Questionable Initiation of Both Decisional Dispute Resolution Processes under the IDEA: Proposed Regulatory Interpretations

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Consider this illustrative case scenario, which has two alternative variations, labelled situation A and situation B. A parent of a child with a disability filed a complaint with the state education agency's complaint procedures (CP) system, alleging (a) various procedural violations in the development of the child's current IEP and (b) incomplete implementation of the IEP.

Situation A: The school district quickly responds to the parents' CP filing by initiating a due process hearing (DPH) on the same issues.

Situation B: The district does not file for a DPH until after the CP investigation and decision, which found that (a) the school district had violated several procedural requirements of the IDEA and corollary state regulations and (b) failed to implement the full scope of the IEP. The CP decision's corrective action order included (a) revision of the district's pertinent policies and related training for district personnel and (b) compensatory services to the child. The state, like the majority of other states, does not provide for judicial appeals of its complaint procedure decisions. The school district promptly filed for a DPH on the same issues, claiming that the procedural violations did not result in substantive loss to the student or the parents; it had implemented the IEP substantially, which was the clearly established judicial level in this jurisdiction; and the two respective remedial orders were ultra vires in light of the school board's exclusive prerogative for hiring and training

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personnel and the delegation to the IEP team to determine the amount of compensatory education.

For situation A, should the state education agency set aside the CP investigation and defer to the DPH decision? For situation B, if the DPH decision is in accord with the district's arguments, does it supersede the CP decision?

The Individuals with Disabilities Education Act (IDEA)[1] is the central federal law for special education.[2] The IDEA provides two parallel decisional[3] dispute resolution mechanisms: (1) an adjudicative avenue that starts with a DPH at the administrative level[4] and (2) an investigative avenue that state education agencies often refer to under the generic designation, "CP."[5] The next two parts of this Article provide (1) a background framework of the DPH and CP decisional avenues of the IDEA and (2) a proposed resolution of situations A and B of the opening case scenario.

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1. 20 U.S.C. §§ 1400–19 (2018). For the extensive regulations pursuant to the Act, see 34 C.F.R. §§ 300.1–300.718 (2019).

2. In addition to corollary state special education laws, the applicable framework supplementally includes an interrelated pair of federal civil rights laws, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA), which are far less detailed with regard to the P–12 context and which do not provide any funding. *E.g.*, Perry A. Zirkel, *An Updated Comprehensive Comparison of the IDEA and Section 504/ADA*, 342 EDUC. L. REP. 886 (2017).

3. The IDEA also amply provides for mediation, and some state laws provide alternative dispute resolution mechanisms, but these other avenues do not fit under this "decisional" designation.

4. For the various state systems for this DPH avenue, which includes a second, review officer level in a small minority of states, see Jennifer F. Connolly et al., *State Due Process Hearing Systems Under the IDEA: An Update*, 30 J. DISABILITY POL'Y STUD. 156 (2019). For the applicable state laws, see Perry A. Zirkel, *State Laws for Due Process Hearings Under the Individuals with Disabilities Education Act*, 38 J. NAT'L ASS'N ADMIN. L. JUDICIARY 3 (2018). For a synthesis of the IDEA regulations, agency interpretations, and court decisions concerning DPHs, see Perry A. Zirkel, *Impartial Hearings Under the IDEA: Legal Issues and Answers*, 38 J. NAT'L ASS'N ADMIN. L. JUDICIARY 33 (2018).

5. For the various state systems for CP, see Kirstin Hansen & Perry A. Zirkel, *Complaint Procedure Systems under the IDEA: A State-by-State Survey*, 31 J. SPECIAL EDUC. LEADERSHIP 108 (2018). For the applicable state laws, see Perry A. Zirkel, *State Laws and Guidance for Complaint Procedures under the Individuals with Disabilities Education Act*, 368 EDUC. L. REP. 24 (2019) [hereinafter Zirkel, *State Laws and Guidance*]. For a synthesis of the IDEA regulations, agency interpretations, and court decisions concerning CP, see Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process: An Update*, 313 EDUC. L. REP. 1 (2015).

I. BACKGROUND FRAMEWORK

The IDEA's DPH and CP avenues have some commonalities, but the overriding differences include the significant distinction between adjudicative and investigative processes.[6] This distinction includes not only the means for fact-finding but also, in the IDEA context,[7] the sources for legal conclusions.[8] As a result, the overall outcomes differ significantly between these two decisional processes, with the parents' success rate notably higher for CP than for DPH.[9] Moreover, the CP avenue may be the preferred choice for some parents because attorney representation is not particularly or extensively needed, this alternative is less lengthy for a final decision, and this alternative is far less emotionally and economically draining than the adversarial nature of DPH.[10]

An overlapping framework distinction is that the DPH is the main avenue to the extent that it is part of the legislative structure of the IDEA.[11] The parallel CP avenue emerged and evolved in the related

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6. For a comprehensive and systematic canvassing of the commonalities and differences, see Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes: Complaint Resolution and Impartial Hearings*, 326 EDUC. L. REP. 1 (2016). For an overall two-dimensional comparison, Mayes characterized CP as low control and high finality and DPH as high control and low finality. Thomas A. Mayes, *A Brief Model for Explaining Dispute Resolution Options in Special Education*, 34 OHIO ST. J. DISP. RESOL. 153, 159–61 (2019).

7. *E.g.*, 20 U.S.C. § 1415(f)(3)(E) (2018); 34 C.F.R. § 300.513(a)(2) (2019) (prescribing a two-step test for procedural denial of free appropriate public education (FAPE) for hearing officers, without any accompanying restriction on procedural FAPE conclusions of complaint investigators).

8. Most complaint investigators based their legal conclusions on the IDEA and any related state regulations, without reliance on or even citation to IDEA court decisions. *E.g.* Perry A. Zirkel, *The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169, 189 (2017).

9. *Id*. at 179.

10. *E.g.*, I.L. v. Knox Cty. Bd. of Educ., 257 F. Supp. 3d 946, 960 (E.D. Tenn. 2017) ("Due-process hearings are costlier and more time-consuming than the complaint-resolution process."); Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B), 61 IDELR ¶ 232 (OSEP 2013) (CP has "provided a very effective and efficient means of resolving disputes between parents and public agencies, without the need to resort to more formal, adversarial, and costly due process proceedings.").

11. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975). For the historical background, including the seminal role of *Mills v. Board of Education*, 348 F. Supp. 866, 878–83 (D.D.C. 1972) (ordering a systemic remedy that includes as a central

regulations[12] and, in contrast to DPH, is an integral part of the compliance-oriented general supervision and enforcement obligation of state education agencies.[13]

II. INTERRELATIONSHIP ISSUES

The IDEA's regulatory framework for CP[14] includes provisions for a complicated and still-evolving interrelationship with the DPH mechanism.[15] One of these provisions provides for deferral as follows:

> If a written complaint is received that is also the subject of a [DPH] . . . , or contains multiple issues of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in [DPH] until the conclusion of the hearing. However, any issue in the

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feature a prescribed administrative hearing) and *Pennsylvania Association for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 302–06 (E.D. Pa. 1972) (approving a consent agreement that incorporates a "due process hearing" as a central requirement), see, for example, David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 L. & CONTEMP. PROBS. 63, 68–74 (1983).

12. For this historical development, see, for example, Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B), *supra* note 10, at B-1; Nicole Suchey & Dixie Snow Huefner, *The State Complaint Procedure under the Individuals with Disabilities Education Act*, 64 EXCEPTIONAL CHILD. 529, 530–31 (1998) (tracing inclusion in the original 1978 regulations, the transfer to the new Education Department's general regulations, and the reincorporation in the 1992 IDEA regulations). As a result, unlike its provisions for DPH, the current IDEA legislation only addresses CP to a relatively limited extent. *See* 20 U.S.C. § 1411(e)(2)(B)(i) (2018) (authorizing use of IDEA funds for CP); 20 U.S.C. § 1412(a)(10)(A)(v), (a)(14)(E) (2018) (providing exclusive jurisdiction for CP for particular disputes, such as private school consultation complaints); 20 U.S.C. § 1415(f)(3)(F) (2018) (clarifying that the right to a DPH does not preclude parent from accessing CP).

13. *E.g.,* Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,694 (Aug. 14, 2006) ("We view the State complaint procedures as a very important tool in a State's exercise of its general supervision responsibilities, consistent with sections 612(a)(11) and 616(a) of the Act, to monitor [school district] implementation of the requirements . . . of the Act."); Letter to Copenhaver, 53 IDELR ¶ 165 (OSEP 2008) ("The [mandatory] legal authority for an SEA to require its LEAs to correct individual noncompliance is the same as the legal authority for an SEA to require its LEAs to correct systemic noncompliance—its general supervisory responsibility over all educational programs for children with disabilities administered within the State.").

14. 34 C.F.R. §§ 300.151–300.153 (2019).

15. *E.g., id.* § 300.152(c)(2) (providing that a DPH decision is binding on CP "[i]f an issue raised in a [CP] . . . has been previously decided in a [DPH] involving the same parties"); *id.* § 300.152(c)(3) (providing enforcement of a DPH decision inferably via CP).

> complaint that is not a part of the [DPH] action must be resolved using [CP].[16]

Conversely, whereas the IDEA's DPH mechanism provides for judicial appeal,[17] the minimum requirements under the IDEA are silent as to any avenue of appeal for CP decisions,[18] leaving the matter to state law.[19]

In recent years, two issues have arisen based on school districts' tactics to respond to parental choice of the CP avenue by initiating the DPH process. One tactic, corresponding to situation A, is for the district to file for DPH soon after the parent files for CP, thus well before completion of this investigative process. The other tactic, corresponding to situation B, is for the district to file for DPH upon issuance of a CP decision that includes one or more findings for corrective action.

Re-stating these two situations in the form of questions, this article provides for each one the prior interpretation of OSEP, the aforementioned[20] administering agency within the U.S. Department of

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16. *Id.* § 300.152(c)(1).

17. 20 U.S.C. § 1415(i) (2018); 34 C.F.R. § 300.516 (2019). Moreover, per the exhaustion doctrine, resorting to a DPH is often a prerequisite to judicial action under the IDEA. *E.g.*, Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the Individuals with Disabilities Education Act*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 349 (2009). For the standard applicable to overlapping and purportedly non-IDEA claims, see *Fry ex. rel. E.F. v. Napoleon Community Schools*, 137 S. Ct. 743 (2017).

18. The option of appeal to the IDEA's administrative agency, the U.S. Office of Special Education Programs (OSEP) is not available. Letter to Anonymous, 40 IDELR ¶ 262 (OSEP 2003). This alternative disappeared as of the 1999 IDEA regulations. Assistance to States for the Education of Children with Disabilities and the Early Intervention Program For Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,406, 12,646 (Mar. 12, 1999) (explaining that "Secretarial review has not been an efficient use of the Department's resources").

19. Assistance to the States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,607 (Aug. 14, 2006) ("We have chosen to be silent in the regulations about whether a State [CP] may be appealed because we believe States are in the best position to determine what, if any, appeals process is necessary to meet each State's needs, consistent with State law."); *see also* Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B), *supra* note 10, at B-34 (OSEP 2013) ("The regulations do not require a State to establish a procedure to replace Secretarial review."). The choice of not providing for appeal, except for enforcement sanctions such as withholding of funds per the model of the corresponding complaint procedure of the U.S. Department of Education's Office for Civil Rights, is high finality per Mayes, *supra* note 6, at 160–61. For the limited minority of states that have established an appeal procedure, see *infra* note 45.

20. Letter to Anonymous, *supra* note 18.

Education, and proposes an alternative interpretation that is better and more clearly aligned with the purpose and structure of the IDEA.

Question 1: Does the deferral provision[21] apply when a district's response to an ongoing parent-initiated CP is to file for a DPH on the same issue(s)?

This tactic "games" the system by subverting the parent's choice of forum to the one in which the district, which generally enjoys a power imbalance in terms of resources and expertise,[22] has a distinct advantage in both the applicable rules but also the likely outcome of the game.[23]

This tactic was frequent and flagrant enough to stimulate a Dear Colleague Letter (DCL)[24] in which OSEP recognized that both the reason[25] and effect[26] were, at least "in some instances," contrary to the

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21. *Supra* note 16 and accompanying text.

22. *E.g.*, Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 449–60 (2012) (identifying resource disparities in terms of access to attorneys and insurance as well as asymmetries in expertise); Tracy G. Mueller, *Litigation and Special Education: The Past, Present, and Future Direction for Resolving Conflicts Between Parents and School Districts*, 26 J. DISABILITY POL'Y STUD. 135, 136–37 (2015) (acknowledging the power imbalance between parents and districts). This differential is further accentuated in terms of economic disparities and cultural propensities among parents. *E.g.*, Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 178–179 (2005) (discussing significant differences in resources and information between wealthy and poor families); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1443–48 (2011) (describing four types of transaction costs, including but not limited to access to specialized attorneys, that are subject to imbalance not only between parents and districts but also between poor and rich parents); Claire Raj & Emily Suski, *Endrew F.'s Unintended Consequences*, 46 J.L. & EDUC. 499, 503 (2017) (identifying disparities in terms of "information asymmetries, leverage inadequacies, and transaction costs").

23. *Supra* notes 8–10 and accompanying text.

24. Dear Colleague Letter, 65 IDELR ¶ 151 (OSEP 2019).

25. *Id.* at *1 ("ostensibly to delay the State complaint process and force parents to participate in, or ignore at considerable risk, due process complaints and hearings"); *see also id.* at *3 ("In some instances, [districts] may have filed due process complaints against parents to prevent the state [CP] from moving forward.").

26. *Id.* at *3 ("This type of action by a public agency increases the costs of dispute resolution for both parties and lengthens the time period for dispute resolution, including the time for resolving the State complaint. Furthermore, it may unreasonably limit parents' dispute resolution options, and force parents either to participate in a potentially more adversarial, lengthy, and costly due process complaint and hearing, or to fail to participate in the due process complaint

spirit of the IDEA.[27] However, rather than interpreting the deferral provision as inapplicable, OSEP "strongly encourage[d]" districts to respect parents' choice of the CP alternative.[28] In doing so, OSEP's interpretation effectively allowed the district's filing of a DPH to trump the parent's choice of forum.[29]

Instead, the obvious purpose of the deferral provision is to honor the parent's choice of forum, with the limited exception of a parent initiating CP after either party has already set a DPH in ongoing motion.[30] The structural basis for this qualified conclusion is that the parent is the only party with the right to initiate either CP[31] or DPH,[32] while the district has the concurrent but limited right only to initiate DPH.[33]

Although the language of the deferral provision is not optimal, timing is the critical factor for squaring with this interpretation. More

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and hearing and thereby risk the hearing official's ruling in favor of the public agency. Indeed, some parents may have opted to file a State complaint rather than a due process complaint precisely because of the time, expense, and complexity associated with the [DPH alternative].").

27. *Id.* at *4 (This tactic "harm[s] the 'cooperative process' that should be the goal of all stakeholders . . . . [and] divert[s] resources into adversarial processes . . . contrary to Congressional intent in the 2004 amendments to IDEA's dispute resolution procedures to give parents and schools expanded opportunities to resolve their disagreements in positive and constructive ways." (citation omitted)).

28. *Id.*

29. *Id.* (A district's filing for a DPH "while a parent's State complaint resolution is ongoing could result in preventing the parent, who may not have the resources to participate in a due process hearing, from exercising his or her right to engage in dispute resolution through the State complaint process.").

30. The structurally inferable dual intent for the exception is to prevent the parent from (a) precluding the district's equal choice for DPH and (b) double-dipping via the asymmetry of an equal option for DPH followed by an exclusive choice for CP.

31. Under CP, the complainant may be "any individual or organization," but the defendant, or target of the complaint, is limited to a "public agency." 34 C.F.R. § 300.153(a)–(b)(1) (2019). Thus, a parent may file a complaint against the district, but the district may not file a complaint against the parent.

32. The complainants under DPH may be either the parent or a public agency. 34 C.F.R. § 300.507(a)(1) (2019). In one of the only statutory references to CP, the IDEA recognizes the parent's exclusive dual right. 20 U.S.C. § 1415(f)(3)(F) (2018) (**"**Nothing in [IDEA provision for DPH] shall be construed to affect the right of a parent to file a complaint with the State educational agency.").

33. This district as a "public agency" fits within the most limited scope of filing parties for DPH. 34 C.F.R. § 300.507(a)(1).

specifically, the prerequisite part of this "if/then"[34] provision refers to filing a complaint under CP "that is also [i.e., already] the subject of a [DPH]."[35] Without any inference of timing, or sequence, of party actions, this language would mean that any CP filing that is within the subject matter jurisdiction of DPH, which is almost the same,[36] would be set aside—an obviously absurd result. Instead, the language fits with the purpose of the deferral, or set-aside provision, if it is limited to the parent initiating DPH for issues that are within an ongoing CP.[37]

Under this interpretation, if the district resorts to the tactic of initiating a DPH for an ongoing CP, the deferral provision would not apply. Absent a settlement between the parties, each of these parallel mechanisms would proceed to its own conclusion, within its own distinctive scope[38] and standards.[39] Neither decision would be binding on the other mechanism due to their ongoing overlap.

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34. The "then" provision is similarly problematic in terms of clarity. The language "set aside . . . until the conclusion of the hearing" does not necessarily mean deferral. It could equally mean that the CP process would be postponed to continue upon the issuance of the DPH decision, except for the stretched interpretation of the sequence for the preclusive effect of DPH. *See supra* note 15.

35. *Supra* note 16 and accompanying text.

36. *Compare* 34 C.F.R. § 300.153(b) (any requirement(s) of Part B of the IDEA or its regulations), *with* 34 C.F.R. § 300.507(a)(1) (identification, evaluation, placement, or FAPE). The exceptions are very limited. Zirkel, *supra* note 6, at 5 nn.20–25.

37. *Supra* note 30 and accompanying text.

38. The differences in scope are both in length and width. For length, the differences include: (a) the limitations period for filing is generally a one-year look back period for CP but a more open-ended period for DPH, Zirkel, *supra* note 6, at 6 nn.28–30; (b) the period from filing to decision is sixty days with limited exception for CP but seventy-five days with more open-ended exceptions for DPH, *id.* at 7 nn.39–43; and (c) the period for remedial action is a one-year limit for CP but not for DPH, *see* 34 C.F.R. § 300.600(e) (2019); Letter to Zirkel, 68 IDELR ¶ 142 (OSEP 2016). For width, the more subtle but significant difference is that DPH is generally limited to the issues raised in the complaint, 20 U.S.C. § 1415(f)(3)(B), whereas CP, as part of the SEA's general supervisory responsibility, extends to additional violations arising during the investigation. Letter to Anonymous, 40 IDELR ¶ 262 (OSEP 2003); U.S. Dept. of Educ., Office of Special Educ. & Rehab. Servs., Letter to Individual (June 26, 2003), at 5–6. https://www2.ed.gov/policy/speced/guid/idea/letters/2003-2/redact062603assess2q2003.pdf. Similarly, the remedial scope of CP is broader than that of DPH. *E.g.*, Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B), *supra* note 10, at B-9, B-10.

39. Among the differences in standards are the structurally distinctive means of finding facts and reaching legal conclusions. *Supra* text accompanying notes 6–8.

Question 2: If a district (or parent) files for a DPH after completion of CP on the same issue(s), does the resulting DPH decision supersede the CP decision?[40]

Although parents occasionally seek to overturn unfavorable CP decisions by resorting to DPH for the same issue(s),[41] districts engage in this practice more frequently due to their aforementioned[42] advantages in the adjudicative arena.[43] Inasmuch as the IDEA does not provide for appeals of CP decisions[44] and the majority of states have not added this right to CP,[45] it is questionable whether DPH is generally available as an appellate mechanism for a CP decision.

OSEP's position appears to be ambiguous. In its Q & A guidance, OSEP responded to the question as to whether a CP decision may be appealed by (1) offering the state the option to establish a reconsideration procedure[46] and (2) observing the district's and parent's right to file for a DPH.[47] For the reconsideration option, OSEP clarified that the

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40. This second question is distinguishable from the first one because the DPH filing is after, not during, the CP process. *E.g.*, In re: Student with a Disability, 68 IDELR ¶ 56, at *8 (N.Y. SEA 2016).

41. *Infra* note 47.

42. *Supra* notes 22–23 and accompanying text.

43. *E.g.,* In re: Student with a Disability, *supra* note 40.

44. *Supra* notes 18–19 and accompanying text.

45. Hansen & Zirkel, *supra* note 5, at 113 (reporting that 31% of the states provide a right of appeal). For those state special education laws that provide for an appeal, the variations are via (1) a higher administrative level in the state education agency (e.g., Kansas and Louisiana), (2) state court (e.g., New Hampshire and Oregon) or, most unusually (3) DPH (e.g., Colorado and Maryland). Zirkel, *State Laws and Guidance*, *supra* note 5, at 43–44. Additionally, a judicial route of appeal may apply under a state administrative procedures act or other basis. *E.g.,* Beth V. *ex rel.* Yvonne V. v. Carroll, 87 F.3d 80, 88–89 (3d Cir. 1996) (implied under IDEA); Lewis Cass Intermediate Sch. Dist. v. M.K. *ex rel.* J.K., 290 F. Supp. 2d 832, 837 (E.D. Mich. 2003) (state judicature act). Although the federal court's ruling in *Lewis Cass* seems to suggest that the parent has an independent right to a DPH after a CP decision, Michigan's state court adds confusion by ruling that exhaustion applies to appeals of CP decisions, thus indirectly pointing to the DPH as the immediate appellate, rather than a separable, route. *E.g.*, Southfield Pub. Sch. v. Dep't of Educ., 64 IDELR ¶ 50 (Mich. Ct. App. 2014).

46. Only approximately eight states provide for reconsideration. Zirkel, *State Laws and Guidance*, *supra* note 5, at 43.

47. Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B), *supra* note 10, at B-32 (OSEP 2013).

implementation of CP corrective action may not be delayed.[48] For the DPH option, however, OSEP did not clarify whether it served as an appeal.[49] OSEP's subsequent policy letter in response to a question about the status of a CP decision upon the filing of a DPH on the same issues again focused on the timely implementation of any corrective action orders.[50] Although the accompanying reference to "pending the outcome of the [DPH]"[51] may imply that the DPH serves an appeal, this understanding is not definitively clear.

The clearer and more cogent interpretation of the IDEA's regulatory scheme is that a DPH proceeding in the wake of CP decision does not serve as an appeal, unless state law provides otherwise.[52] Instead, the two decisions, again, stand independently, each being based on the scope and

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48. *Id*. ("Therefore, if the reconsideration process is completed later than 60 days after the filing of the State complaint, the public agency must implement any required corrective actions while the reconsideration process is pending."). However, OSEP did not seem to recognize that reconsideration is distinguishable from appeal, being limited to the state education agency. Zirkel, *State Laws and Guidance*, *supra* note 5, at 43.

49. The response's reference to "if the issue is still in dispute" does not sufficiently resolve the matter, although it suggests the possible meaning of an appeal.

50. Letter to Deaton, 65 IDELR ¶ 241 (OSEP 2015). Interestingly, the party filing for a DPH in this Mississippi scenario was the parent.

51. *Id*. at *2.

52. The only state special education laws that clearly provide this route are Colorado, Maryland, and Alaska. Zirkel, *State Laws and Guidance*, *supra* note 5, at 44. These states should more carefully consider this policymaking choice because it incentivizes manipulative party behavior that is contrary to the collaborative vision of the IDEA and that erodes the integrity of the separate, compliance-oriented CP process. Illustrating the potential problems with the DPH appellate route for CP, in a Colorado case, the federal district court rejected the hearing officer's reversal of the CP decision, explaining:

> The state complaint process that is mandated by the IDEA would become a sham proceeding if the remedies devised pursuant to that process were not enforceable. To ignore these requirements would discourage parents and school districts from pursuing such remedies in the first place. Such an outcome would pervert the intention in the IDEA that states create such systems to provide a remedy for parents before they seek relief in federal court.

Steven R.F. v. Harrison Cent. Sch. Dist. No. 2, 331 F. Supp. 3d 1227, 1243 (D. Colo. 2018), *vacated on mootness grounds*, 924 F.3d 1309 (10th Cir. 2019). Unlike a DPH, not only administrative but also judicial appeals of a CP decision tend to adhere to the nature of the investigative process rather than importing the IDEA standards for adjudication. *E.g*., Indep. Sch. Dist. No. 709 v. Bonney, 705 N.W.2d 209 (Minn. Ct. App. 2005); Haddon Twp. Sch. Dist. v. N.J. Dep't of Educ., 67 IDELR ¶ 44 (N.J. Super. Ct. App. Div. 2016) (upholding CP decision based on deferential review standard of substantial evidence and not arbitrary or capricious).

standards of its own process.[53] The only interrelationship between the CP and DPH decisions is that the hearing officers, leaving the CP decision unaffected, have the discretion to accord whatever weight they deem appropriate to the CP decision and, in cases of relief in both forums, avoiding unjust enrichment in determining the DPH remedy.

III. CONCLUSION

In sum, although the regulatory interrelationships between the parallel CP and DPH routes are complicated and subject to confusion, the appropriate resolution of the two identified questions is via their structural separation. First, if a school district files for DPH in response to an ongoing parent-initiated CP on the same issues, the preclusive effect of the set-aside provision of CP should not apply. Second, if either party files for DPH in response to a completed and adverse CP decision, the appellate effect of DPH should not apply. Thus, the proper interpretation is for each process to stand separately on its own based on its distinctly different scope and standards. This interpretation is not only reasonable but also fair in relation to the overall intent of the IDEA.[54]

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53. In contrast, showing that timing is the key, the regulations provide that a DPH decision is binding if it is prior to the issue arising in CP between the same parties. *Supra* note 15.

54. Thus, it is not only the appropriate for direct judicial application or state law adoption but also, to the extent that OSEP either adopts it or issues a contrary interpretation, is subject to the clarified criteria for *Auer* deference. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2412–18 (2019); Perry A. Zirkel, *The Courts' Use of OSEP Policy Interpretations in IDEA Case*s, 344 EDUC. L. REP. 671 (2018).