencies for the purpose of preparation for a due process hearing.<sup>81</sup> The parents refused, claiming privilege, and the district filed a motion to compel pre-hearing discovery.<sup>82</sup> In granting the motion, the hearing officer warned the parents that further refusal to sign the requisite documents would result in a dismissal of their due process hearing.<sup>83</sup> The officer relied on another New Hampshire special education case, *In re Caroline T.*, where the officer had considered dismissing the parents' case for refusing to sign release forms but ultimately declined to do so.<sup>84</sup> Instead the hearing officer in that case issued an order compelling the parents to comply with a district's discovery order, warning that further failure to comply would result in imposition of a sanction.<sup>85</sup>

V. REFUSAL TO ADMIT FACTS OR DOCUMENTS INTO EVIDENCE

Among the most commonly used sanctions in typical court cases is the exclusion of evidence. In the special education context, two cases involved excluding evidence for failure to offer it in a timely manner as required by the procedural rules governing the adjudication under state law. One appellate panel review of the hearing officer's decision concluded that each hearing officer has broad discretion in the conduct of the proceedings, including whether or not to allow in certain evidence.<sup>86</sup>

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<sup>80</sup> Epsom Sch. Dist., 31 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 120, 445 (N.H. SEA 1999).

<sup>81</sup> *Id.* at 444.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 445.

<sup>84</sup> *Id.* at 444; *In re Caroline T.*, 16 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 1340 (N.H. SEA 1990).

<sup>85</sup> *Id.* at 1341.

<sup>86</sup> Wissahickon Sch. Dist., 26 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 1370, 1372 (Penn. SEA 1997).

In a due process hearing in Tennessee, an administrative law judge issued a pre-trial order compelling a school district to disclose certain documents within five business days before the hearing.<sup>87</sup> The district failed to provide the documents in a timely fashion and refused proffer of the parents' documents.<sup>88</sup> In ruling on the parent's request for contempt against the school district, the ALJ stated that pursuant to state statute, he had "no powers to fine or jail anyone" as a sanction for conduct.<sup>89</sup> Instead, the ALJ reasoned that the only remedy that would be available to him in this case would be to refuse to allow the school district to enter any documents into evidence if they were submitted at a later date.<sup>90</sup>

#### VI. ALLOWING PROCEEDING TO CONTINUE WITHOUT REPRESENTATION

One special education case involved the imposition of a rare sanction by a hearing officer, forcing the petitioner to proceed without representation.<sup>91</sup> An appellate review of this decision declared that this was a harsh and unreasonable sanction.<sup>92</sup>

A Maine federal district court review of a special education case resulted in admonishment of a hearing officer for having allowed a due process proceeding to continue without the *pro se* parent party present.<sup>93</sup> The court noted that the parent representative requested multiple continuances during the proceedings on numerous grounds including that the parent had developed a "serious illness."<sup>94</sup> The hearing officer seemed to have assumed that the parent was feigning illness to obtain a continuance for her case, given that the hearing officer contacted her at various times to obtain

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<sup>87</sup> Smith Cnty. Sch. Sys., 27 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 764, 764 (Tenn. SEA 1998).

<sup>88</sup> *Id.* at 775.

<sup>89</sup> *Id.* at 766; TENN. CODE. ANN. § 4-5-301 (1998).

<sup>90</sup> *Smith Cnty. Sch. Sys.*, 27 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 766.

<sup>91</sup> *Millay ex rel YRM v. Surry Sch. Dep't*, 707 F. Supp. 2d 56, 65 n.3 (D. Me. 2010).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*



documentation from her medical doctor.<sup>95</sup> Due to her lack of communication and the belief on the part of the hearing officer that she had failed to provide proof of a medical evaluation for her illness, the officer allowed the proceeding to continue without the parent's presence.<sup>96</sup> Although the parent was later able to provide documentation stating that she had developed acute bronchitis during the time period in question, the hearing officer had already allowed the school district to present its case-in-chief in its entirety without cross-examination.<sup>97</sup> The district court stated that this was in effect a "sanction" which had "turned out to be extreme."<sup>98</sup> The court stated that the hearing officer should have continued the hearing for a few days to determine whether the parent was indeed sick and if not, then "impos[ed] a carefully devised sanction" making sure to sanction the *pro se* parent and not penalize the student.<sup>99</sup>

#### VII. CONTEMPT SANCTIONS FOR FAILURE TO COMPLY WITH DUE PROCESS DECISIONS

In contrast to the cases discussed above which sanctioned misconduct occurring during the proceedings, in the case discussed below, the parents requested the issuance of a sanction to force implementation of a final decision previously rendered against a school district.<sup>100</sup> At the conclusion of a special education proceeding, the decision made by the ALJ is considered final, although the parties can still appeal the decision to a state or federal court.<sup>101</sup> Generally, a party that is aggrieved by the ALJ's decision must exhaust state administrative procedures before bringing a civil action in state or federal court.<sup>102</sup> Although there is no specific provision addressing enforcement of hearing officer decisions in

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<sup>95</sup> *Id.*

<sup>96</sup> *Millay*, 707 F. Supp. 2d at 65 n.3.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 64 n.3.

<sup>100</sup> Long Beach Unified Sch. Dist., 32 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 128, 411 (Cal. 2000).

<sup>101</sup> 20 U.S.C. § 1415(i)(1) (2005).

<sup>102</sup> An aggrieved party in this context is the losing party at the due process hearing. *See Robinson v. Pinderhughes*, 810 F.2d 1270, 1272 (4th Cir. 1987).

IDEA, case law has indicated that parties seeking to compel enforcement of the final decision made by the ALJ may appeal directly to state or federal courts and are not obligated to exhaust remedies.<sup>103</sup> Another way to enforce ALJ decisions is through the state educational agency.<sup>104</sup> In New Jersey, for example, since ALJs do not retain jurisdiction after a final decision is rendered, enforcement of the decision must be accomplished by the state educational agency.<sup>105</sup> The case below was brought by the parents before a hearing officer to compel enforcement through use of contempt proceedings.<sup>106</sup>

In California, a hearing officer denied a request to initiate contempt proceedings against a school district<sup>107</sup> for failure to comply with orders in a previous special education decision to reimburse parents for unilateral placement and services.<sup>108</sup> The hearing officer found that he had the requisite authority, under California regulations, to “initiate contempt sanctions against a person in the superior court in and for the county where the hearing is being conducted.”<sup>109</sup> This may be done in response to disobedience of a lawful order or failure to comply with an order.<sup>110</sup> However, there must be a showing of “bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay” pursuant to California’s Code of Civil Procedure.<sup>111</sup> The hearing officer could

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<sup>103</sup> *Id.* at 1272-73.

<sup>104</sup> See Theodore A. Sussan, *Enforcing Administrative Law Special Education Decisions During the Appeal Process*, 222 N.J. LAW. 52, 53 (June 2003).

<sup>105</sup> *Id.*

<sup>106</sup> *Long Beach Unified Sch. Dist.*, 32 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 410.

<sup>107</sup> As demonstrated by cases outlined in this Article, requests for sanctions against school districts are rare.

<sup>108</sup> *Long Beach Unified Sch. Dist.*, 32 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 410.

<sup>109</sup> *Id.* at 129; see CAL. CODE REGS. 5 § 3088 (a), (c); CAL. GOV’T CODE § 11455.20(a) (West 1997).

<sup>110</sup> *Long Beach Unified Sch. Dist.*, 32 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 410.

<sup>111</sup> *Id.* at 411 (quoting CAL. CIV. PROC. CODE § 128.5 (West 2000)).

not find that such obstructive actions were taken by the district and denied the motion for sanctions.<sup>112</sup>

#### VIII. EVALUATION: AVOIDING SANCTIONS AS A PRACTITIONER IN A SPECIAL EDUCATION PROCEEDING

If the precedents outlined above demonstrate anything, it is that parent attorneys and *pro se* parents bringing due process hearing requests ought to be especially careful of the potential for sanctions ranging from dismissals with prejudice to monetary sanctions or exclusion of evidence. Of the fourteen cases discussed above, twelve involved sanctions against the parent-party and/or their representatives. Although this cannot be viewed as a trend by any means, given the fact that many ALJ decisions are unpublished, it is telling of the type of sanctioning authority granted to ALJs across various states under each state's interpretation of IDEA.

Given the relatively loose structure of the due process hearing in special education under IDEA, ALJs have attempted to utilize state regulations and cases defining sanctioning authority from other states to find ways to curb abuse of the process by attorneys or *pro se* parents. Generally, procedural requirements, such as timing for filings of documents in evidence, appearances before the ALJ, or the filing of the due process request multiple times, are of particular concern to ALJs, as evidenced by the cases discussed in the preceding sections. The cases described in this Article provide overwhelming support for the authority of ALJs to sanction parties in a proceeding. Appellate review of these decisions whether by a second-tier reviewer or a state or federal judge has resulted in upholding the discretionary authority of the lower-level ALJ in nearly all instances.

Legal practitioners ought not mistake the informality of the system set up under IDEA as laxity. They ought to treat the process with the same respect and care as they would a proceeding before a court of law. Given the potential for prejudice to their claims, *pro se* parents and representatives ought to be especially cautious when

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<sup>112</sup> *Long Beach Unified Sch. Dist.*, 32 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 411.

bringing a due process claim.<sup>113</sup> A due process hearing request requires due diligence, effective communication throughout the process, compliance with judicial orders, and cooperation with opposing counsel to prevent the issuance of a sanction against them for procedural misconduct. School district attorneys are most experienced with these types of proceedings and this may be why examples of sanctions against them were less common in the survey of cases made in this Article. However, the two examples provided where the ALJ contemplates disciplinary sanctions against counsel for the school district demonstrate that they too, are not immune.<sup>114</sup>

## IX. CONCLUSION

This description of the sanctioning authority of special education ALJs demonstrates relative uniformity among a number of states in which ALJs have authority to issue disciplinary sanctions. However, there is no agreement as to the type of sanctions within the scope of their authority. Indeed, this Article illustrates the divergence of opinion on the appropriate sanction to be employed by the ALJ. Overall, it serves as a reminder to practitioners representing parents in special education cases and *pro se* parents to treat the process with the utmost diligence, timeliness, and respect so as to avoid potentially damaging consequences for the child seeking to assert rights under IDEA.

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<sup>113</sup> For example, monetary sanctions may impact a parent's ability to afford to continue bringing their claim before a hearing officer.

<sup>114</sup> See *supra* sections V, Refusal to Admit Facts or Documents into Evidence, and VII, Contempt Sanctions for Failure to Comply with Due Process Decisions.

