

Financing Special Education in New Jersey
New Jersey School Boards Association
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Mediation and Due Process Issues

Due Process Procedures. Parents of students with disabilities have many rights spelled out in the *Parental Rights in Special Education*, a state Department of Education publication that provides information about state and federal special education law and regulation. Among those rights is the ability to request mediation or a due process hearing if parents and districts disagree on issues, such as eligibility for special education, program or placement. In the first instance, a State Mediator will conduct a conference and facilitate communication between the parties. If an agreement is reached, the State Mediator will prepare a document delineating the terms that are binding on both parties. If an agreement is not reached or if either party declines mediation, the parents may request a due process hearing at the Office of Administrative Law (OAL).

Before transmitting a case to OAL, a State Mediator may conduct a resolution meeting if both parties agree or may forward the case directly to OAL. At the hearing, the parties and their representatives (advocate or attorney) present evidence supporting their positions. A 2005 U.S. Supreme Court decision (*Schaffer v. Weast*) shifted the burden of proof from the district to the petitioner. The Administrative Law Judge will encourage the parties to work out an agreement, but will conduct a full hearing if one is not forthcoming. Strict timelines govern both mediation and due process hearings.

Parents may request relief either through mediation alone, due process alone, or in combination. A direct transmittal is sent to OAL without a resolution meeting. Parents may request emergency relief if the Administrative Law Judge determines that the petitioner is likely to prevail or may suffer irreparable harm if it is not granted. An expedited hearing may be requested when the issue involves a disciplinary action. The following chart shows the number and percentage of mediation and due process requests from 2001 to 2006.

Mediation-Due Process Requests

Number

Relief Sought	2001	2002	2003	2004	2005	2006
Mediation	459	332	302	243	197	230
Mediation/Due Process	120	261	295	383	378	539
Direct Transmittal	204	157	139	42	135	17
Due Process Hearing	186	160	195	322	196	208
Emergency Relief/Expedited Hearing	283	235	281	241	186	54
Unrecorded	0	0	6	10	4	2
Total	1252	1145	1218	1241	1096	1050

Percent of Requests

Relief Sought	2001	2002	2003	2004	2005	2006
Mediation	36.7	29.0	24.8	19.6	18.0	21.9
Mediation/Due Process	9.6	22.8	24.2	30.9	34.5	51.3
Direct Transmittal	16.3	13.7	11.4	3.4	12.3	1.6
Due Process Hearing	14.9	14.0	16.0	25.9	17.9	19.8
Emergency Relief/Expedited Hearing	22.6	20.5	23.1	19.4	17.0	5.1
Unrecorded	0.0	0.0	0.5	0.8	0.4	0.2
Total	100.0	100.0	100.0	100.0	100.0	100.0

Mediation Outcomes. Mediation can result in several possible outcomes. A case is closed when an agreement is reached prior to a hearing. The percentage of cases closed varied between 5% and 7% from 2001 to 2006. As of 2006, cases also could be recorded as closed after a resolution meeting. This change increased the number of cases closed by 5% and resulted in a corresponding drop in the percentage of cases transmitted to OAL. A case may be returned (about 2% in 2006) if the request is incomplete or the petitioner cannot be reached. A case is recorded as settled if mediation results in an agreement. The percentage of cases settled decreased from 22% in 2001 to 14% in 2006. A case is transmitted when the State Mediator sends it to OAL for a due process hearing. Transmitted cases increased from 48% in 2001 to 58% in 2005, but went back down to 44% in 2006. A case may be withdrawn by the petitioner prior to any meeting (no action) or after some action is taken by the State Mediator (e.g., contacts the parties; schedules a meeting). Fifteen percent to 18% of the cases were withdrawn with or without action. Over the last six years, there has been a slight decrease in the percentage of cases withdrawn with action and a corresponding increase in the percentage withdrawn without action. Data were not recorded in a small number of cases. The following chart describes the number of cases and their outcomes from 2001 to 2006.

Mediation Outcomes

Number

Mediation Outcome	2001	2002	2003	2004	2005	2006
Closed	69	102	89	77	54	78
Closed-Resolution Agreement						57
Returned	76	58	65	88	56	22
Settled	280	210	198	177	171	147
Transmitted	606	568	664	691	635	467
Withdrawn-Action	72	71	53	37	33	34
Withdrawn-No Action	149	136	136	152	134	148
Unrecorded			13	19	13	97
Total	1252	1145	1218	1241	1096	1050

Percent of Cases

Mediation Outcome	2001	2002	2003	2004	2005	2006
Closed	5.5	8.9	7.3	6.2	4.9	7.4
Closed-Resolution Agreement						5.4
Returned	6.1	5.1	5.3	7.1	5.1	2.1
Settled	22.4	18.3	16.3	14.3	15.6	14.0
Transmitted	48.4	49.6	54.5	55.7	57.9	44.5
Withdrawn-Action	5.8	6.2	4.4	3.0	3.0	3.2
Withdrawn-No Action	11.9	11.9	11.2	12.2	12.2	14.1
Unrecorded	0.0	0.0	1.1	1.5	1.2	9.2
Total	100.0	100.0	100.0	100.0	100.0	100.0

Due Process Hearing Outcomes. Hearings can result in several possible outcomes. A case may be denied, its sufficiency challenged or dismissed for a small number of reasons. A case may not be heard if one of the parties does not attend. A case may be remanded to the Office of Special Education Programs for further mediation efforts. Prior to the hearing date, almost half the petitioners withdraw their request, frequently because they have settled with the district outside of due process. A case may be settled on the day of the hearing through negotiations between the parties, with the agreement confirmed by the Administrative Law Judge. The percentage of cases settled increased from 35% in 2001 to 42% in 2006. The percentage of cases decided after a hearing decreased from 19% to 6.5% during that same period. Data were not recorded in a number of cases. The chart below describes the number of due process cases and their outcomes from 2001 to 2006.

Due Process Hearing Outcomes

Number

DP Hearing Outcome	2001	2002	2003	2004	2005	2006
Denied/Sufficiency Challenge	15	5		5	4	15
Dismissed	28	13	9	2	18	5
Failed to Appear	7	11	6			3
Remand			7	1	2	
Withdrawn	193	123	214	228	208	225
Withdrawn-No Action			2	14	30	
Settled	212	195	288	289	269	201
Decided	115	106	114	102	80	31
Unrecorded	36	115	24	50	24	
Total	606	568	664	691	635	480

Percent of Cases

DP Hearing Outcome	2001	2002	2003	2004	2005	2006
Denied/Sufficiency Challenge	2.5	0.9		0.7	0.6	3.1
Dismissed	4.6	2.3	1.4	0.3	2.8	1.0
Failed to Appear	1.2	1.9	0.9			0.6
Remand			1.1	0.1	0.3	
Withdrawn	31.8	21.7	32.2	33.0	32.8	46.9
Withdrawn-No Action			0.3	2.0	4.7	
Settled	35.0	34.3	43.4	41.8	42.4	41.9
Decided	19.0	18.7	17.2	14.8	12.6	6.5
Unrecorded	5.9	20.2	3.6	7.2	3.8	0.0
Total	100.0	100.0	100.0	100.0	100.0	100.0

Cases. Slightly over 1,000 cases with an average of one or two issues are brought per year involving about half the school districts. From 2001 to 2006, 19% of districts had at least one case every year. In contrast, 22% of the districts had no cases at all during that same time period. The overall average is less than two cases per year per district; however, for districts that regularly have cases, the average is between three and four per year. Keep in mind that mediation or due process is requested on behalf of only a small number of students with disabilities. An average of just 0.5% to 0.7% of the students Eligible for Special Education and Related Services (ESERS) had such cases brought on their behalf over the past six years. The districts or charter schools with the highest percentages have very few ESERS students for the denominator, thereby exaggerating the size of their percentage (e.g., two cases among four ESERS students equals a rate of 50%). The following chart shows the distribution of districts according to the percentage of their ESERS students who had mediation or due process cases requested on their behalf from 2001 through 2006.

**Distribution of Districts by Mediation-Due Process Cases
As a Function of their Percent of ESERS Students**

Pct of ESERS	2001	2002	2003	2004	2005	2006
0.0	331	355	338	328	342	358
0.1	1	3	3	1	1	7
0.2	16	20	16	12	19	11
0.4	43	42	42	53	56	49
0.6	42	36	47	40	43	43
0.8	38	32	33	35	40	37
1.0	37	39	38	43	30	32
1.2	26	22	32	28	32	32
1.4	19	18	23	18	20	21
1.6	22	20	15	16	7	13
1.8	9	12	13	16	6	11
2.0	13	13	12	12	13	8
2.2	9	11	9	8	8	7
2.4	7	10	6	4	9	6
2.6	10	3	8	9	1	3
2.8	5	3	4	10	5	5
3.0	3	1	5	3	3	3
3.5	8	14	8	7	8	5
4.0	4	4	4	0	6	3
4.5	5	4	5	5	2	6
6.0	9	2	2	7	8	4
6.5	0	0	1	1	2	2
7.0	2	0	2	2	0	0
7.5	2	1	0	1	1	1
8.0	0	0	1	2	2	0
8.5	0	0	0	1	0	1
9.0	0	0	0	0	0	0
9.5	1	1	0	2	2	1
10.0	0	1	0	3	0	0
More	9	4	4	4	5	2
Districts with Cases	340	316	333	343	329	313
Pct of All Districts	50.7	47.1	49.6	51.1	49.0	46.6
Avg Pct Cases / ESERS	0.7	0.6	0.6	0.6	0.6	0.5

Issues. About 60% of the issues in mediation and due process are about the students' IEP programs and/or placements. Other common issues involve evaluation, eligibility or related services. Although mediation and due process is a concern for those districts involved, the litigation itself it is not a major cost issue, according district directors of special services. However, if it results in placement in an out-of-district school, the settlement can be costly with tuition and transportation costs exceeding \$40,000 to \$50,000 or more. Districts sometimes balance the costs of litigation against the cost of the program or placement sought by parents. They also have to weigh the cost of

initiating a local program instead to fulfill the requirements of placement in the least restrictive environment. Districts may have too few students in need of a given program to support establishing one in-district. This chart shows the number, percent of requests, and percent of issues over the last three years. Included under “Other” are issues such as, home instruction, graduation, transition, student records, and State Assessment.

Issues in Mediation and Due Process Cases

Issues	Number			Percent of Issues		
	2004	2005	2006	2004	2005	2006
504 Eligibility and Accommodation Plans	23	37	14	1.1	1.4	0.7
Identification, Referral, Evaluation or Reeval	272	590	485	12.6	21.7	23.5
Eligibility - Declassification	48	108	58	2.2	4.0	2.8
IEP-Program	501	610	568	23.1	22.4	27.5
Least Restrictive Environment (LRE)	97	62	35	4.5	2.3	1.7
Related Services	228	309	280	10.5	11.4	13.6
Placement	576	477	201	26.6	17.5	9.7
Placement Out of District - Transportation	222	324	327	10.2	11.9	15.8
Extended School Year	50	60	14	2.3	2.2	0.7
Discipline	40	37	13	1.8	1.4	0.6
Other	109	104	69	5.0	3.8	3.3
Total Number of Issues	2166	2718	2064	100.0	100.0	100.0
Requests	1241	1096	1050	-	-	-
Average Number of Issues per Request	1.7	2.5	2.0			

Cases by Region. The overall percentage of ESERS classified students on whose behalf due process cases are filed each year is about 0.6%. As a percentage of all child study team classified students, the regions have similar rates of due process cases, about 0.5% to 0.6%. Approximately 37% of the total number of cases filed statewide came from the north in 2005, with the central region accounting for a similar percentage. Just 27% of the cases originated in the south where the population is smaller. In the past, the north had more of the cases (about 40%) and the central and south regions had about 30% each. The chart that follows shows the number of cases in each region for the last six years, the percent of all cases and the percent of all ESERS students.

Mediation-Due Process Cases By Region

Number

Year	North	Central	South
2001	504	392	359
2002	426	335	384
2003	467	390	362
2004	508	371	362
2005	406	402	295
2006	402	361	290

Percent of All Cases

Year	Pct North	Pct Central	Pct South
2001	40.2	31.2	28.6
2002	37.2	29.3	33.5
2003	38.3	32.0	30.0
2004	40.9	30.0	29.2
2005	36.8	36.5	26.8
2006	38.2	34.3	27.5

Percent of ESERS Classified

Year	North	Central	South
2001	0.7	0.4	0.6
2002	0.6	0.6	0.6
2003	0.6	0.6	0.6
2004	0.7	0.6	0.6
2005	0.5	0.6	0.5
2006	0.5	0.6	0.5

Cases by Operating Type. About half of the due process cases are from large K-12 districts. Large K-8 and medium-sized K-12 districts each have about 13% of the cases. The rest of the district operating types have fewer than 10% of the cases. The lowest rates are in K-6 and small K-8 districts. Parents generally want to keep their children in the local schools when they are in the lower grades. They begin to consider more distant schools when their children are older. Given that program and placement are at issue in more than half the mediation-due process cases, it is not surprising that the larger volume of cases is generally in districts with higher grade levels.

Among ESERS students, variations in the mediation-due process rates are lowest in the K-6 and large K-12 districts (0.5%) and highest in the small K-8 and medium K-8 districts (0.9% to 1%). The large K-8, small and medium K-12 districts have 0.7% due process rates. The numbers in the vocational and charter schools are too small with which to calculate reliable rates. The following chart shows the number of mediation-due process cases in districts by operating type from 2001 to 2006. It also shows the percentages of all cases and the percentage of ESERS students on whose behalf they are requested. There were no identifiable trends over the last six years by operating type or district factor grouping in either the percentages of cases or the percentages of ESERS students involved in mediation or due process.

Mediation-Due Process Cases By Operating Type

Number										
Year	K-6	K-8 Small	K-8 Med	K-8 Lrg	K-12 Small	K-12 Med	K-12 Lrg	7-12/9-12	Voc	Charter
2001	24	22	46	166	59	129	696	97	9	7
2002	24	14	30	170	101	161	532	103	7	3
2003	36	8	44	140	96	144	643	92	3	13
2004	46	12	46	179	77	143	622	103	3	10
2005	24	19	44	141	80	148	548	85	2	11
2006	26	15	44	154	80	138	510	79	3	4

Percent of All Cases										
Year	K-6	K-8 Small	K-8 Med	K-8 Lrg	K-12 Small	K-12 Med	K-12 Lrg	7-12/9-12	Voc	Charter
2001	1.9	1.8	3.7	13.2	4.7	10.3	55.5	7.7	0.7	0.6
2002	2.1	1.2	2.6	14.8	8.8	14.1	46.5	9.0	0.6	0.3
2003	3.0	0.7	3.6	11.5	7.9	11.8	52.8	7.5	0.2	1.1
2004	3.7	1.0	3.7	14.4	6.2	11.5	50.3	8.3	0.2	0.8
2005	2.2	1.7	4.0	12.8	7.3	13.4	50.0	7.7	0.2	1.0
2006	2.5	1.4	4.2	14.6	7.6	13.1	48.4	7.5	0.3	0.4

Percent of Eligible for Special Education and Related Services (ESERS)										
Year	K-6	K-8 Small	K-8 Med	K-8 Lrg	K-12 Small	K-12 Med	K-12 Lrg	7-12/9-12	Voc	Charter
2001	0.5	1.0	0.9	0.8	0.5	0.6	0.7	0.8	0.3	1.1
2002	0.5	0.7	0.6	0.8	0.9	0.8	0.5	0.8	0.2	0.4
2003	0.7	0.4	0.8	0.6	0.8	0.7	0.6	0.6	0.1	1.4
2004	1.0	0.6	0.9	0.8	0.7	0.7	0.6	0.7	0.1	0.9
2005	0.5	1.0	0.9	0.7	0.7	0.7	0.5	0.6	0.1	0.8
2006	0.5	1.0	0.9	0.7	0.7	0.7	0.5	0.6	0.1	0.8

Cases by DFG. Since 2001, close to 48% of due process cases involved districts in the three highest socio-economic groups – district factor groups GH, I and J. DFG I alone has generated more than one-quarter of the due process cases each year since 2004. The next highest percentages are found in GH districts, followed by district factor groups A, B, CD and J, each generating less than 10%. Statewide, 0.6% of special education students file due process cases. Among district factor groups, the highest percentage of students filing due process cases was found in DFG J, where cases were brought on behalf of 1.2% of the districts’ disabled students – double the state average.

Mediation-Due Process Cases By District Factor Grouping

Number									
Year	A	B	CD	DE	FG	GH	I	J	
2001	158	96	89	185	159	219	249	56	
2002	101	81	86	162	118	223	286	55	
2003	129	79	84	206	156	232	254	58	
2004	119	93	95	192	143	193	330	61	
2005	95	78	81	130	153	192	292	65	
2006	70	63	99	174	129	170	263	75	

Percent of All Cases									
Year	A	B	CD	DE	FG	GH	I	J	
2001	13.0	7.9	7.4	15.3	13.1	18.1	20.6	4.6	
2002	9.1	7.3	7.7	14.6	10.2	20.1	25.7	5.0	
2003	10.8	6.6	7.0	17.2	13.0	19.4	21.2	4.8	
2004	9.7	7.6	7.8	16.7	11.7	15.7	27.0	5.0	
2005	8.8	7.2	7.5	12.0	14.1	17.7	26.9	6.0	
2006	6.7	6.0	9.5	16.7	12.4	16.3	25.2	7.2	

Percent of Eligible for Special Education and Related Services (ESERS)									
Year	A	B	CD	DE	FG	GH	I	J	
2001	0.5	0.4	0.5	0.7	0.8	0.9	1.0	1.1	
2002	0.3	0.4	0.4	0.6	0.5	0.9	1.0	1.0	
2003	0.4	0.4	0.4	0.8	0.7	0.9	0.9	1.0	
2004	0.3	0.4	0.5	0.7	0.6	0.7	1.1	1.0	
2005	0.3	0.4	0.4	0.5	0.7	0.7	1.0	1.0	
2006	0.2	0.3	0.5	0.6	0.5	0.6	0.8	1.2	

Survey Results on Mediation and Due Process. A survey conducted for this study asked respondents to rank factors they believe contribute to special education costs. “Due Process” was one of ten factors offered to respondents, who ranked it last. (Due process, however, was frequently listed in responses to separate survey questions addressing needed regulatory change and concerns about the cost, financing and effectiveness of programs.) When a due process case or mediation occurs, both districts and parents are faced with substantial costs for legal representation and expert witnesses. In addition, districts must find substitutes for teachers for the many settlement meetings or for appearances as witnesses. There is no information currently available on the cost of litigation to the parties.