

**A Split in the Road: Issues, Outcomes, and Remedies Between and Within State Complaint and
Hearing Officer Decisions – A CADRE Webinar
With Dr. Perry Zirkel
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Transcript**

>> Hi, this is Candace at CADRE and we'll get started in just a couple minutes.

Hello everyone, I'm Candace Hawkins, CADRE's policy analysts and with me here today at CADRE I have?

>> Marshall Peters.

>> Kelly Rauscher.

>> Diana Cruz.

>> And Noella Bernal.

>> Welcome everyone to today's webinar A Split in the Road: Issues, Outcomes, and Remedies Between and Within State Complaint and Hearing Officer Decisions, we are delighted you can join us today. This webinar continues a series that began in 2010 and is being presented by Dr. Perry Zirkel. Phone lines have been muted to minimize interruptions. You can enter any questions or comments into the question box, not the chat box on your control panel. The Power Points and handouts for this webinar will be available in the handouts box on your control panel and also on CADRE's website. We are extremely fortunate to have Perry Zirkel with us today. Perry is professor Emeritus of Education and Law at Lehigh University where he formerly was Dean of the College of Education, subsequently held the Iacocca Chair in Education for its five year term and continues to co-direct the Lehigh Special Education Law Symposium. He has a PhD in Educational Administration and a JD from the University of Connecticut and a Master of Law Degree from Yale University. He has written more than 1,475 publications on various aspects of school law with an emphasis on legal issues in special education. In 2013 he received the University Council for Educational Administration's Edwin Bridges award for significant contributions to the preparation and development of school leaders. In 2016 he received the Education Law Association's Stephen S. Goldberg Award for distinguished scholarship in education law, and in 2017 he received the Council for Exceptional Children's Special Education Research Award. Again it is our pleasure and I will turn things over to Perry.

>> Thanks Candace, and welcome everybody and thanks for participating. We have a wonderful group across the country and just to give you some quick idea as to the diversity of state folks, we've got folks like Taren Tagucci and Barb Draden who's from South Carolina, Taren from Hawaii, Heather Riesman in Texas, Kerry Smith right here in our own State of Pennsylvania, Cary Sorenson, Rhode Island, Bridget Brown from New Hampshire, Monica Drvota from Ohio, Jamilla Pollard from Georgia, Paris Taylor from Louisiana, Steve Sparks from Tennessee--lineup including Victoria Glick from DC and old friend Mark

Ward from Kansas and those are just state folks that I've had the pleasure of communicating with in the part. And then we've got various other folks with diverse role groups including for quick examples Lisa Pagano from OSEP, and my old friend Rita Loof from California, and Mitch Yell from the University of South Carolina and Evan Farer from Florida.

So let's get into our materials today. What the information that I'd like to share with you today has to do with the two decisional and pardon the sort of metaphor but I'm referring to them as avenues here. The complaint procedures process at each state which the regulations require, and the more well-known process of impartial hearings that starts the whole adjudicative avenue. now when I say decisional I am not trying to at any way demean, but rather ultimately and indirectly to reinforce the alternate dispute resolution mechanisms that CADRE has been so helpful in stimulating across the country starting with but not ending with mediation and including things like IEP facilitation and various other innovations that try to get folks to resolve things on their own mutually without these two decisional avenues. But ultimately if they don't get resolved otherwise these two avenues get plugged in and we wanted to examine them together since we've got folks who represent both avenues here as well as the folks who are the traffic for these avenues.

On the bottom of this slide by the way I'm plugging real quickly my website not because it's any sort of commercial entity 'cause it's not, but now that I'm retired my daughter has sort of channeled me into doing this so I keep busy and out of her hair, but similarly hopefully get to share some information for some of you so that for example some of the articles that we talk about that you may have difficulty otherwise getting ahold of I've posted there on my website just as long as the publisher's copyright agreement allows me to do so.

With that, let's get into the material. On this next slide you'll see first of all, and I'll use my arrow to point it out, I'll be using the acronyms here for abbreviation pardon me, CP for the complaint procedures. I don't know why it's bouncing back like that but CP for complaint procedures and HO for the hearing office avenues. And when we look at these two avenues you find that there's far more attention both in a scholarly way and in a practical way on the whole hearing office avenue and even in my long career I've only become more clearly aware of the CP avenue in very recent years. The professional literature provides far less attention to CP. Colker for example did a study in Ohio limited to just one year and reported that in 2014, Suchey & Hufner in 1998 did a survey of the various state systems but that obviously although providing some baseline is out of date right now. And up until what we're going to look at I could not find any empirical examination which tried to compare the content and outcome of these two alternative avenues and that's going to be the focus of what we're going to do today. This webinar more specifically shares the results of an empirical analysis that compared these two different alternatives with regard to three sort of variables or characteristics.

The first variable or feature here--and I don't know why it's bouncing like that but the first variable is issue categories which I'll define in a moment but basically it has to do with broad classifications of the kind of specific complaints that people will raise. Then the outcomes would be essentially did the hearing officer or complain investigator find that there had been for example denial of FAPE and thus

ruled in favor of the parent, or found no such denial and such ruled in favor of the district. So the outcomes are essentially a rather rough 1-0 kind of scale.

And then if the outcome was something like denial of FAPE, that is in favor of the parent what would the specific remedies that resulted from HO or CP? In this particular case you will find that rather than trying to get a random sample of the 50 states which I found to be impossible, what I ended up doing is selecting five of the most active states and what you find for those that have looked at this including the Government Accountability Office in a report some years ago, they found that for hearing officer decisions approximately 10 states accounted for 90% of all of the hearing officer decisions.

The concentration is a little less extreme for CP than it is for HO but nevertheless about 20 states account for 90%. When you see the slide bouncing back and forth frankly I have no idea why that's occurring but I'm correcting it each time. I took those five states and I designated them as letters A through E and I must admit some ambivalences as to whether to identify the states by name but in looking through the literature I found that in general one didn't identify these states for various reasons including that some people may be either embarrassed, or over generalized and so at least at this point for purposes of sharing publicly I've designated them merely with letters.

The organization of this webinar you see an overview of right now, or a preview of right now I'll be comparing very briefly these two decisional so-called avenues, showing you quickly the methodology for this little empirical analysis. The third part will share with you the major findings or results and the fifth part which I think will be the juiciest for all of us will be to try to start thinking about what the implications are for policy makers and practitioners.

So now we go into the first part and by the way as Candace had said at the beginning if you have any particular questions, or comments, or corrections if you put them in your chat box Candace will stop and ask those where they fit and we will also stop about halfway through to catch up and do the same at the end.

Now what we're doing here is just taking a look at these avenues that is CP and HO. And first looking at them in terms of similarities and then differences. In one of the references at the very end of the Power Point you will find a published analysis I'd done which is available on my website that really gets into much more detail comparisons between the two. These are just selected features where there are similarities.

First although we often forget about this, but both of them are pretty special to IDEA. And education law more generally if a parent is dissatisfied with their child's program there is no such thing as an impartial hearing with exception of a couple of unusual complaint processes in states like New Jersey. And similarly that would be for the adjudicative avenue and similarly there is no typical investigative avenue that is anything comparable to CP.

So these are the two avenues, the one, HO was established under the statute originally. The CP procedure first starting with the Edgar regulations but more recently in the IDEA regulations is a more recent newcomer but nevertheless an equal alternative at this point legally and required of every state. Both of them are administrative, that is conducted by the state education agency with due independence or impartiality but they're part of an administrative agency process so that for example HO, although adjudicative is pre-judicial and both of them again unlike mediation are decisional. That is ultimately there has to be from that hearing office or investigator a decision one way or the other. Both of them also are complaint initiated where someone actually formally files a complaint to start it off with and both have a fairly tight timeline specified by law by the IDEA for between the periods of filing the complaint until the written decision. And the subject matter of these complaints is very similar between the two, and not only do we have the language in the IDEA regulations with regard to CP but because some states at least had gotten into the informal habit of doing procedure only if you look at the OSEP question and answer document that originally had some out about 10 years ago and then was updated again more recently there's clear guidance, encouragement and if you will direction from OSEP that for example CP, it's supposed to address substantive not just policy issues which makes the jurisdiction very similar between the two sides. And finally with regard to remedial authority again I don't know why this thing is bouncing like this but in any event bottom bullet here is that both of them, the adjudicator or investigator is like the chancellor in England when they started the whole system of equity. That is having the authority to order, that is come up with injunctive relief both retrospectively like compensatory services or monetary reimbursement as well as prospective orders about essentially correcting any violations for the future for this child.

Now when I say this child it sort of introduces one of the differences because one of the differences is that one of the differences and actually I don't even think I have it listed on this slide, but one of the differences is that HO is limited as far as the remedy. HO is limited to the individual child. CP on the other hand is not limited to the individual complainant but can proceed ahead to system-wide investigation and relief. But starting at the top the basic difference is this is an adjudicative system that would somewhat resemble then a court in terms of collection of evidence, and assessment of evidence whereas the other process is purely investigative.

A second difference is that HO starts with filing and again I have no idea why this is doing this and oddly enough we went through a testing process and didn't try this part out. If either Candace or Jen knows--

>> Yeah, Perry, are you using a pointer or are you using your mouse or the arrows to advance the slide?

>> I'm using the arrows to advance the slides and once I'm on a slide the pointer, and somehow while using the pointer it'll just automatically as you saw bounce from one to the next.

>> You might try not using the pointer. Yeah, if we could not use the pointer and see if that remedies the error.

>> Yeah, let's see what that does then. So I've just put the pointer over to one side. Now I'm at the second bullet at the left. For the HO process standing, or the complaining party may only be the parent or the district whereas if you look at the second bullet under CP you have what I called open filing. That is the filing can be done by any individual whether they're the parent or not on behalf of this child, or a group of child. It can be done by an organization. And one sort of open question to me under this open filing is may a district file? and it seems to me that that's not really logical because the whole idea is for compliance so why would a district be filing against itself although I suppose a district could somehow file against another district but in any event you don't find districts using the CP process. You will find them using the HO process and we'll be looking a little bit of that data when we get to the results of this study.

The third bullet down under HO is unfortunately one of the prices to be paid for an adjudicative process as symbolized by appellate courts but still existing although at a much lesser level at the hearing officer side is it can be very burdensome in terms of for example getting an attorney to represent one, or an advocate and if one proceeds pro se, although they may do so, that is without an attorney it can be quite disadvantageous whereas on the CP process if I'm the complainant I filed the complaint and then I step back. I don't have to worry about having an advocate or an attorney except maybe to help we write the complaint, and that's not really essential at all. But once that's done all of the sort of transaction costs and incurred by the state and the district in terms of their investigation and responding to the investigation.

And I don't have to also do those emotionally burdensome kind of things like face off against my child's teacher and to have that person testify against me and/or my child. So in general it's much less of a burden particularly for a parent complainant and most of the complainants on both sides are parents.

The fourth bullet down on the left-hand side talks about the statute of limitations and it's inadvertently quite complicated under the HO system and we only relatively recently have learned or been awakened to that complication by a third circuit case called *GL versus Liboneer* and more recently a nine circuit case called *Obila versus Spokane* which had pointed out that if you look at the language the two-year period under HO is not a look back period, that is you don't take the date of filing of the complaint and just go back two years, but rather you have to determine the so-called KOSHK when the parent if the parent is the complainant knew or should have known of the underlying violation or action that led to this and then you count two years forward from that KOSHK date to determine whether the complaint is timely.

It is much simpler, although shorted for the complaint procedures process, you see the fourth bullet down talking about a one-year rather than a two year period and it's a lookback period. You just go back one year from the date of filing. Unless the state decided that it wanted to have a longer statute of limitations but the IDEA requires one year unless the state extends further.

The last bullet on the left-hand side points out that what I'm calling open again means that the losing party that the hearing officer level skipping for a second the limited number of states that are second

tier states that is that have a review officer. So if we just eliminate that for a minute the losing party at the hearing would go to either state or federal court. Both have concurrent jurisdiction and it's relatively an automatic, easy process and by the way I found over the years that it's become almost 100% at the federal court level rather than folks electing state courts. Whereas the last bullet down which actually now that I look at it the bullet is misplaced in terms of spacing 'cause the bullet should be up where it says no judicial appeal in most states. I'm guestimating that approximately 12 states allow for some form of appeal sometimes to the state agency, sometimes to state court, sometimes to both but it's the exception rather than the rule.

Now how about again previous research? The hearing officer, that is the HO level there are many, many, many, many studies that have looked at the various characteristics of hearing officer rulings that include some of the studies that have come up with this concept, this rules of analysis of issue categories. That is not just looking at the case as a whole, but taking a look at the frequency, and outcomes of groupings of issues in categories--and we'll again get closer and closer to examples of this but an example would be FAPE procedural, FAPE substantive, or FAPE implementation. In other words that the complaint has something to do with FAPE whether the child is receive free, appropriate public education and it may be more of several procedural claims, grouping them all together here for our purposes as an issue category of FAPE procedural even though there may have been 25 sub-categories of that. Or FAPE substantive which the recent Supreme Court decision Andrew F comes up with a refined standard.

Implementation which is an emerging dimension of FAPE where the parent is complaining that the district failed to implement the IEP. What about the outcomes? The outcomes would be basically again as I mentioned in this two part scale the district win, or did the parent win on a case basis and or on an issue category basis? And by the way, some of the previous research has taken outcome scales like this and divided it up into seven, or five, or three different categories. The three for example would be parent prevailed, district prevailed, or a mixed where either it was inconclusive or both sides partially prevailed. And finally remedies.

Well, what about for CP? Which you'll see gets at least within my study more attention because it's historically resolved less attention. and I list for you at the bottom of this slide the few published studies that I've been able to find and at this point I'm gonna jump out of the slides for a minute to just show you come of the CADRE data that's available from a previous webinar done by CADRE and it gives us some overall profile of the frequency of activity that we're talking about. So I'm just for a moment jumping out of this and looking at this slide. Now when you look at this slide you'll find on the CADRE website the collections was more sophisticated than this. IT covered four areas. The first two you see listed here, this first pair and this is CP. State complaints filed, and issued, and I'll come back to that in a minute. A second for what I'm calling HO but here abbreviated as DP or DPC, or the pair having to do with filings and decisions. Now the other two that were on the full slide were mediation which can exist on its own or be in tandem with either CP or HO and finally for HO specifically there were data about the resolution meetings process but I removed the other two so we can focus on this. Now the first point is this overall. Now notice this is roughly a seven or eight year period from 2006-2014. And so those are the multi-colored bars that you find in each set.

And my second point again is filings versus essentially decisions. Now if we just look at filings notice that there are about four times as many filings for DP as there are for CP. This is national data again so it may vary in your particular date but overall again thinking of avenues this is much more traffic than this is. This is a sort of multi-lane federal highway. This doesn't appear to have the same kind of traffic. However when we compare the actual end result of these filings, the decisions, then you find that they're relatively comparable, the number of complaint reports issued pretty closely approximates the overall level of decisions here meaning adjudicated hearings. Now the semantics and nuances vary as well as you'll see for example the longitudinal frequency over time that they don't exactly parallel each other.

For example if you look at these filings, the first two years were high, then it was relatively level. If we look at HO filings you see that the same two years were the highest although one was higher whereas we didn't see that here and then there was a more significant drop-off and then for whatever reason a bounce up and then down but overall there was about an 8% drop for that time period of 12% drop here.

Now if we had more time we could analyses this more thoroughly but my main point is going back to this notion of roads travelled by, or a split in the road this this one is much more travelled by initially but the end result is approximately the same and that will bring us back because you will find that for my little study what we analyzed were this versus this. That is we were not looking at filings although that's certainly a relevant background factor, comparing a random sample of complaint reports versus due process hearings in five very active states that thus had a disproportional percentage of the overall national activity. So that brings us back hopefully to where we were with the slides.

And now we're moving into the particular study that I'm sharing with you the overall results and in the references you will see listed an Impress article that will be coming out within the next few months that will provide much more detailed analysis.

First bullet at the top you see repetition of what I've told you. I selected five states for which CP decisions were readily available and HO decisions were readily available for approximately a five year period. And by the way although I had to go through the Freedom of Information Act for some of these states, they were states that were quite responsive, and helpful in providing for me this random sample of data.

We ended up with 50 CP decisions and 50 HO decisions from each state. Again when you multiply it out it ends up being 500 decision, 250 CP, 250 HO. And the research assistant who worked with me and I laboriously went through and developed a coding protocol where we were able to each take decisions and independently code these cases including issue categories again which I'll be referring to as ICs, and their outcomes that is did it favor the parent, or the district? And we went through a pilot phase that took much longer, it was much more time consuming than I would have thought to develop inter-rater reliability between the assistant and me.

Once we finished with that and it took us almost 100 decisions then he proceeded ahead to code the rest and would contact me and we would code together or double-check together any that he had questions about. The end results was I feel pretty confident that our coding was accurate in terms of what were the issue categories and what were the overall outcomes.

Now again on this slide if you haven't captured again what I'm talking about by issue categories here are some specific examples on a coding protocol that was two pages long. But for example Child Find was one IC and it overlapped but was differentiable from a second IC which you see on the first bullet of eligibility. Then we have the three different broad groupings of FAPE that I had referred to earlier. FAPE procedural, FAPE substantive, and FAPE implementation.

Next, least restrictive environment, next after that was discipline, then as far as the two remedies and by the way these remedies overlap if you will with FAPE. That is in a given case let's say the parent complained that there had been various FAPE procedural violations as well as a FAPE substantive then we would have coded that case as having first FAPE procedural as an IC, then FAPE substantive. Now let's say that either the investigator or the hearing officer concluded that there were no FAPE procedural violations but there was a FAPE substantive violation, then for FAPE procedural there would be no remedy. But for FAPE substantive we would have either tuition reimbursement or compensatory education and we by the way had other remedial categories like prospective and we'll get into that--prospective orders. But my point here is that in effect what would happen is that we would have an under-count of tuition reimbursement or a comp ed to the extent that the parent may have sought that--up in the coding unless there was the pre-requisite denial of FAPE in one or more of the FAPE ICs.

So this is what we're calling the unit of analysis. It is more precise than the overall case but secondarily we looked at the case and you'll see that kind of data. So when we get to outcomes you'll see that primarily we're referring to what are the rulings for each of the IC that is each of these overall issue categories and secondly what are the outcomes if we sort of conflate together those ICs and I'll describe how we did that which was not necessarily the optimal or most sophisticated approach but seemed to be the best under the circumstances, but I'll get to that.

Now here are the results finally. First how many ICs were there per case? For each of the two avenues? and what we found was that it came out to something like 2.1 ICs, in other words the average case whether it was HO or CP, and remember we're only looking not at the initial filing but only those that made it down to that much lower level of the decisions and second remember that we conflate together specific issues within these overall categories but after having done so there was no statistically significant difference between the average number of ICs per case in CP versus HO. If you look however at the second bullet here becomes to me a very significant both statistically as well as practically significant variable. And that is the so-called success rate. Now by success rate I mean again on this outcome scale of winning versus losing that the success rate would be what are the percentage of ICs or cases where the ruling was in favor of the parent and not the district. And so under the first--excuse me, under the second bullet, the first dash again I can't use my pointer here 'cause it somehow seems to

throw things off so I'm under outcomes, under overall ICs. Parents were successful overall across the five states approximately in 1/4 of the ICs, 24% success rate, but double that for the CP process.

The CP avenue half of the ICs were in favor of the parent. Now to me this is quite significant. If I were a parent everything else being equal and they may well especially since if they're not equal it may be easier for me to use CP. I have twice as high odds of winning if we go ultimately to a decision. Of course the if there may become significant here.

Now what about again our secondary unit of analysis is cases. Now here it gets a little trickier. How do you figure out who won the case? Here for simplicity's sake what we did was we said okay, if there were let's say three ICs in this case and the parent won one of them, or two of them, or three of them we considered it a victory for the parent as far as success rate. That is we took the best for plaintiff, or best for parent version to conflate from issue categories to cases.

Now I understand this is not precisely correct and we could get into a discussion back and forth as to what are the various ways of doing this? As a matter of fact if you look at the Skidmore and Zirkel article in the references you'll find that we came up with a more sophisticated process akin to the IDEA definition of prevailing for attorney's fees for a separate study of hearing officer decisions but here in this context it seemed to make more sense given our outcome scale etcetera to use a best for plaintiff conflation process understanding what we did.

The result was, and you may be somewhat surprised at this because it may have seemed to be skewed in favor of giving the benefit of the doubt to the parent, but the success rate for HO when you looked at any one of the ICs that the parent won it only changed the success rate from 24% to 32%. And similarly there wasn't that huge or dramatic a change for CP from 50-66% but again what it's showing is the ratio of wins or success rate is still twice as high even when we look at it for cases. That is 1/3 or 32% at the HO avenue, 66% or approximately 2/3 wins at the CP level.

We have found one sort of odd glitch that I had mentioned briefly before. In the HO process since districts may file we found that districts did file in about 15% of the cases they were the filing party. And we found that the parents 'cause again for the sake of uniformity we're looking at the parent success rate, when the district filed the district won 92% of the ICs. That is the parent only had an 8% success rate. Now when you look at these things you have to understand that most of these ICs which were district initiated had to do with IEEs, that is independent educational evaluations 'cause the regs say if a parent seeks an IEE at public expense the district has two choices only. It either must pay for that IEE or it must file. And so when the districts do file they do relatively well in these IEE cases.

The other quick example which is even more dramatically in favor of districts is when the district seeks to evaluate the child because of Child Find, they have reason to suspect the child may be eligible and the parent refuses consent for that initial evaluation. The regs do not require but allow the district to file for due process to override the parent's lack of consent and here you find the odds strongly favor districts presumably because hearing officers conclude one if there is reason to suspect, if there wasn't why

would the district be doing this? And number two it'll provide more data for both the parent and district to see, and number three ultimately protecting the parent's choice even if the evaluation concludes the child is eligible if the parent doesn't consent to the IEP or revokes consent that's their sort of fallback veto if you will.

But I don't want to overdo the district initiated ICs because they're the relative small, minority of cases and reinforcing my point that it was at least preferable that districts do not file complaints through the CP process at least in our random sample of 250 CP cases. We found none where the district was the initiating party.

So that's the overall comparison in terms of outcomes. How about if we look within these cases at the ICs? My first if you look at the first category here on this slide of these are the high frequency ICs. If you look at HO cases as you may or may not expect you'll find that there is a fairly high percentage of complaints based upon whether the IEP is reasonably calculated to yield appropriate progress. The Andrew F Refinement of *Rowley*, that's the FAPE substantive standard. However for CP even though OSEP has encouraged and essentially required CP to examine substantive issues as well you find a much higher predominance of FAPE procedural cases. Relatively few CADRE substantive rulings at least 'cause again we only count where they've actually addressed the IC not sort of ducked it. And also a fairly high predominance of where the parent is complaining that the district failed to implement fully the IEP.

The reasons why include--I don't want to get into too much interpretation but one of the reasons I find at least and we'll get into this a little bit more later but for FAPE procedural cases although there are exceptions in general we found that most CP decisions used a so-called one step analysis. They just simply said is this a requirement under the law that is federal regulation or state regulation? And if so did the district violate the procedure? That's like 1A and 1B of a single step. That yields a violation.

Whereas for HO based upon the post-*Rowley* lower court cases and the 204 amendments to the IDEA hearing officers are legally obligated to use a two-step analysis which is after finishing the first step if there is a procedural violation then examining whether it resulted in a substantive loss to the child or a loss to the parent in terms of parental participation. As a result then parents do better for CP cases in terms of outcomes and thus as well since outcomes effect frequency more folks will bring procedural claims to that more compliance oriented process.

Similarly for FAPE implementation it just seems to be not only easier but the courts have mandated a more relaxed, district-friendly standard for FAPE implementation whereas the CP investigators not bound by the case law tend to use a more rigorous, more strict almost per se approach for failure to implement which then again increases the outcomes in favor of parents and the gravitational pull towards more cases of that sort.

Moving down to parental success again you find that in CP correlating with what we just said about frequency the outcomes tend to do much better for parents for procedurally oriented ICs and for FAPE implementation ICs.

As far as confirming what some of you just in terms of your experience otherwise know or suspect to tuition reimbursement is a rare, rare bird for CP even though theoretically the regulation reference to monetary reimbursement would allow for that at CP. You don't find it. You do find it a very common remedy at the HO level.

At the bottom of this slide where it says CP you will find that another big difference is that when there is compensatory education not always but predominantly CP investigators tend to delegate the calculation--well actually whether the child is entitled to any and more frequently how much left to the IEP team whereas hearing officers much less frequently do so especially because the DC circuit court of appeals in the Reed case and then the sixth circuit in the LM case following the Reed Standard have reasoned and concluded that hearing officers may not delegate that authority and various lower courts in other jurisdictions have picked up that kind of approach although not as uniformly and as strongly as one might expect but enough so that you find much more dampening effect for delegation for HO than you do for CP.

Now--

>> Terry?

>> And it's time for us to stop anyway for questions so Candace what do we have so far?

>> All right, so far you've kind of addressed it but we have one person who has asked if you can file a state complaint where you're looking for tuition reimbursement as the post remember?

>> Yeah, and that's going back again. In my view it is perfectly permissible because the regulations with regard to CP although relatively skeletal actually provide almost more specificity and strength than for the HO process because the remedial authority of hearing officers is derivative of the courts with the exception of attorney's fees if you conclude that that's a remedy. And all the IDEA says in both the statute and regulations is that a court may provide or order whatever relief it deems appropriate.

But for CP it specifically authorizes the complaint investigation process to yield either compensatory services which is translated to what we have at the bottom of this slide, compensatory education, or monetary reimbursement. And the only conclusion that seems to me one can have as to what monetary reimbursement refers to is not monetary damages 'cause there's a general agreement that monetary damages are not available. So all that leaves is reimbursement. Reimbursement for what? Reimbursement for either special education which could be then tuition, or related services. And what I occasionally would find is reimbursement for some related service like transportation. But in my view the answer to the question is perfectly permissible but if you look at it in terms of practice for various reasons--perhaps because some complaint investigators think they don't have the jurisdiction that might be part of it, it may be that attorneys that advise parents are pushing them towards the hearing officer avenue, and it may be because for a high stakes issue like this we somehow feel that we're gonna take

the adjudicative route. But my view subject to what the rest of you think is that tuition reimbursement like any other reimbursement is an authorized remedy under CP.

Any further questions Candace?

>> Yes, we have another one asking whether or not you did any research or came across any outcomes to when the SEA was referenced in the complaint and was kind of the subject of the complaint.

>> Yeah, that's interesting. First of all I separately recently did an article that's in West Education, Law Reporter and on my website about SEA liability. That is State Education Agency. When I say liability I don't mean money damages necessarily although in some of the cases it is monetary because it's section 1983 but I found a bunch of court cases around the country with varying results as to what extent an SEA may be liable and for what sorts of things beyond direct services. So my first point is that you will certainly see court cases addressing the SEA as a defendant.

For hearing officer cases now the question was about CP but I'm backing into it. For hearing officer cases I found in general that hearing officers is a matter of practice and a limited authority that comes from courts like the 10th circuit case and the Chavez decision seem to suggest that it would be the exception rather than the rule that the SEA would be a defendant in a hearing officer case. Finally getting to the answer of the question, in CP none of the 250 cases that I can recall had the SEA as a defendant. And I don't know if that's because there's some legal barrier to doing that. I hadn't even thought about it. Or that was just our random sample but it would be relatively fair to find the SEs and if you asked me the same thing as tuition reimbursement at least theoretically is it possible to file a complaint against the state itself? I'd have to think about it and probably Mark Ward'll jump in and give us the correct answer 'cause he usually thinks about these things more thoroughly or more carefully than I do. But I don't have a good answer for that except to say that we did not have CP cases where the SEA as compared to the LEA was the defendant. Any others, Candace?

>> We've got them coming fast and furious Perry. One is a clarifying question on the complaint process. In an order for monetary reimbursement could that only be for tuition reimbursement and not for say speech language services that were not provided?

>> Yeah, it would seem to me that monetary reimbursement is generic. And so it could be for a particular related service like speech therapy if it is a related service, or transportation which clearly is a related service 'cause speech therapy can sometimes be special ed. But it also can be for essentially not the tail but the dog, the special education which could be a private school placement. So my view is that monetary reimbursement in this case could be any of the above that one would be able to get reimbursement at a hearing officer level 'cause I've seen hearing officer cases where the reimbursement claim or decision was merely for a related service and/or for private school, and/or for tutoring etcetera. It seems to me that the reference to monetary reimbursement is generic and would include tuition but not be limited to tuition or be based upon tuition alone.

But again if you actually look in practice, if we look at our sample I found one case of the 250 that it was tuition reimbursement and there what it turned out to be was essentially a settlement for tuition reimbursement that the district allegedly breached and so the parent filed for CP to enforce the settlement agreements that they didn't pay tuition reimbursement and this complaint investigator said that's within my jurisdiction and I order you to provide the tuition reimbursement. But that's the sort of indirect way of getting there. So I would think that most of you would find my answer to be either eye opening or provoking some sort of allergic reaction that says no, we don't do that. And unless and until a parent really made an issue of that and because the judicial appeal is difficult in many of your jurisdictions maybe you'll continue to get away with it but if I were for example OSEP doing some sort of accountability compliance review it'd seem to me that your position would be indefensible.

Other questions or comments?

>> So Perry we do have quite a few questions but I know that we're kind of pressed for time so, right.

>> Yeah, let's move ahead and then we'll have more opportunity toward the end.

>> Okay great, thank you.

>> Okay, so the slide where we're at, we're showing you sort of the quantitative data, but in addition as we read each case and coded it we had a comments column on our spreadsheet and we recorded there our observations of some of these cases. And this is a quick summary of observations that we had made. The first bullet here really surprised me and yet when you think about it it's understandable, but I found that in CPs starkly different from HO, you hardly found any citation of court decisions. A few cases, only a few that mention Rowley since they were pre Andrew F, but beyond Rowley the court cases having to do with implementation of FAPE for example, or having to do with LRE etcetera. Just the whole slew of court cases that we constantly train ourselves to stay up to date on in the age old process are almost entirely ignored. And if you again because of time but a couple of quick reasons.

One is that many complaint investigators are not attorneys and so they don't necessarily know or keep abreast of what these court decisions are. Number two, many of these cases the person that's bringing the complaint is the parent operating pro se, doesn't file a brief or anything and thus the court cases are not even put in front of the investigator to be applied and third, there was one DC case--oop, I've just mentioned DC being one of our five but I might as well admit it, but one of the DC cases and I commend DC for doing so actually in explaining why they were reconsidering a decision actually addressed this issue and said that there's no legal authority that requires the CP process to follow the case law because the case law is built on the whole adjudicative avenue. Now that's just a quick discussion of that.

A second bullet down here because of time again, just reinforcing what I said earlier for CADRE procedural ICs and FAPE implementation IC with certain exceptions but in general we found that there was a much more compliance oriented, strict, rigorous analysis that was much more parent friendly for those two categories in the CP processes compared to HO process. Third after doing many hearing

officer trainings it's become almost automatic for me to say don't get engaged in sua sponte meaning on your own extending beyond the complaint. If a parent brings a complaint to HO about a substantive FAPE and you find in the course of the evidence a procedural FAPE it's not up to you to raise that issue if the parent has not raised the issue. Just stay limited to the issues brought before you and the particular complainant, not other kids that somehow come up or the system wide problems, but in clear contrast to that I found that in general complaint investigators found no limitation whatsoever and instead an obligation because of their compliance responsibility for the agency they if they uncovered issues that the parent had not brought but effected this child, or issues involving other children who are similarly situated, or just came up in the case they went after it. And that apparently is not only a prevailing practice but permissible and perhaps required practice. So it's a distinct difference that we noted.

And finally as a tradeoff if I were telling a parent consider which avenue you go down I'd be saying gee in general although there are variations from state to state and issue to issue but in general your odds are twice as good at CP as compared to HO again for decision, not just filings etcetera but for decision. But what you're likely gonna get is gonna be for your child which is usually your interest a less deep, a less satisfying remedy because what I often found in CP cases in the wake of a violation would be things like ordering the district to review its policy. Well that's nice if you're gonna review its policy but I want compensatory ed for my kid. And sometimes it just said review its policy, and revise it as appropriate. Well I want a clear revision to fix this for my kid and other kids. Or to train personnel which is a nice thing. I like that as a remedy but as a parent if I looked at this remedy often it just says train personnel but it doesn't say exactly which personnel, or what's the level of training, or any accountability or quality indicators as to the effectiveness of this training and again remember what we said earlier based upon the questions. Something like tuition reimbursement which to me is a very deep remedy whether we're talking about a deep pocket like how much it's gonna cost this district or the relief that it's giving me as a parent that I had gambled on paying this and seeking reimbursement, that's a deep remedy but as we pointed out you don't find that typically in CP.

So in general again subject to exceptions I found the remedies to tend to be broader for CP, but less deep. This is just again because of time and this gets a little bit difficult here but what we're looking at here is here are the five states listed in the first column A through E and for each state you find two rows. The top row uses the unit of analysis of the ICs like a case that might have FAPE procedural and FAPE substantive it would analyses each separately. The second row for each state says cases where we looked at which was the best outcome for the parent in that case if there were for example two or three ICs. And what you see here first if you look just vertically on the HO column, look at the variants in the success rates.

So for ICs which is under HO the left-hand side of it you see that states C and E had a success rate of 6% or 9% for ICs whereas if you go to D, 44%. So that's quite a bit of difference among the states just in terms of HO success rates. Then the paired column under HO on the right is just the same cases but here using what's the best for plaintiff and you see again a very similar variant.

Now move over to the CP column. And remember, we had said there was a 50% overall percentage success rate for ICs, but if you look within it state E, it's 32% whereas state D it's double that, it's 64%. So my first point is there's a substantial variance among our five states for HO and for CP. Now if you look horizontally or look simply at the P column towards the end is there a statistically significant difference for that state for HO compared to CP? And what you find is there is statistically significant difference at varying levels of .05, .01, or .001 for every state except B. And state B interestingly enough, the success rate for ICs was 44%, hearing officer and CP 44%. So again there's substantial variance within our overall results among the states within HO, within CP and also comparing HO to CP. If we look at the same thing in a more qualitative sense trying to drill down to the IC level here my problem is that there were several ICs that had such a low frequency that I couldn't really compare or count them and that then skews the data. But in general for example if you take a look at the first we're now in table two under FAPE procedural you find that with FAPE procedural CP there were 205 of these ICs and if you look at relative frequency you find that state A and E had in general relatively few FAPE procedural ICs whereas state B had double their percentage. Those two at 14%, state B had 30%.

Now again we're just looking at a sample of this but if we stick with FAPE procedural for CP if you then move across the right and I'm apologizing that I'm not using my cursor because of the cursed problem we have of switching slides, but you'd find that the success rate for FAPE procedural was particularly high in states A, C, and D although the order was D, C, and A in terms of percentage. Again without getting too much into the detail 'cause I want to save some time for questions you find again big interstate and intrastate differences for frequency and outcomes at the IC level not only at the just overall level.

Finally for more qualitative kinds of observations I found some peculiarities again showing you how the states differ. In state A for example unlike the other states here this state used a two-step analysis for FAPE procedural much like HO cases in state A there was much similarity between the two for FAPE procedural. And the other weird thing I found was that their corrective actions apparently were just a polite we're ordering you but they called them recommendations. Even though they were presumably orders and I just found that just sort of odd. By the way in various other states I found in CP recommendations or dicta meaning it's not something I'm ordering but here there were literally recommendations in these other states whereas in Connecticut they were using it seems to me recommendations as just a boilerplate euphemism for orders.

State B, I found here that yes they delegated for CP compensatory ed which was typical of all the states but here what I found interesting is they would delegate to the IEP team but the investigator would say in the decision this child shall receive at least 25 hours of speech therapy as a minimum but the ultimate number beyond that 25 is left to the IEP team. And state D had what I found if I were a parent particularly shallow order it said at the end after finding a violation we order the district to have a memorandum to the effect of staff not to do that again. Now maybe you think that's good, I don't know. It's up to your perception but nevertheless that's the kind of remedy which I typically wouldn't find for HO and didn't find in other states for CP but did come up commonly in state D.

Now those are peculiarities for CP finishing our slides, how about for HO? For whatever reason remember those cases I mentioned of district initiated ICs? Well half of them all were in state A. Again I'm not sure why, if they've become particularly hospitable to that or if it's something to do with the parents bar but there was that sort of state difference. Second one down, states C and D tended to in this case the hearing officer when the parent had a laundry list of let's say FAPE procedural claims the hearing officer would conflate them. In other words when I was doing thee coding, or when my colleague was doing the coding we did the conflation. Or in states C and D the hearing officer conflated them and I found that some hearing officers vary. I happen to be a conflation type. Others say no, I'm gonna analyses and list each one separately. Finally state B had something--there's one last one. State D had an interesting thing. I've always regarded FAPE as a unitary concept. You either provided FAPE or you denied FAPE. In state D I found the hearing officers would not uncommonly say district you provided FAPE, however you didn't provide enough speech therapy, or the goals weren't specific enough or something and ordered a remedy just specific to that limited area whereas otherwise saying there was no denial of FAPE which I found to be unusual but again because of time we go on.

Now these are the kinds of questions that if we really had more time and I would hope as a follow up some of you will consider either on your state levels through the stakeholders or just the people who provide this to consider, and/or through the CADRE list serve perhaps organizing some sort of either practical project or research project. But first question I have as an outside observer, remember when we looked at the FAPE and we found that there were five times as many filings, or four times as many filings for HO? Why is that when the odds are twice as high of the parent prevailing? Second question, are these significant difference, for example 50% success rate versus 24%, or are the two-part tests for FAPE versus the one-part? Or the use of case law for HO and is that sort of difference worth the trade, or put differently should we try to get more harmony between the two approaches? 'Cause if not then I would think a smart parents or complainants will forum shop. They'll go to one place for one kind of case, and another kind of place for another which is maybe all the more effective for them, but for me it just increases the odds of gamesmanship under law rather than dispute resolution and professional collaboration.

And finally why is the interstate variability--now we know that states vary, that's why we have states but this significant that it be 6% in one state and five times as much in another state in terms of success rates? With those questions and the references you see at the end that's pretty much used up my time except for any questions. Those of you who have to leave early do so without guilt and I thank CADRE and the rest of you for participating. For those of you who hang in, what kinds of questions do we have left Candace?

>> Well we have a couple Perry. I don't know if we'll have time to get to them all but one that's kind of related to what you were just talking about was someone asking for you to clarify a little bit about your statement that the complaint process is not bound by case law. If you could elaborate on that, that was earlier on.

>> Yeah, what I'm saying here is let's just take one quick example. Implementation cases. In case law the 9th circuit has what's called the Van Duin approach, the 5th circuit has the Bobby R Approach. They're both Circuit Court of Appeals decisions and various lower courts have adopted either Van Duin, Bobby R, or a blended approach of the two. None of the major courts or case law have adopted a per se, meaning a strict standard, anything beyond the minimalist of the district must make--none of the courts have adopted that per se approach. However if you look at CP cases most CP investigators use the per se approach. That's an example of where CP investigators are not following case law and if I told them you must follow it they could say to me show me authority that requires us to follow case law authority. And I know of none. To me I think it is understandable that what most investigators do is they look at the law they look at are federal regulations, state regulations as being the framework for whether there's a violation or not. Not case law.

>> Thank you. We have one other one asking for some clarity around monetary reimbursement for damages.

>> Again first of all I don't do clarity. I complicate the word, but actually I think here we can get some clarity. The first point is that some folks are translating this notion of monetary talking about money damages and there is general agreement that money damages whether you go to HO, whether you go to CP, or you go to court itself money damages direct payment for pain, suffering, injury, etcetera are not available under the IDEA. That is a limited exception for section 1983 when connected but basically no way money damages. So then what's left? more specifically what is monetary reimbursement, the two-word phrase found in the IDEA regulations as an authorized and it seems to me obligated remedy under CP, what does it mean? Well it doesn't mean money damages them so all it seems to me as a default is it must mean what we often call in HO cases tuition reimbursement and by the way when you look at those or an article I wrote on tuition reimbursement I retitled it Tuition and Related Reimbursement because sometimes in court or through the HO process you get reimbursement for tuition, and related services, sometimes related services alone and sometimes something feels like just sort of tutoring, whatever you regard that and it seems to me that meaning is the same for CP as it is to HO. If you can come up with a better answer I'd love to hear it but thus far it seems to me quite clear that monetary reimbursement for CP means reimbursement for any sorts of services that the parent has incurred on their own when the district should have done so under its own CADRE obligation.

Finally by the way 'cause apparently there's some question through the list serve before, some people say could monetary reimbursement be referring to compensatory services? My quick answer to that is no, the regs actually say compensatory services and monetary reimbursement so they're two different things yet a given parent could receive both or--and we see this in some of the court and HO cases--some sort of escrow or trust fund which essentially is reimbursing the parent that comes out as compensatory ed. But basically to keep it clean and clear to me, monetary reimbursement in the CP context means reimbursement of parent outlays when the district had the obligation to do so regardless of the form of service the parent made an outlay for including at the most extreme a residential placement out of state.

With that, is it time for us to pardon the expression Candace, but duck out?

>> I believe it is, Dr. Zirkel. Thank you so much for joining us today. We've done our best to answer what can be some pretty complicated questions or I should say Dr. Zirkel has done his best to answer some complicated questions and his answers are those of his alone and not IDEA's but we are so appreciative of your expertise and the webinar that you've done for us today. Feel free to contact us with your questions or comments. Please click on the link in the chat box. Fill out a very brief survey monkey to evaluate the webinar and we greatly appreciate you taking just a few minutes to do this.

Our next webinar will be presented by Greg Abel and he will present some of the work he's doing around trust. More information around the webinar will soon be available on CADRE's website and we look forward to you joining us, thank you.