

**REPORT OF NEW JERSEY SPECIAL EDUCATION
PRACTITIONERS
TO THE HONORABLE PHIL MURPHY,
GOVERNOR**

**How long does it take a special education
case to be decided in New Jersey?**

March 21, 2018

EXECUTIVE SUMMARY:

This report, prepared by New Jersey Special Education Practitioners (NJSEP),¹ provides an analysis of the State of New Jersey's compliance with the 45-day timeline to complete special education due process matters as required by federal and state regulations. Notwithstanding the 45-day timeline to conduct hearings under the Individuals with Disabilities Education Improvement Act (IDEA), as established by implementing federal regulations at 34 C.F.R. §300.515(a) and state law at N.J.A.C. 6A:14-2.7(j), NJSEP's analysis showed it took, on average, 212 days to adjudicate a special education dispute. When emergent relief and expedited matters were removed from the sample, the average number of days to complete a due process matter jumped to 312, or more than ten (10) months.

Data for the analysis was mined from documented dates in decisions by the Office of Administrative Law (OAL) posted to the OAL website as Final Decision and Orders (2014-Present). The analysis looked at the length of time between the transmittal of the matter to the OAL (the trigger that starts the 45-day period for a final decision to be issued and mailed to the parties) and the final decision date. Calculations were made to determine the number of days that elapsed between dates for key events during the adjudication process. The data pointed to four factors as having the greatest impact on the number of days from transmittal to final decision:

1. the number of days from transmittal to the OAL and the first hearing date;
2. the number of days between first and last hearing dates;
3. the number of days between the last hearing date and the record closed date; and
4. the number of days between the date the record closed and the date a final decision issued.

The report recognizes there are systemic issues that impact the length of time to adjudicate special education disputes including understaffing at the OAL, an increase in the number of special education matters being filed, and the expertise needed in these matters. The analysis conducted also has some limitations. Dates needed to make the calculations for all factors were not documented in every decision and the large variability in the data, specifically outlier data, may overly influence the average number of days calculated.² The variability in the data prevents drawing conclusions about trends for each factor. However, it is clear the systemic issues continue to impede efforts to improve the adjudication process for special education matters. The analysis found the State was non-compliant with the 45-day timeline for each year of the period reviewed (2014-2017) and prior analysis indicated non-compliance going as far

¹ NJSEP is a statewide association of approximately 100 attorneys and professional advocates from private law firms and public interest advocacy organizations who represent parents and their students with disabilities in special education matters.

² Given the variability in data ranges, the analysis in this report includes both the average number of days and median number of days for each factor.

back as 2011. Noting the adverse impacts of improper delays on both parents and school districts, NJSEP calls on the State to take immediate corrective action to remedy its longstanding noncompliance.

INTRODUCTION:

In 2016, the New Jersey Special Education Practitioners (NJSEP) established a task force to study the resolution timeline for a due process complaint in a special education matter from the date the complaint was filed to the date a final decision was issued. The experience of NJSEP members, as well as anecdotal evidence, raised concerns that the 45-day decision timeline for a due process hearing was not being met. However, there was little empirical evidence to demonstrate that the State -- through its designated State Educational Agency (SEA), the New Jersey Department of Education (NJDOE), and its independent forum for adjudicating agency disputes, the Office of Administrative Law (OAL) -- was not in compliance with the regulations.³ The goals of the study were to quantify the timeline for adjudication of a due process complaint, to ascertain systemic elements affecting compliance, to identify factors that impact the OAL's ability to meet the statutory 45-day timeline, and to determine a course of action to improve NJDOE's compliance with the procedural requirements in the IDEA and New Jersey's Administrative Code.

A due process petition may be filed by a parent or guardian of a student eligible for special education programs and services, a student eligible for special education programs who has attained the age of majority or the school district that serves the student.⁴ The due process petition is initially filed with the Office of Special Education Policy and Procedure (OSEPP) within NJDOE. After a statutory 30-day period to allow for amicable resolution of the dispute, the matter is transmitted to the OAL for a due process hearing before an Administrative Law Judge (ALJ).⁵ The date of transmittal to the OAL begins the 45-day timeline to complete the hearing and to mail a final decision to the parties.

To design a study, and to perform a data-based analysis to demonstrate compliance with the 45-day requirement, an initial review of published OAL final decisions in special education matters decided from 2011 to 2015 was performed. Searches were conducted for special

³ N.J.A.C. 6A:14-2.7(j); 34 C.F.R. §300.515(a).

⁴ The majority of due process petitions are filed by a parent(s) on behalf of their child or by an adult student (18 years old or older) who remains eligible for special education programs and services until age 21. These two groups comprised 85% of the petitioners in the due process matters reviewed in this analysis.

⁵ See 20 U.S.C. §1415(f)(1)(B)(ii); 34 C.F.R. §300.510 and N.J.A.C. 6A:14-2.7(h).

education decisions the OAL issued between January 1, 2011 and December 31, 2015 through the quick link titled “OAL Decisions (1997-present)” on the OAL website. This quick link opens a search page, located at <https://njlaw.rutgers.edu/collections/oal/>, through which OAL decisions can be accessed. Searches were also conducted in LEXIS and WESTLAW legal databases. A cross reference of the three databases showed that none of them contained the exact same set of decisions for the period of review. Data was, therefore, collected from across the three databases which resulted in a population sample that could not be easily replicated.

In late 2016, or early 2017, the OAL set up a system to directly access published decisions through another quick link on its homepage titled “OAL Final Decisions and Orders (2014-present).” This link connects to another page on the OAL website where decisions are grouped by matter type on separate tabs. Special education matters are located on the tab labeled EDS - the prefix used to identify special education matters in the OAL. Decisions are posted on the EDS tab by Caption and Docket Number although there does not appear to be an order to the decisions listed therein. Each caption then links to the final decision located at <http://www.state.nj.us/oal/decisions/final/index.html>.

In 2017, the NJSEP members overseeing this project (“the Committee”)⁶ determined decisions available through the OAL Final Decisions and Orders (2014-present) link represented a finite sample of material and relevant decisions that would provide the necessary data to analyze NJDOE’s compliance with the 45-day timeline and could be easily replicated. Therefore, the set of OAL final decisions reviewed was limited to only those decisions listed on the EDS tab. The scope of the period of review changed from five calendar years to a period spanning forty-two (42) months as the analysis included final decisions dated July 3, 2014 to December 22, 2017 for special education due process petitions filed between September 27, 2012 and December 19, 2017.⁷

⁶ The Committee consisted of attorneys Elizabeth Athos, Esq., Lisa Quartarolo, Esq., and John Rue, Esq. Committee member Lisa Quartarolo undertook the time-consuming and exacting task of analyzing the data from the OAL decisions and drafting this report.

⁷ Of note, during NJSEP’s investigation, the Innisfree Foundation made an Open Public Records Act (OPRA) request to the OAL for the document used to track special education cases for compliance with federal law. After initial resistance, the OAL provided this document (an excel spreadsheet), which the Committee reviewed and considered in the preparation of this report. The Committee decided unanimously, however, that the analysis already performed by NJSEP was of sufficient value, and the OAL’s spreadsheet had sufficient ambiguities, that NJSEP should continue to rely on its own analysis for this Report rather than the OAL spreadsheet. A copy of the OAL spreadsheet is available on Innisfree’s website at <http://innisfree-foundation.org/the-knowledge-database-project/>.

THE 45 DAY TIMELINE:

The due process resolution procedure starts with the filing of a petition for due process with OSEPP. If a parent, guardian or adult student files for due process, the school district must convene a resolution meeting within 15 days of receiving notice of the due process complaint.⁸ If the school district is unable to resolve the due process complaint to the satisfaction of the petitioner within 30 days of its receipt, the complaint is transmitted to the OAL for a due process hearing.⁹

The date of transmittal to the OAL begins the 45-day period in which the State is required to conduct a due process hearing, make a final determination and mail a copy of the ALJ's decision to the parties.

The public agency must ensure that not later than 45 days after the expiration of the 30-day period under §300.510(b)(resolution period)....(1) A final decision is reached in the hearing; and (2) A copy of the decision is mailed to each of the parties... A hearing or reviewing officer may grant specific extensions of time beyond the periods set out at the request of either party.

34 C.F.R. §300.515(a) and (c).

A final decision shall be rendered by the administrative law judge not later than 45 calendar days after the conclusion of the resolution period.... unless specific adjournments are granted by the administrative law judge in response to requests by either party to the dispute.

N.J.A.C. 6A:14-2.7(j).

At least once a year, unless the parents waive the right to receive it, school districts in New Jersey must provide parents of children eligible for special education programs and services a copy of NJDOE's Parental Rights in Special Education (PRISE) document.¹⁰ This document

⁸ 34 C.F.R. §300.510(a); N.J.A.C. 6A:14-2.7(h)(2). If the school district, referred to as the Local Education Agency (LEA), files for due process, then no resolution meeting is held. N.J.A.C. 6A:14-2.7(h)(11). The resolution meeting can be waived if both parties agree to do so in writing. 34 C.F.R. §300.510(a)(3); N.J.A.C. 6A:14-2.7(h)(9). Parents may request mediation in lieu of a resolution meeting. N.J.A.C. 6A:14-2.7(h)(8).

⁹ 34 C.F.R. §300.510(b)(1); N.J.A.C. 6A:14-2.7(h)(4).

¹⁰ N.J.A.C. 6A:14-2.3(g)(7). A copy of the PRISE handbook, latest revision August 2016, can be found at <http://www.state.nj.us/education/specialed/form/prise/prise.pdf>.

has been developed by OSEPP “to provide the most comprehensive and up-to-date information” to parents in a clear and concise manner.¹¹ With regard to how long it takes a special education due process hearing to be completed, PRISE states:

After resolution activities have occurred and the case has been transmitted to the OAL, **the due process hearing must be completed, and a copy of the decision mailed to you and the school district within 45 days**, unless specific extensions of time have been granted by the ALJ.¹² (Emphasis added.)

THE PROBLEM:

In New Jersey, the resolution of a dispute over educational programs and services for students with disabilities currently takes many months and, in some extreme cases years, to complete. All the while, many students with disabilities are left in limbo: in inappropriate placements, receiving inadequate services, or not being evaluated to determine their need for special education and related services. In 30% of the special education decisions reviewed, the ALJ determined the school district had violated its obligation to provide a child the free appropriate public education (FAPE) required under the IDEA and state regulations.¹³ The average number of days from the date the due process petition was transmitted to the OAL to the date a final decision was issued was 212 days - more than four times the number of days allowed by law. In those matters, and for those students, the school district’s initial injury was compounded by the unreasonable delay in granting them the relief they were entitled to receive within 45 days.

Students who ultimately obtain a favorable ALJ decision following a hearing are not the only ones who are negatively impacted by hearing delays. The document obtained through Innisfree’s OPRA request showed nearly half of the matters OSEPP transmitted to the OAL were settled at some point during the litigation process.¹⁴ NJSEP members know from experience that

¹¹ PRISE document, Introduction. Note: The Office of Special Education Policy and Procedure (OSEPP) was previously known as the Office of Special Education Programs (OSEP).

¹² PRISE document, pg. 20.

¹³ Overall, the school district prevailed in 70% of the decisions recorded in the database. In the sub-set of decisions where the parent appeared *pro se* before the OAL (i.e. without legal representation), which comprised 40% of all matters reviewed, the school district prevailed in 93% of the decisions.

¹⁴ The spreadsheet obtained by Innisfree listed over 5000 case numbers for petitions received by OSEPP between December 24, 2014 and September 27, 2017. Of these cases, approximately 48% were labeled as “Settled/ER Settled/Settled on ER” under the column titled “OAL Outcome.”

ALJs often use the prospect of a year-long timeline for resolution of a case as a tool to promote settlement. While settlement can certainly be beneficial, NJSEP members are aware of cases in which parents have settled meritorious cases for less than their children deserve, simply because some relief is better than relief that comes far too late.

Strikingly, it is not only students who suffer from OSEPP's failure to comply with the federally mandated timeline for special education dispute resolution. Although school districts lack specific rights under the IDEA, in some cases, most notably where a District believes that a student's expensive placement is no longer necessary for the child to access a FAPE, but the placement is governed by the pendent placement safeguard in the IDEA and state regulations, it is the District that suffers from OSEPP's failure to timely resolve these cases.¹⁵ Simply stated, all stakeholders in New Jersey's special education system have an interest in seeing this long-standing problem resolved.

NJSEP recognizes that understaffing at the OAL and increases in special education filings are systemic factors impacting the State's ability to meet the statutory 45-day timeline for special education due process matters. The OAL is intended to operate with a full complement of 45 ALJs, but has not done so in a number of years. During the years from 2008 to 2016, when the number of special education cases filed with the OAL doubled from 500 to over 1000 per year, the number of ALJs decreased from 41 to 32.¹⁶ From a low of 32 full-time ALJs in December 2016, the number increased to 39 in 2017, and, with recent appointments, the OAL currently has a nearly full complement of ALJs as well as a number of temporarily assigned (t/a) ALJs in Trenton, Newark and Atlantic City.

An increase in the number of ALJs alone is not a sufficient fix. The OAL needs ALJs with the experience and expertise to handle special education cases which require understanding and enforcing federal, as well as state, law. If ALJs without such a background are appointed, they should be given time, and training, to become well-versed in the procedural and substantive requirements of special education law before being assigned to these cases. If providing time

¹⁵ The pendent placement ("stay put") provision states, in relevant part, that "during the pendency of any proceedings conducted pursuant to this section [1415], unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j); 34 C.F.R. §300.518; See also, N.J.A.C. 6A:14-2.6(d)(10) and N.J.A.C. 6A:14-2.7(u).

¹⁶ These numbers were presented by a group of ALJs who accepted an invitation to meet with the New Jersey State Bar Association's School Law Committee on January 10, 2017.

and training slows the process of dispute resolution, then it may be necessary for the State of New Jersey to expand the bench in the OAL, perhaps to 50 or even 60 ALJs.¹⁷

ALJs have articulated several factors that have resulted in appointments not keeping pace with departures in recent years. Salary, pension, and caseload issues have all played a role: ALJ salaries were frozen from 2009 to 2015, when they were relinked with the salaries of Superior Court judges;¹⁸ changes in pension laws left newer ALJs with much reduced access to pensions; and OAL filings (estimated at about 20,000 total in 2016) have increased in other areas leading to unsustainable workloads. Moreover, ALJs are provided neither with tenure, nor with assigned law clerks to assist them in researching law and drafting opinions.¹⁹

Notably, the OAL itself, under the leadership of former Chief Judge Laura Sanders, has solicited recommendations from attorneys representing both school districts and families and implemented practice changes in an effort to improve the adjudicative process and alleviate delays. However, as this report shows, the problem of hearing delays in New Jersey persists, and, indeed, the data shows the problem worsened between 2014 and 2017.²⁰

¹⁷ At the same time, New Jersey needs to examine ways to reduce special education disputes by improving IDEA implementation throughout the State. A 2014 study by Lehigh University professor Perry A. Zirkel revealed that New Jersey is one of six jurisdictions within the United States that accounted, over a six-year period, for 80 percent of due process complaints filed, and 90 percent of those adjudicated. West's Education Law Reporter, v. 302, pp. 1-11. Zirkel examined U.S. Department of Education data over the period from 2006-07 through 2011-12.

¹⁸ Despite this improvement, ALJ salaries must become more competitive to attract and retain talented and committed judges. ALJs in the OAL make \$59,797 to \$132,642 annually. See http://www.acfc.org/acfc/assets/File/JudgeSalary2pagesB_NJ.pdf. In comparison, New Jersey Superior Court judges make \$78,721 to \$165,390, and Appellate Division Judges make \$175,000. *Id.* But perhaps more significant, according to the Bureau of Labor Statistics, the average salary for a lawyer in private practice in New Jersey is \$144,190. See <http://www.bls.gov/oes/current/oes231011.htm>. Thus, a starting ALJ in the OAL is asked to accept approximately 40% of the average compensation of a private practice attorney in New Jersey and that compensation is likely to remain unchanged for the number of years s/he serves on the bench.

¹⁹ These factors were described by ALJs in communications with the School Law Committee at meetings held on January 10 and December 6, 2017 and in October 19, 2017 correspondence from former Chief Judge Sanders to School Law Committee chair John Geppert.

²⁰ In 2017, the average number of days between Transmittal to the OAL and Final Decision was 261 days compared to 126 days in 2014.

METHODOLOGY:

As of February 7, 2018, the EDS tab on the OAL website listed 191 final decisions in special education matters (<http://www.state.nj.us/oal/decisions/final/index.html>).²¹ Three duplicate decisions and one final decision dated January 19, 2018 were removed from the list leaving a total of 187 decisions for review.²² Twelve of the decisions consolidated one or more due process petitions involving the same parties. Of those twelve decisions, eight were determined to have documented the data needed to evaluate compliance with the 45-day timeline for the individual due process petitions resolved in the decision. These eight decisions were bifurcated, and eight additional records were added to the population of decisions. Thus, a total of 195 records comprised the population of decisions in the database (N = 195).²³

Each decision was reviewed in its entirety and specific dates, if documented in the decision, were recorded in the database. These dates were: 1) Filing of the due process petition with OSEPP; 2) Transmittal of the due process petition by OSEPP to the OAL for a due process hearing; 3) Settlement Conference(s); 4) Pre-Hearing Conference(s); 5) First Day of the Hearing; 6) Oral Argument in matters that did not involve a hearing; 7) Last Day of the Hearing; 8) Filing of Post-Hearing Briefs; 9) Closing of the Record and 10) Final Decision. Information as to the specific date the decision was mailed to the parties was not documented in the decisions.

Calculations were made to determine the number of days that elapsed between documented dates including: 1) days between Filing the petition with OSEPP and Transmittal to OAL; 2) days between Transmittal to OAL and a Settlement Conference; 3) days between Transmittal to OAL and a Pre-Hearing Conference; 4) days between Transmittal to OAL and a

²¹ The list of final decisions on the OAL Tab does not appear to be updated on a regular basis. Periodic checks of the OAL website over the past year found new decisions added to the EDS tab at various times. For example, two updates appear to have occurred in December 2017 adding nine (9) new decisions to the list while removing one decision that had been added to the EDS tab in September 2017. The latter record was also removed from the database for this analysis.

²² The final decision for EDS 10161-13, which consolidated two due process complaints identified as EDS 10161-13 and EDS 10159-13, stated that the matter “appeared to have been inappropriately labeled as a special education matter because it did not concern special education, but rather residency, upon which the special education services were based.” The decision was listed on the EDS tab and therefore it was kept in the database.

²³ One decision, an emergent relief matter with one hearing date, did not document the date the decision was issued. The record is included in the database but, given the lack of a decision date, it could only be included as a record in calculations involving the number of hearing dates.

First Hearing or Oral Argument date; 5) days between the First and Last Hearing dates; 6) days between Last Hearing date and Record Closed date; 7) days between the Record Closed date and Final Decision date; and 8) the total number of days between the date of Transmittal to OAL and the Final Decision date.²⁴ If this last measure was less than or equal to 45-days, the decision was deemed to be compliant with the regulations.

Not every decision documented each specific date to be recorded in the database. Therefore, although a total of 195 records (N=195)²⁵ were included in the database, the sample size (n) for each subset of data varied based on the number of decisions that documented the necessary dates. For example, only 155 of the 195 records documented both the date of transmittal to the OAL and the date a final decision was issued. Thus, the sample size for the measurement of the number of days between transmittal to the OAL and the issuance of the final decision is 155 (n=155).

Additional data collected as notes in the database included: 1) the type of petition submitted to OSEPP (due process, emergent relief or expedited relief); 2) the nature of the dispute; 3) if both parties were represented by counsel; 4) if adjournments were granted; 5) specific reasons for adjournment; and 6) prevailing party.

ANALYSIS

Based on an analysis of the 155 records that documented both the transmittal date and the final decision date, 212 was the average number of days that elapsed between a due process petition being transmitted to the OAL and an ALJ issuing his or her final decision (n=155).²⁶ The median number of days from transmittal to final decision was 130 days, or nearly three times the number of days allowed by statute. With a median of 130 days, 50% of the decisions took more than 130 days to complete. The 212 average number of days and 130 median number of days included all types of special education decisions.

²⁴ The average and mean number of days for each of the eight factors is attached as Appendix 1.

²⁵ N, as used in statistics, refers to the population size used in the study and n represents a sample or sub-group of the population.

²⁶ Days have been rounded to the nearest whole number. The average number of days for the adjudicative process to be completed will be higher when the number of days between the final decision date and the date the final decision was mailed to the parties is added to the calculation. The mailing date was not documented in the OAL decisions and, therefore, could not be considered in the analysis.

When matters identified as emergent relief²⁷ or expedited relief²⁸ were removed from the sub-sample, the number of records reduced to 103 (n=103). The average number of days from transmittal to the OAL to final decision for these matters increased by 100 to 312 days and the median number of days date jumped more than 80% to 238 days. Thus, at least one-half of all non-emergent, non-expedited due process complaints took *238 days or more* to be adjudicated.²⁹

A breakdown by percentage showed only 39% of all due process matters had reached a final decision within the statutory 45-day timeline, 57% were completed within 180 days and 43% required more than 180 days for completion with 21% taking a year or more to adjudicate (n=155). When emergent and expedited issues were removed from the sub-sample, the percentage of records that met the 45-day requirement dropped to 10%. Only 36% were completed within 180 days and nearly one third (32%) were unresolved for a year or more (n=103).

Table 1: % of Records Segmented by # of Days for Adjudication (Date of Transmittal to OAL to Date of the Final Decision)

Days from Transmittal to OAL to Decision Date	Total Decisions	After Removing Emergent Relief and Expedient Decisions
	n= 155	n =103
Final Decision issued <= 45 days	39.40%	9.70%
Final Decision issued <= 180 days	57.40%	35.90%
Final Decision issued > 180 days	42.60%	64.10%
Final Decision issued > 360 days	21.30%	32.00%

²⁷ Emergent relief shall only be requested for the following issues:
i. Issues involving a break in the delivery of services;
ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;
iii. Issues concerning placement pending the outcome of due process proceedings; and
iv. Issues involving graduation or participation in graduation ceremonies.
N.J.A.C. 6A:14-2.7(r)(1).

²⁸ Expedited relief is available in disciplinary cases under N.J.A.C. 6A:14-2.7(e). The timeline for an expedited due process hearing is twenty (20) school days after resolution period has completed (i.e. the date the matter is transmitted to the OAL). N.J.A.C. 6A:14-2.7(o).

²⁹ The number of days between transmittal to OAL and final decision ranged from 1 to 1178.

The number of records documenting both the date the due process petition was filed with OSEPP and the date it was transmitted to the OAL was 110 (n=110). The average number of days between filing and transmittal, 27 days, and the median number of days, 30 days, were both within the 30-day period for resolution.³⁰ When emergent relief and expedited relief matters were removed, the average increased to 38 days and the median to 35 days (n=73). Thus, more than half of the matters exceeded the thirty-day resolution period by 5 or more days. The number of days in the resolution period does not count towards the 45-day timeline which begins with the date the matter is transmitted to the OAL. Therefore, the measure of days between the filing of the due process petition and transmittal to the OAL was not identified as a factor impacting NJDOE's ability to comply with the 45-day timeline.

The length of time from transmittal to the OAL to the first scheduled hearing date before the ALJ assigned to adjudicate the matter was a contributing factor to violations of the 45-day timeline.³¹ A total of 125 records in the database documented both the transmittal date and the first hearing date (n=125). On average, 104 days passed between the two dates with 70 days being the median number of days. Removing emergent relief and expedited relief matters from the sub-sample increased the average number of days to 169 while the median number of days more than doubled to 143 days (n=74). Further analysis showed that the number of days between transmittal and the first hearing date more than likely exceeded the 45 days allocated for the entire adjudicative process. The length of time between transmittal to the OAL to the first hearing date is the first factor that impacts compliance with the 45-day rule.

Hearings that required one or more hearing dates also contributed to a greater number of days between transmittal to OAL and the issuance of a final decision. Three (3) days was the average number of hearing days for a due process hearing (n=142).³² However, the median number of days for a hearing was one (1). The data showed 59% of the decisions in this sub-set required only one hearing date. Even with just one hearing date, 30% of those special education disputes took more than the allocated 45 days to adjudicate.

³⁰ See fn 4.

³¹ The first date the parties are given to meet at the OAL is reserved as a Settlement Conference date. The parties meet with an ALJ who attempts to assist them in settling the dispute. If unsuccessful, the matter is assigned to another ALJ for adjudication. The ALJ who will hear the matter assigns the first hearing date based on availability in his or her calendar.

³² Without emergent relief and expedited relief matters (n=86), the average number of hearing days increased to 4.

In the sub-sample of records with only one documented hearing date and the transmittal date, it took an average of 60 days for these matters to be adjudicated in full (n=72). The number of days in this sub-sample ranged from 1 to 338 days. The median was 17 days, primarily due to the inclusion of emergent relief and expedited relief matters in the sub-sample. When these matters were removed, the sub-sample size decreased from n=72 to n=22. The average number of days for full adjudication more than doubled to 165 days and the median number of days increased to 145 days.³³

In final decisions for matters that required more than one hearing date (n=52), on average, it took a staggering 470 days from transmittal to OAL to final decision. The median number of days was only slightly lower at 418 days; thus, half the matters with two or more hearing dates took 418 days or more for a determination to be made and a decision issued.

The average number of days between the first and last hearing dates was 152 days, or approximately five months, and the median was 115 days (n=56). The range of data for the number of days between the first and last hearing date spanned from 2 to 651 days. While 651 days between hearing dates is an outlier, in more than 80% of the records that documented both the first and last hearing date, the total number of days between hearing dates was greater than the 45 days allocated to reach a final decision (n=56). Long delays between hearing dates is the second contributing factor to non-compliance with the 45-day requirement.

Federal and State regulations give an ALJ the authority to grant specific adjournments “in response to requests by either party to the dispute.”³⁴ Of the 195 records reviewed, 27 records (14%) noted that adjournments had been granted but few stated the reasons for the adjournments. This does not indicate that adjournments were not granted in other records only that any such adjournments were not documented in the written decision. Within the sub-sample of decisions noting adjournments, that also recorded the date of transmittal to the OAL, it took an average of 201 days, and a median of 132 days, from transmittal to the OAL to final decision (n=23).

An average of 32 days elapsed between the last hearing date and the record closed date (n=130). The median number of days in this sub-sample was 0 due to the number of emergent relief and expedited matters in this sub-sample. The removal of emergent relief and expedited

³³ Only one of the final decisions in the sub-segment of non-emergent or expedited relief matters with only one hearing date was adjudicated within the 45-day regulatory requirement (n=22). In that matter, the school district filed a due process petition to compel the parent to allow the student to be evaluated, the parent failed to appear at the hearing but testimony was taken and evidence introduced on an ex parte basis, pursuant to N.J.A.C. 1:1-14.4(d). A final decision was issued forty (40) days after the matter was transmitted to the OAL.

³⁴ 34 C.F.R. §300.515(c); N.J.A.C. 6A:14-2.7(j).

relief matters from the sub-sample decreased the number of records to 76. The average number of days from last hearing date to the record closing increased to 54 days and the median to 37 days (n=76). Time between the end of the hearing and the record closing is necessary to allow the parties to submit post-hearing briefs. Nevertheless, the number of days between the completion of the hearing and the closing of the record is the third factor that contributes to the State's non-compliance with statutory requirements.

The number of days that elapsed between the date the record closed and the date the ALJ issued a final decision also contributed to the length of time to adjudicate the due process complaint. Of the 195 records in the database, 190 documented both the date the record closed and the date the final decision was issued. The average for all records in the database was 33 days and the median 8 days (n=190). When emergent relief and expedited relief matters were removed, the average number of days rose to 47 days and the median to 18 days (n=130). The data in this sub-sample ranged from 0 day to 553 days. While 553 days between the closing of the record and the issuance of the decision is the extreme, it was one of sixteen (16) records in which more than 100 days elapsed between the record closing date and the final decision date. More than 45 days elapsed between the date the record closed and the issuance of the decision in 14% of the records in this sub-segment. Thus, the number of days between the record closing and a final decision issued is the fourth factor that contributes to non-compliance with the 45-day timeline requirement.

TRENDS

In 2014, the average number of days from the date a matter was transmitted to the OAL to the decision date was 126 days. By 2017, the average number of days to adjudicate a matter had more than doubled to 261 days.³⁵

The time between transmittal to the OAL to the first scheduled hearing date appears to have had the largest impact on the length of the adjudication. The average number of days for this factor nearly doubled from 70 days for matters decided in 2014 to 134 days for matters decided in 2017; however, there was not a steady increase over this period. The average number of days that passed between the last hearing date and the record closed date increased from 17 days to 44 days, but again it was not a steady increase over the four-year period. While the average number of days between the record closing and the final decision issued appears to have stayed steady, 26 days in 2014 and 2017, this factor had been at its highest, 46 days, in 2016. The average number of days between the first and last hearing dates declined during the 42-month

³⁵ The average number of days in each factor by year is for all records with final decision dates in each year. The removal of emergent relief and expedited relief records in each year would result in a greater number of days for each factor reviewed.

period, dropping from a high of 188 days in 2014 decisions to a low of 118 days for decisions in 2017 but the decline was not steady over this period. As noted above, the data mined from OAL final decisions is too variable to identify trends or to conclude that a decrease in the average number of days for any factor indicates a lasting improvement for that factor or for the overall number of days for adjudication of a special education matter.

Table 2: Comparison of Factors that Impact Compliance with the 45-day Timeline by Year (2014-2017)³⁶

	<u>TOTAL # OF RECORDS</u>	<u>2017</u>	<u>2016</u>	<u>2015</u>	<u>2014</u>
	N = 195	N = 48	N = 52	N = 50	N = 45
Transmittal Date to Decision Date:	n = 155	n = 40	n = 37	n = 37	n = 41
Average # of Days	212.0	261.0	247.0	219.0	126.0
Transmittal Date to 1st Hearing Date	n = 125	n=32	n = 28	n= 33	n = 32
Average # of Days	104.0	133.0	100.0	112.0	70.0
# of Days Between 1st and Last Hearing Date	n = 56	n=16	n = 14	n = 17	n = 9*
Average # of Days	152.0	118.0	163.0	157.0	188.0
Last Hearing Date to Record Closed Date:	n = 130	n = 32	n = 31	n = 35	n = 32
Average # of Days	32.0	44.0	30.0	37.0	17.0
Record Close Date to Decision Date:	n = 190	n=44	n = 52	n = 49	n = 45
Average # of Days	33.0	26.0	46.0	32.0	26.0

***n = 9 is a small sub-sample**

³⁶ A comparison of all factors by year is attached as Appendix 2.

CONCLUSIONS AND RECOMMENDATIONS:

The data collected from OAL final decisions for special education matters posted on the OAL website clearly demonstrated that NJDOE and the OAL have together failed to meet the 45-day timeline for a special education due process hearing for at least the past four years.³⁷ The analysis validated concerns expressed by NJSEP members about the length of time it takes to adjudicate special education matters and the impact on the children, and families, during the extended dispute resolution. Of the four factors that contributed most heavily to the non-compliance - the number of days that passed before a first hearing date; the number of days between hearing dates; the number of days from the date the record closed to the date the final decision was issued; and the length of time between the last hearing date and the record closing – the first three are reasonably assumed to be related to ALJ workload and to have been aggravated by the longstanding ALJ shortage.³⁸ Within the past year, the OAL has moved closer to having a full complement of 45 judges - closer than it has been since 2010. However, an insufficient number of ALJs, with heavy workloads that limit their availability to hear special education matters in a timely manner, are issues that must be rectified.

As the ultimate guarantor of FAPE under IDEA, the State's failure to properly staff the OAL cannot serve as an excuse for the violation of the civil rights of students with disabilities. The harm resulting from delayed decision-making is self-evident and compliance with federal and state law is not optional. New Jersey must promptly develop a plan to address the identified factors in this report that implements necessary changes to the adjudicative process to protect the rights of special education students. Until it does so, the factors that create the delays, and hinder compliance with the 45-day timeline, will continue to negatively impact students, parents, and school districts, in 2018 and beyond.

While NJSEP recommends the OAL continue to work with special education attorneys on both sides of the bar to improve the litigation process for special education cases, a broader commitment by the State is urgently needed. NJSEP suggests the State look to procedures in other states that adjudicate special education matters in a manner consistent with the regulations. For example, at least two states that reportedly conduct timely special education hearings have done so by assigning hearing officers, unlike New Jersey's ALJs, to work solely on IDEA

³⁷ NJSEP's initial research and analysis that included decisions from 2011-2015 demonstrated that NJDOE had been non-compliant with the 45-day requirement going back to at least 2011.

³⁸ The fourth factor, the length of time between the last hearing date and the record closing, may be impacted by the time needed to obtain and review transcripts of the hearing dates. In the experience of NJSEP members it can take several weeks.

disputes.³⁹ Massachusetts established the Bureau of Special Education Appeals ("BSEA"), an independent subdivision of the state's Division of Administrative Law Appeals. The BSEA is dedicated to conducting mediations, issuing advisory opinions and adjudicating due process hearings to resolve special education disputes. Pennsylvania's Office of Dispute Resolution currently has six hearing officers dedicated to special education matters who render final decisions for all such matters throughout the state. Identifying and adopting effective practices from other states could lead to long term structural improvements in NJDOE's special education dispute resolution process.

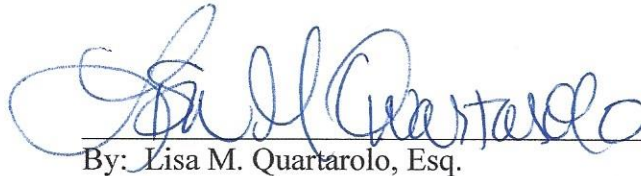
NJSEP calls on the State of New Jersey to take immediate action to quickly improve its compliance with the 45-day timeline. NJSEP supports a plan to achieve compliance that includes, at a minimum, the following elements:

1. Ensures a full complement of 45 ALJs, or expands that number if necessary to provide sufficient judges to handle the increasing number of special education matters;
2. Commits to appointing ALJs with the expertise and experience to adjudicate special education cases and/or provide training for new ALJs in this specialized area of law;
3. Commits the resources to develop adequate tracking and reporting programs, so that data about the process, including any delays, is readily accessible to the State and the public; and
4. Tasks NJDOE with undertaking necessary systemic reforms in the statewide provision of special education services to decrease the need for due process hearings.

NJSEP asks the State's new administration to prioritize the fixing of this broken system, and to act proactively to avoid the litigation or loss of federal funds that will inevitably result if this travesty of justice is not fully remedied. How long does it take for a special education case to be decided in New Jersey? Far too long.

March 21, 2018

NEW JERSEY SPECIAL EDUCATION PRACTITIONERS



By: Lisa M. Quartarolo, Esq.

³⁹ The timeliness of the adjudication process in other states is based on NJSEP members' experience. NJSEP has not undertaken an analysis of compliance with the 45-day rule for states other than New Jersey.

Encls.

Cc: Dr. Lamont Repollet, Acting Commissioner of Education
Hon. Lisa James-Beavers, Acting OAL Director and Chief ALJ
John Worthington, Director, OSEPP
Hon. Laura Sanders, former Chief ALJ, Governor's Counsel's office

APPENDIX

	TOTAL # OF RECORDS	# OF RECORDS W/O EMERGENT/EXPEDIENT	# OF EMERGENT/EXPEDIENT RECORDS ONLY
	N = 195 ¹	N = 133	N = 62 ¹
Filing Date - Transmittal Date	n = 110	n = 73	n = 37
Average # of Days	26.7	37.8	4.8
Median # of Days	30.0	35.0	3.0
Range of # of days	0 to 93	0 to 93	0 to 34
Transmittal Date- Settlement Conference Date	n = 26	n = 24	N = 2
Average # of Days	32.5	34.1	
Median # of Days	17.5	19.5	
Range of # of days	7 to 150	7 to 150	
Transmittal Date - Pre-Hearing Conf. Date	n = 21	n = 21	NA
Average # of Days	61.4	61.4	
Median # of Days	42.0	42.0	
Range of # of days	9 to 299	9 to 299	
Transmittal Date-1st Hearing Date	n = 125	n = 74	n = 51 ²
Average # of Days	104.2	169.3	9.6
Median # of Days	70.0	142.5	7.0
Range of # of days	1 to 497	10 to 497	1 to 39
# of Hearing Dates (decisions with > = 1 hearing dates)	n = 142 ³	n = 86	NA
Average # of Hearing Days ³	2.9	4.2	
Median # of Days	1.0	3.0	
Range of # of days	1 to 28	1 to 28	
# of Days Between First and Last Hearing Date	n = 56	n = 56	NA
Average # of Days	152.3	152.3	
Median # of Days	115.0	115.0	
Range of # of days	2 to 651	2 to 651	
Last Hearing Date - Record Closed Date:	n = 130 ⁴	n = 76	n = 54
Average # of Days	32.1	54.3	1.0
Median # of Days	0.0	37.0	0.0
Range of # of days	0 to 322	0 to 322	0 to 17
Record Closed Date - Decision Date:	n = 190	n = 130	n = 60
Average # of Days	32.9	46.6	3.3
Median # of Days	8.0	17.5	1.0
Range of # of days	0 to 553	0 to 553	0 to 36
Transmittal Date- Decision Date:	n = 155	n = 103	n = 52
Average # of Days	211.9	312.0	13.8
Median # of Days	130.0	238.0	10.0
Range of # of days	1 to 1178	1 to 1178	1 to 61

¹ One final decision listed on EDS Tab did not document the decision date. It is included among the population (N=195) but only included in hearing dates sub-samples.

² Emergent Relief/Expedited matters with Oral Argument or 1 Day Hearing to present evidence

³ Six (6) days is the average # of hearing dates for matters with 2 or more hearing dates.

⁴ The majority of records for Emergent Relief/Expedited matters closed on the day of the hearing date resulting in -0- for this data point. (68 of 130 records had a value = 0)

	TOTAL # OF RECORDS	# OF RECORDS W/O EMERGENT/EXPEDIENT	# OF EMERGENT/EXPEDIENT RECORDS ONLY
	N = 195 ¹	N = 133	N = 62 ¹
Decisions with Single Hearing Date or Oral Argument Only	n = 83	n = 27	n = 56
Subsample - # of records with documented transmittal dates	n = 72	n = 22	n = 50
Average # of Days Transmittal to FINAL DECISION	60.1	164.8	14.0
Median # of Days	16.5	145.0	10.0
Range of # of days	1 to 338	40 to 338	1 to 61
Decisions with 2 or More Hearing Dates	n = 59	NA	NA
Subsample - # of records with documented transmittal dates	n = 52		
Average # of Days Transmittal to FINAL DECISION	470.0		
Median # of Days	418.0		
Range of # of days	121 to 1178		

APPENDIX 2
COMPARISON BY YEAR 2014-2017

	<u>TOTAL # OF RECORDS</u>	<u>2017</u>	<u>2016</u>	<u>2015</u>	<u>2014</u>
N = Total # of records in analysis of data including Emergent/Expedient Relief Decisions	N = 195*	N = 48**	N = 52	N = 50	N = 45
ER/EXP as % of total records	ER/EXP n = 62 31.8%	ER/EXP n = 14 29.2%	ER/EXP n = 13 25.0%	ER/EXP n = 16 32.0%	ER/EXP n = 19 42.2%
Filing Date - Transmittal Date	n = 110	n = 36	n = 20	n = 30	n = 24
Average # of Days	26.7	24.4	36.4	25.1	24.0
Median # of Days	30.0	22.5	34.5	29.0	22.5
Range of # of days	0 to 93	0 to 93	3 to 79	0 to 82	2 to 69
Transmittal Date- Settlement Conference Date	n = 26	n = 8	n = 8	n = 4	n = 6
Average # of Days	32.5	n is too small	n is too small	n is too small	n is too small
Median # of Days	17.5				
Range of # of days	7 to 150				
Transmittal Date - Pre-Hearing Conf. Date	n = 21	n = 8	n = 6	n = 5	n = 2
Average # of Days	61.4	n is too small	n is too small	n is too small	n is too small
Median # of Days	42.0				
Range of # of days	9 to 299				
Transmittal Date-1st Hearing Date	n = 125	n = 32	n = 28	n = 33	n = 32
Average # of Days	104.2	133.9	100.1	111.8	70.1
Median # of Days	70.0	103.5	87.0	68.0	14.5
Range of # of days	1 to 497	1 to 497	3 to 388	2 to 466	2 to 289
# of Hearing Dates (decisions with > = 1 hearing dates)	n = 142	n = 34	n = 34	n = 42	n = 32
Average # of Hearing Days	2.9	2.6	3.2	3.2	2.7
Median # of Days	1.0	1.0	1.0	1.0	1.0
Range of # of days	1 to 28	1 to 9	1 to 18	1 to 28	1 to 12
# of Days Between First and Last Hearing Date	n = 56	n = 16	n = 14	n = 17	n = 9 (small base)
Average # of Days	152.3	117.7	162.6	157.3	188.0
Median # of Days	115.0	90.5	136.5	151.0	187.0
Range of # of days	2 to 651	12 to 427	2 to 369	41 to 651	6 to 506
Last Hearing Date - Record Closed Date:	n = 130 ¹	n = 32	n = 31	n = 35	n = 32
Average # of Days	32.1	44.0	29.5	37.3	17.2
Median # of Days	0.0	19.5	0.0	5.0	0.0
Range of # of days	0 to 322	0 to 322	0 to 213	0 to 171	0 to 180
Record Close Date - Decision Date:	n = 190	n = 44	n = 52	n = 49	n = 45
Average # of Days	32.9	26.1	45.9	31.6	26.0
Median # of Days	8.0	11.0	14.0	4.0	3.0
Range of # of days	0 to 553	0 to 186	0 to 528	0 to 553	0 to 412
Transmittal Date- Decision Date:	n = 155	n = 40	n = 37	n = 37	n = 41
Average # of Days	211.9	261.0	247.2	218.9	126.0
Median # of Days	130.0	196.5	168.0	179.0	29.0
Range of # of days	1 to 1178	1 to 1178	6 to 937	5 to 962	1 to 772

As of February 7, 2018:

* 191 decisions listed on OAL Tab as of 020718 subtract 3 duplicate decisions and one (1) 2018 decision date = 187 decisions to be analyzed

Of the 187 decisions - 8 decisions for consolidated cases that contained necessary information to allow bifurcation of the two cases adding 8 records = 195 total records in database

** One decision on EDS Tab did not document the decision date. It is included among the population (N=195) but only used in calculation of hearing days.

APPENDIX 2
COMPARISON BY YEAR 2014-2017

N = Total # of records in analysis of data including
Emergent/Expedient Relief Decisions
ER/EXP as % of total records

	<u>TOTAL # OF RECORDS</u>	<u>2017</u>	<u>2016</u>	<u>2015</u>	<u>2014</u>
	N = 195*	N = 48**	N = 52	N = 50	N = 45
	ER/EXP n = 62	ER/EXP n = 14	ER/EXP n = 13	ER/EXP n = 16	ER/EXP n = 19
	31.8%	29.2%	25.0%	32.0%	42.2%
Decisions with Single Hearing Date or Oral Argument Only	<i>n = 83</i>	<i>n = 18**</i>	<i>n = 19</i>	<i>n = 23</i>	<i>n = 23</i>
Subsample - # of records with documented transmittal dates	<i>n = 72</i>	<i>n = 16</i>	<i>n = 16</i>	<i>n = 17</i>	<i>n = 23</i>
Average # of Days Transmittal to FINAL DECISION	60.1	61.7	80.3	59.3	45.4
Median # of Days	16.5	19.5	34.0	18.0	11.0
Range of # of days	1 to 338	1 to 271	6 to 338	5 to 320	3 to 219
Decisions with 2 or More Hearing Dates	<i>n = 59</i>	<i>n = 16</i>	<i>n = 15</i>	<i>n = 19</i>	<i>n = 9</i>
Subsample - # of records with documented transmittal dates	<i>n = 52</i>	<i>n = 15</i>	<i>n = 14</i>	<i>n = 16</i>	<i>n = 7 (small base)</i>
Average # of Days Transmittal to FINAL DECISION	452.6	487.5	499.2	411.4	507.7
Median # of Days	418.0	419.0	483.0	368.0	420.0
Range of # of days	121 to 1178	121 to 1178	236 to 937	123 to 962	167 to 772

As of February 7, 2018:

* 191 decisions listed on OAL Tab as of 020718 subtract 3 duplicate decisions and one (1) 2018 decision date = 187 decisions to be analyzed

Of the 187 decisions - 8 decisions for consolidated cases that contained necessary information to allow bifurcation of the two cases adding 8 records) = 195 total records in database

** One decision on EDS Tab did not document the decision date. It is included among the population (N=195) but only used in calculation of hearing days.