

DATE: March 28, 2001

M E M O R A N D U M

TO: Directors of Special Education

FROM: Gordon M. Riffel
Deputy Superintendent
Special Education Unit

SUBJECT: Study of the Illinois Due Process Procedures

Attached is a *Study of the Illinois Due Process Procedures* that was presented to the Illinois State Board of Education in February 2001. Last year, Illinois received 515 requests for the appointment of a due process hearing officer. Fortunately, most cases (451 out of 515) were settled prior to hearing. While we recognize that the system is far from perfect, the data shows that the overall effectiveness and efficiency of Illinois' due process system is improving.

There is a growing concern nationally regarding the increasing cost of due process and particularly the number of days it is taking to conduct a hearing. We in Illinois are also concerned about the rising costs of due process and we are committed to putting in place an action plan that will insure that due process is accessible to all parties and is a viable mechanism for resolving differences, but not the only mechanism.

If you have any questions regarding the attached Study, please feel free to contact Bobbie Reguly or me at 217/782-5589.

Study of the Illinois Due Process Procedures

*Public Act 89-652
105 ILCS 5/14-8.02a*

Introduction and Background

On November 16, 2000, the Illinois State Board of Education, after receiving external input concerning the high cost of impartial due process hearings, directed staff to review the existing statutory requirements and related rules pertaining to the impartial hearing process and to report its findings at the February 2001 Board meeting.

Effective July 1, 1997, after a large amount of input from the field, Illinois moved from a two-tier due process system to a single level system. This change was made in response to PA 89-652 that amended Section 14-8.02a of the School Code that governs the impartial due process hearing procedures for students with disabilities and suspected disabilities.

This law and the implementing rules significantly changed the Illinois hearing process. Highlights of the changes include:

- moving Illinois from a two-level system to a single level system with the parties having the right to appeal a decision directly into court;
- the establishment of a small cadre of highly trained hearing officers (18 hearing officers as opposed to 120 Level I hearing Officers and 40 Level II Review Officers);
- the establishment of a 7 member screening committee that recommends candidates to be trained as hearing officers and is involved in the on-going evaluation of the hearing officers;
- the appointment of hearing officers on a rotation basis, eliminating the striking process previously required;
- a mandatory prehearing conference to be convened by the hearing officer for

the purpose of clarifying issues and organizing the hearing;

- an opportunity for the parties to seek clarification of a hearing decision from the hearing officer;
- no ex parte communications except to arrange the date, time and location of the prehearing conference and the due process hearing;
- no ex parte communication between the hearing officer and the Illinois State Board of Education or its employees concerning the hearing, except where circumstances require communications for administrative purposes that do not deal with substantive or procedure matters; and
- in the event that a hearing is withdrawn prior to the issuance of a written decision, the hearing officer shall retain jurisdiction over the matter for a one-year period.

105 ILCS 5/14-8.02a(e) requires that the Illinois State Board of Education monitor, review and evaluate the impartial due process hearing system on a regular basis by a process that includes a review of written decisions and evaluations by participants in impartial due process hearings and their representatives.

Sources Used for This Study

This study includes information and data collected from the following sources:

1. A review of the annual evaluation reports prepared in response to 105 ILCS 5/14-8.02(a) for 1997-1998, 1998-1999 and 1999-2000.
2. A thorough and careful reading of all written decisions.

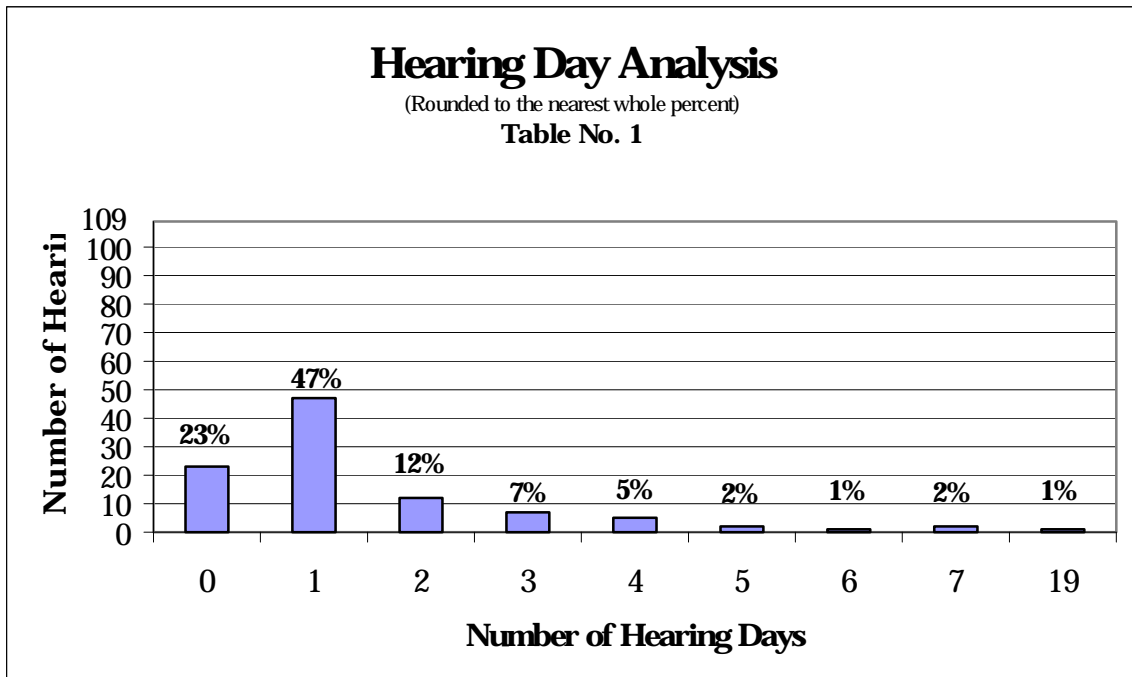
3. A review of evaluation reports returned by users of the system.
4. Observation and inter-actions with the hearing officers.
5. A review of the administrative records.
6. A review of all written complaints received by users of the system (4 since July 1997).
7. Anecdotal information provided by users of the system, i.e., attorneys, parents, district representatives and hearing officers.

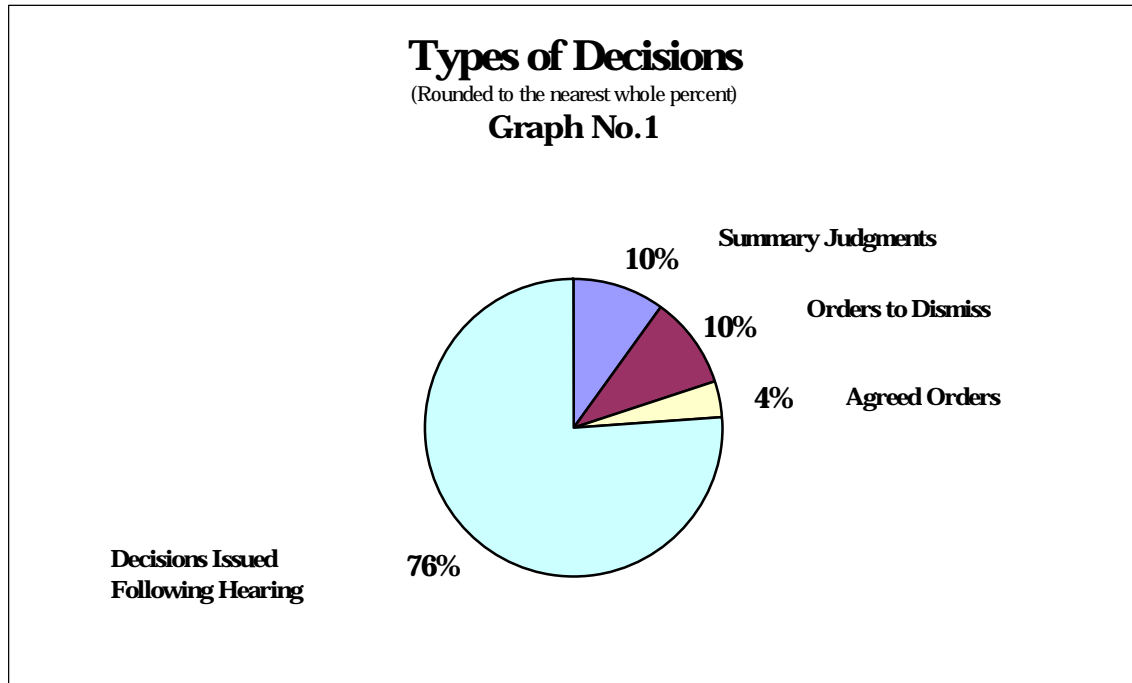
Concerns of Users of the System

As reported in the August 14, 2000, evaluation report submitted to the Illinois State Board of Education, users of the system expressed concern about the increasing cost of due process and the number of days it is taking to conduct a due process hearing.

As illustrated in **Table No. 1** below, between June 1999 and November 2000, **109** due process hearing decisions were issued. The data shows that **52** out of **109** hearings took only **1** day; **13** hearings took **2** days; **8** hearings took **3** days; **6** took **4** days; **2** took **5** days; **1** took **6** days; **2** took **7** days and **1** took **19** days.

24 decisions were issued without an actual face-to-face hearing, i.e. motions for summary judgments, agreed upon orders, or responses to motions to dismiss (**Graph No. 1**).





Reasons for Increase in Costs

Users of the system report that the reasons for the increased costs and the increasing number of days it is taking to hear a case can be attributed to the following:

- The complexity of the cases being heard.
- The increased use of witnesses/experts.
- The need to prepare a thorough and convincing record in the event of a court appeal.
- The unwillingness of hearing officers to limit witnesses/testimony.
- Insufficient use of the pre-hearing conference.
- Clustering hearing dates to accommodate the schedules of attorneys and the hearing officer.
- Cumulative testimony and redundant cross-examination.

These issues have been and will continue to be addressed during hearing officer trainings.

Protracted Cases Increase the Costs to Both Parents and Districts

Section 14-8.02a of the School Code and the Individuals with Disabilities Education Act Amendments of 1997 require that due process hearings be conducted and the decisions issued within 45 days from the date of the request, unless the hearing officer grants a specific extension of time at the request of a party. Illinois regulations require hearing officers to grant specific extensions of time when continuances are jointly requested (23 IAC 226.640 c)1)). This regulation promotes unnecessary delays, which is thought to contribute to the increasing cost of due process. Because of the limited number of attorneys and advocates specializing in this area of the law, both sides are reluctant to object to a request for continuance from the other side. Hearing officers have suggested that they be given the authority to determine the appropriateness of all requests for continuances, even those jointly submitted by the parties.

During FY00, 43 out of 65 cases that went to hearing exceeded the 45-day timeline required in federal and state law. It is not uncommon for cases to linger on for 6 to 12 months before being settled, withdrawn or heard. Most cases, (451 out of 515 during FY00) are settled prior to hearing. Even those cases, which are settled prior to hearing, can be costly to the parties. It is important to note that most cases do move forward to the point of a pre-hearing conference prior to settlement or withdrawal. While the inclusion of the pre-hearing conference has proven to be a valuable vehicle for resolving due process disputes, it too has contributed to the cost of the system. Hearing officers must begin using the pre-hearing not as a settlement conference, but rather, as a case management conference. Users of the system, repeatedly voiced concerns regarding the unwillingness of hearing officers to address case management issues during the pre-hearing conference. This includes:

- Unwillingness to limit witnesses.
- Not requiring the parties to specifically cite the remedy they are seeking.
- Allowing new issues to be introduced after the pre-hearing conference.
- Scheduling hearings for 5-10 days of testimony, when it may only takes 1-2 days.
- Scheduling clustered hearing dates; for example, 4 days in November and 2 additional days in January..
- Unwillingness to rule on Motions for Summary Judgment.

Hearing officers are required to maintain documentation regarding the status of the cases assigned and the factors contributing to any delays. Each month hearing officers are provided a written report on the status of all assigned cases. In December 2000 each hearing officer was asked to provide a brief summary why, in their opinion, some cases were taking so long to get to hearing. Following is a summary of the factors contributing to hearing delays as reported by the hearing officers:

- Parents not responding to telephone calls or certified letters.
- Scheduling conflicts (particularly problematic among attorneys).
- Accommodating the availability of witnesses.
- Delays in obtaining results from independent educational evaluation.
- Submission of post-hearing briefs.
- Settlement agreement in process.
- Interim placement being tried.
- Joint requests for continuances usually due to scheduling conflicts.

Efficiency and Effectiveness of Illinois' Due Process System

The overall effectiveness and efficiency of Illinois' due process system is continually improving and will continue to improve as the new system is implemented. There is no question that the system, with the oversight of the Illinois State Advisory Council and the Due Process Screening Committee (both statutorily required), is a system that insures an impartial review of the facts and the issuance of a final decision based on conclusions of law. Is the system impractical for both parents and school districts? No. Can the system be improved? Certainly.

There is no question that due process is an adversarial system fraught with legal maneuvering that makes it extremely difficult for those, particularly families, not represented by legal counsel. The cost of due process is a concern to parents and school administrators, not only in Illinois but also throughout the country. Since 1991, five states have converted from a two-tier due process system to a one-tier system, Illinois being one. Since moving to a single-tier system, Illinois has seen fewer cases moving forward to hearing. Under the two-level system, the Illinois State Board of Education received an average of 450-500 requests for due process, with 120-140 going forward to a hearing. Of the 120-140 Level I decisions issued annually, between 40-60 were appealed to Level II, with fewer than 20 cases proceeding to court. Under the current single-tier system, the number of

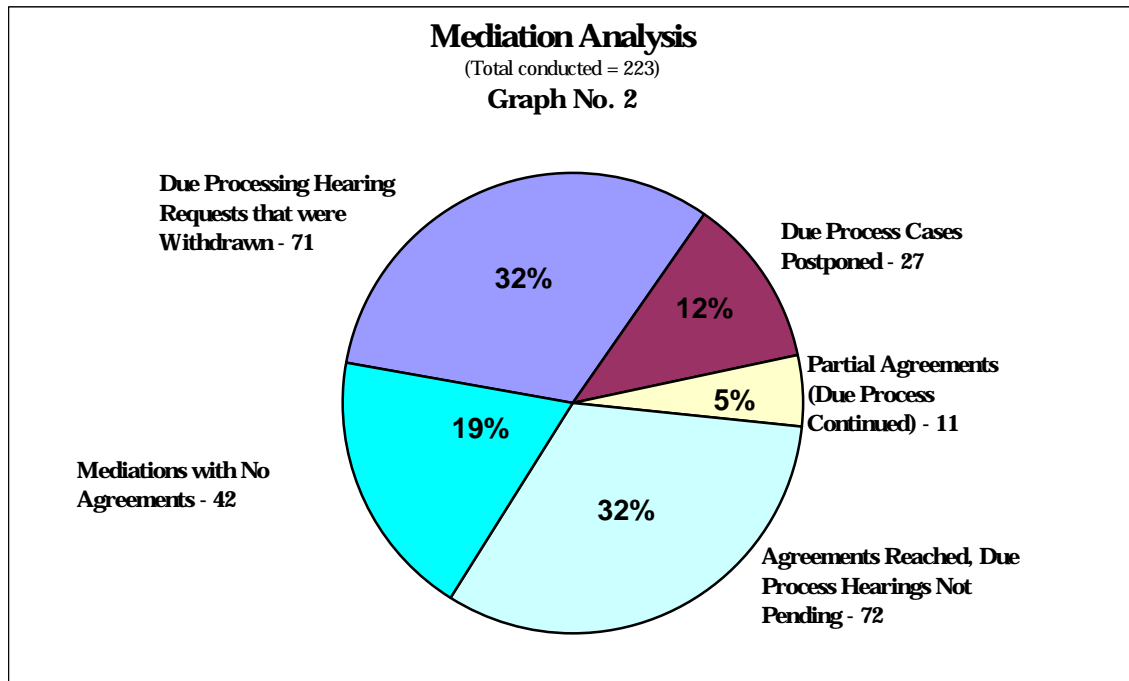
hearings being held have been dramatically reduced. While users of the system are concerned about the number of days it is taking to conduct hearings, it is important to note that most cases are being resolved prior to hearing.

Improvement Strategies

What can Illinois do to insure that our system is accessible to all parties and is viewed as a viable mechanism for resolving differences? During the next 6 months the Special Education Unit will focus its attention on the following improvement strategies:

1. Due Process should not be seen as the ONLY system for resolving differences. More emphases must be placed on the other dispute resolution processes, such as mediation and complaint investigations.

As illustrated in **Graph No. 2**, between July 1, 1999 and June 30, 2000 the Illinois State Board of Education received **310** mediation requests from both parents and districts of which **223** mediations were conducted. Of the **223** mediations conducted an agreement was reached in **181** cases resulting in **71** due process hearing requests being withdrawn. An additional **27** due process cases were postponed due to a mediation agreement most of which were later withdrawn or are still pending. **11 of the 181 agreements** resulted in partial agreements (in all of these cases the due process hearing continued.) **72 agreements were reached in which a due process hearing was not pending.** **42** of the **223** mediations resulted in **no** agreement.



Currently Illinois has 11 trained mediators, all employees of the Illinois State Board of Education. While the demand for mediation services has steadily increased, the number of trained mediators has decreased. By increasing the availability of mediation services, disputes can be resolved without the parties having to request a due process hearing. As illustrated in **Chart No. 2**, 32 % of the agreements reached involved disputes not pending in due process. This percentage should increase as more emphasis is placed on mediation as a means for resolving differences. Staff will be asked to develop an action plan for increasing the availability of mediation services statewide.

Similar success can be seen in the Illinois Complaint Investigation System. During FY00 the Illinois State Board of Education received and investigated over 198 complaints alleging a violation. Many of the same issues seen in due process are successfully resolved through the Illinois Complaint system at no cost to districts or families. Federal regulations require that all written complaints be investigated within 60 days of the date received. Steadily over the past several years, Illinois has seen an increased use by parents of this system. As more emphasis is placed on Illinois' complaint system, the numbers of due process hearings are likely to decrease.

2. Disputes must be resolved before they escalate to the point where the only option available to either side is to request a due process hearing. More emphasis must be placed on parent training and the establishment of parent liaisons at the local level.
3. The Hearing Officer Education Network (HOEN) must continue to provide immediate and on-going training to hearing officers on case management strategies.
4. Hearing officers must be held accountable for managing all cases in a timely and efficient manner. Hearing officers who fail to efficiently manage cases must be removed from the hearing officer registry. Hearing officers will be evaluated on their ability to effectively manage cases.
5. The Illinois State Board of Education must more closely monitor and manage the caseload of hearing officers. The statute requires that hearing officers be appointed on a rotation basis. The rotation process does not take into consideration pending cases or the frequency in which a hearing officer is removed from a case at the request of the parties or due to a conflict of interest. The statute and regulations must be amended to allow hearing officers residing in districts with a population base of over 500,000 to take cases in those districts. Of the 18 hearing officers, only 8 are available to take cases involving the Chicago Public Schools.
6. The Illinois State Board of Education must provide technical assistance to both school districts and families regarding due process. The videotape "Due Process – Resolving Special Education Disputes" developed by the ISBE and the Illinois State Bar Association in 1999 is an excellent training tool, but is being under-utilized. Its use should be encouraged.
7. Hearing officers must be given the authority to deny joint requests for continuances that are not justifiable or not in the best interest of the child – this will require a change in the 23 IAC226.640 c)1).