ADDRESSING THE NEEDS OF PRO SE PARENTS

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I. INTRODUCTION

A. The biggest challenge most IDEA impartial hearing officers (IHO) face in fulfilling the role and responsibilities as an IHO is addressing the needs of *pro se* or unrepresented parents during the hearing process. While a few parents possess the skills and emotional control to cogently and professionally present their case to an IHO, most understandably do not.

B. The number of *pro se* parents in IDEA cases seems on the rise, probably for many reasons. First, though IDEA provides that parents shall be notified of any free or low cost legal services,[1] in reality such services in most areas of New York are available but the agencies providing them are overwhelmed by the demand. Second, since 1986 IDEA has provided that parents may be reimbursed for attorneys fees if found to be a prevailing party.[2] But, many attorneys require a substantial retainer to mitigate their risk and most parents just cannot afford it. Finally, a few parents dislike/distrust attorneys or consider representing

[1] 34 C.F.R. §300.507(b).
[2] 34 C.F.R. §300.517.

themselves and their child kind of a do it yourself project.[3]

C. The increase in persons representing themselves appears to be occurring not just in IDEA cases but generally, including the courts. The trend has prompted more discussion on the extent and manner in which a decision maker may or must assist an unrepresented party in an adversarial proceeding, and if so, the appropriate manner to do so. One factor in the discussion is the nature and purpose of the proceeding.[4]

D. The primary goal of the IDEA hearing process is to ensure that the educational rights of a child with a disability are upheld.[5] Query to what extent, if any, does the IHO have a responsibility to take some steps to mitigate the potential adverse effect the lack of representation may have on the process while also achieving the primary goal, i.e., ensuring the educational rights of the child are upheld? And, to ensure those educational rights are upheld, is an affirmative duty to develop the record created?[6] Or, is the role of an IHO just to sit back and act as an

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[3] Memorandum to Erlichman, et. al from Wamsley re: Judges, Administrative Law Judges, and Hearing Officers Ability, Extent, and Duty to Question Witnesses to Develop the Record with Pro Se Litigants (July 23, 2012) at 1.

[4] *See*, *e.g.*, Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant,* 27 J. Nat'l Ass'n Admin. L. Judiciary 447,459 (2007).

[5] 34 C.F.R. §300.1.

[6] At least one New York court has found an affirmative duty to develop the record exists if mandated by enabling law. In *Lizotte v. Johnson,* 777 N.Y.S.2d 580 (2004) the court held the New York City Administration for Children's Services hearing officer "should have inquired into the relevant facts to provide a more complete record, especially considering the petitioner's *pro se* appearance and her inability to speak English." The [Children's] Service's regulations require hearing officers to develop a full record.

Arguably, IDEA implicitly requires an IHO to develop the record. First, an IHO's "determination of whether a child received a FAPE must be made on substantive

umpire calling balls and strike but not overly intruding in the process of completing the record?[7]

E. If an IHO agrees that the very nature of the IDEA hearing process places upon us the responsibility to take some steps, the concern often then is how to balance maintaining impartiality while participating in the completion of the record. But, the two dimensions are not mutually exclusive.[8] Rather, IHOs must strike the balance between them by determining the extent, if any, each step will assist and/or accommodate the unrepresented parent in making a record for the IHO to rule on the issues presented.

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grounds." 34 C.F.R. § 300.513(a). Further, an IHO is given the authority to request an independent educational evaluation. 34 C.F.R. §300.502(d)
8 NYCRR § 200.5(j)(3)(vii) clearly provides the authority for an IDEA IHO to develop the record when it states: "Nothing contained in this subparagraph shall be construed to impair or limit the authority of an impartial hearing officer to ask questions of counsel or witnesses for the purpose of clarification or completeness." *See also* Manual for Administrative Law Judges and Hearing Officers, Department of Civil Service (2002) at p. 119 (stating a HO has the duty to conduct the hearing so that a full and complete record of all relevant facts is made).

Some IHOs might contend that in developing the record the IHO is inappropriately impacting the burden of proof (both the burden of production and the burden of persuasion). In New York both aspects of the burden of proof are placed on the district save when a parent is seeking tuition reimbursement then the burden is placed on the parent regarding the appropriateness of the unilateral placement. NY Educ. Law §4404(b). In my view, the burden of persuasion would be unaffected by the IHO developing the record and remain with the district. To the extent the burden of production is affected, if at all, I believe it would be justified to ensure the overreaching goal of IDEA to uphold the educational rights of the child are met, i.e., to obtain a decision on the merits.

[7] *Logue v. Dore,* 103 F.3d 1040, 1045 (1st Cir. 1997) (stating it is" well-established that a judge is not a mere umpire"). *See also Quercia v. U.S.,* 289 U.S. 466, 469 (1933).

[8] Memorandum, supra at 5.

F. Clearly, IHOs cannot give an unrepresented parent legal advice. But, it is also well settled that more leniency is also dictated on procedural matters.[9] There are a host of accommodations and assistance that an IHO can provide a *pro se* parent.[10] And, there are additional measures an IHO can take to develop the record. I will offer a variety of suggestions in both of these regards to help ensure that the process achieves its primary goal of upholding the educational rights of the child. Whether an IHO chooses to implement any of them will depend on how the IHO perceives her/his role and responsibilities as an IHO and assesses the particular circumstances in each case.

G. Whether an IHO under IDEA has the authority to engage more fully in the hearing process appears clear. IDEA sets forth the specific rights accorded to any party in a due process hearing.[11]A hearing officer is charged with the specific responsibility "to accord each party a meaningful opportunity to exercise these rights during the course of the hearing. It is further expected that the hearing officer " ensure that the due

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[9] *See Haines v. Kerner,* 404 U.S. 519,520-21 (1972) and *Merritt v. Faulkner* v.697 F.2d 761, 769 (7th Cir. 1983). *See also In re: Student with Disabilities*, 112 LRP 36509 (SEA NY 2010) (stating that an IHO "should deal flexibly with, liberally to, and with understanding towards a *pro se* parent with respect to matters relating to procedures"). *See also* Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents with Children with Disabilities, 52 IDELR 266 (OSERS 2009) ("Although the comments to the regulations permit a state agency to dismiss complaints that are unsigned or do not contain the parent's contact information, OSERS notes that "the better practice might be to notify the parents of the defects in their complaints and allow the parent to remedy the deficiencies.")

[10] *See* 8 NYCRR §200.5(j)(3)(vii) ("At all stages of the proceeding, the impartial hearing officer may assist an unrepresented party by providing information relating only to the hearing process.") *See also* ABA Model Code of Judicial Conduct R. 22 (2007), Comment 4 (stating: "[i]t is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.")

[11] *See*, *e.g.*, 34 C.F.R. §300.512.

process hearing serves as an effective mechanism for resolving disputes between parents" and the school district. In this regard, apart from the hearing rights set forth in IDEA, "decisions regarding the conduct of due process hearings are left to the discretion of the hearing officer," subject to appellate review.[12] And, the generally applicable standard of review is abuse of discretion, which typically favors the hearing officer.[13]

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[12] *Letter to Anonymous,* 23 IDELR 1073 (OSEP 1995). *See also* 8 NYCRR § 200.5(j)(3)(vii) noted above at note 9 and Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, pages 46704-46706 (stating, in pertinent part, "the specific application of those procedures [regarding pre-hearing and decisions] to particular cases generally should be left to the discretion of hearing officers who have knowledge and ability to conduct hearings in accordance with standard legal practice. There is nothing in the Act or these regulations that would prohibit a hearing officer from making determinations on procedural matters not addressed in the Act so long as such determinations are made in a manner that is consistent with a parent's or a public agency's right to a timely due process hearing.")

[13] *See*, *e.g.*, *O'Toole v. Olathe Unified Sch. Dist. No. 233*, 144 F.3d 692,709 (10th Cir 1998); *D.Z. v. Bethlehem Area Sch. Dist*., 2 A.3d 712 (Pa. Commw. Ct. 2010). Interestingly, neither I nor other researchers have been able to find a single case in which a judge or HO overstepped their bounds in assisting an unrepresented party. But, in reviewing IDEA decisions, courts in giving deference to HO's findings have noted their questioning of witnesses. *See J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.,*611 F. Supp. 2d 1097, 1109 (E.D. Cal. 2009) *aff'd* 626 F.3d 431 (9th Cir. 2010) (court gave "due weight to ALJ's decision" after "ALJ questioned many witnesses, both to clarify responses as well as to elicit follow up responses"); *R.B., ex rel. F.B. Napa Valley Unified Sch. Dist*., 496 F.3d 932, 942 (9th Cir. 2007) (court treated "hearing officers findings as 'thorough and careful' when the hearing officer participate[d] in the questioning of witnesses"); *M.M. v. Lafayette Sch. Dist.*, No. CV 09-4624, 2012 WL 398773 (N.D. Cal. Feb. 7, 2012) (court in deferring to ALJ's fact findings noted the ALJ was "thoroughly engaged…asking numerous follow-up and clarifying questions of the witnesses though out"); *S.A. ex rel. L.A. v. Exeter Union Sch. Dist*., No. CV F 10-347 LJO SMS, 2010 WL 4942539 (E.D. Cal. Nov. 24, 2010) (court finding that "although the ALJ actively questioned [the superintendent] for a lengthy period of time, there [was] no

H. While not the focus of this presentation, often problems similar to those presented by a pro se parent arise with certain non-attorney advocates. In as much as there is no certification/licensure-type process for non-attorney advocates, the range of advocacy skills and professionalism they exhibit varies widely. Some non-attorney advocates present themselves in a manner very similar to the parents who does not have the emotional control or skills to provide the IHO with a complete record from which the IHO can make an informed decision. On the other hand, other non-attorney advocates exhibit advocacy skills and professionalism comparable to excellent special education attorneys. Accordingly, there can be no "hard and fast" ground rules in handling the involvement of a non-attorney advocate in the hearing process.

The IHO will have to assess each situation in terms of whether the non-attorney advocate presents her/himself more like a *pro se* parent or a competent special education attorney. Usually the participation of the non-attorney advocate in the pre-hearing conference will give the IHO a fairly good indication of what can be expected in the hearing and give the IHO a chance to consider various options and get prepared. To the extent the situation presented more closely reflects the former, the IHO may elect to limit the involvement of the non-advocate and implement some of the strategies suggested here for an unrepresented parent.

I. Another awkward situation for an IHO is presented when the parent is also an attorney, but not experienced/familiar with hearing and/or special education procedures. Again, an IHO must assess each situation presented to determine the extent an IHO should become more engaged in the process to help ensure

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evidence that the ALJ inappropriately credited her responses");other cases cited in Memorandum, *supra* at 9.

IDEA's goal is achieved. Again, the pre-hearing conference will usually provide some insight of what to expect at the hearing and prepare for it.

II. UPON APPOINTMENT

A. An IHO cannot start too early in helping the parent understand that with the right to go to hearing under IDEA comes responsibilities in exercising that right. An option some IHOs have found helpful is a letter of introduction. (*See* Attachments A -1 and A – 2.) This type of letter can accomplish several purposes. It can alert the IHO that the parent needs an interpreter to participate in future proceedings. It can encourage the parties to raise any concerns about a possible conflict of interest immediately to avoid possible delays. It can set forth the initial procedural obligations of the parties to help the parent better understand them. It provides the IHO an opportunity to request a copy of the IEP, which can often be very helpful in understanding the parent's concerns/issues/proposed resolutions. Most importantly, it provides an IHO the opportunity to give the parent what I will call: "Hearing Process Guidelines." (*See* Attachment B.)

B. The Hearing Process Guidelines document attempts to set forth in plain language some expectations and standards of conduct that most IHOs would expect of any party, advocate and attorney. But understandably, most unrepresented parents are not acquainted with them. Too many IHOs only deal with these "ground rules" as the need for them arises. I believe it is fairer to the parent to establish them at the outset and give the parent notice of them (so at the pre-hearing conference (PHC) the IHO can ask if the parent if s/he has any questions and provide explanations early on). Also, as a general rule, good practice dictates that whatever an IHO tells an unrepresented parent in terms of the process, it should be confirmed in writing. Doing so

will not only make sure that what the IHO said is clear and on the record but also provide the parent with a confirmation of the information or directive to refer to later.

C. Holding a PHC with an unrepresented parent can be the most helpful strategy an IHO can implement. In calling or writing to set up the date and time for the PHC, often the parent will want to tell an IHO about her/his situation at length, not understanding such is improper, even if the IHO sent the parent the above Guidelines. Be sure to not only cut them off, but also explain why, e.g., "The purpose for this call is/correspondence was solely to set up the date and time for the PHC. The time for you to tell me about your view as to what has happened with your child and what you believe your child needs is at the hearing. While you probably are not aware of this (referring to the Guideline if the IHO sent it out) it also is not proper or ethical for me to listen to one party without the other being present to hear it. I think you, too, would be upset if I listened to the District or its attorney without you being present, and I assure you I won't, telling them the same thing I have told you here."

D. You should send out a Notice regarding the PHC as well as an agenda or "Subjects to be Considered." (*See* Attachments C and D.)

E. The likelihood of a notice of insufficiency being filed is no doubt higher with a *pro se* parent. But, with a *pro se* parent the complaint can be read more liberally.[14] Should the IHO agree that the complaint is insufficient, the IHO must notify the

[14] *See In re: Student with Disabilities*, 111 LRP 61694 (SEA NY 2011) and *In re: Student with Disabilities*, 111 LRP 48732 (SEA NY 2011) (both decisions noting the "due process notice may be reasonably read to include the issue of whether the student should be provided with compensatory education despite the fact that the *pro se* parent did not use the exact terminology).

parties in writing of that determination and identify how the complaint is insufficient.[15] This provides the IHO with a very appropriate opportunity to provide assistance regarding how the parent might amend the complaint.[16]

III. THE PRE-HEARING CONFERENCE

A. It cannot be over emphasized that for many reasons the PHC is usually the most important strategy an IHO can use to help the unrepresented parent understand and navigate the hearing process.

B. I would suggest, if reasonably possible, to hold the PHC in person, considering how quickly it can be held and the distance/difficulties in all the parties getting there. It's always better to discuss things face-to-face, particularly where the IHO is trying to provide explanations and may have difficulty in maintaining control of the discussion. Plus, the parent will likely feel more comfortable and less rushed.

C. It may also be helpful to the parent, and the IHO, to record the PHC, possibly providing the parties with a copy of the

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[15] Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, Page 46698 (August 13, 2006).

[16] *Id*. at 46699 ("With regard to parents who file a due process complaint without the assistance of an attorney or for minor deficiencies or omissions in complaints, we would expect that hearing officers would exercise appropriate discretion in considering requests for amendments.")
*See Sudbury Pub. Sch. v. Mass. Dept. of Elementary and Secondary Educ.,*762 F. Supp. 2d 254 (D. Mass. 2010) (where the district's challenge to the IHO's impartiality, for among other things, suggesting that the *pro se* parent amend her complaint to request "an additional year of retroactive reimbursement" was rejected. The court found that the efforts of the IHO "reflect a commendable effort to assure that all contentions were fully developed and evaluated."

recording.

D. As to certain matters normally covered in a PHC (as noted in the "Subjects to be Considered" document (Attachment D) I would offer these suggestions:

a. Avoid using legal jargon, or if you must, explain what it means in plain language.

b. Regarding possible representation, encourage them to obtain an advocate or attorney and check on whether the parent is considering such. If not, ask if the parent is informed about free or low cost legal services by the district, as well as sources to contact to obtain assistance in understanding IDEA in the prior written notice. If such were not provided, or the parent lost/cannot find them, ask the district if another copy could be sent the parent.

c. Confirm the result of the resolution meeting, if held, or any mediation, particularly any complaint issues that may have been resolved.

d. The typical due process complaint includes a myriad of concerns the parent has regarding his/her child's education. Presenting these concerns in an understandable and logical sequence can be difficult for any individual let alone an unrepresented parent.

   Nonetheless, as discussed in prior trainings, the importance of the IHO having a comprehensive understanding of the precise question(s) that s/he must answer after the record has been closed cannot be overstated. When the IHO understands what it is that is being asked of him/her, the IHO is in a better position to extract the necessary evidence that will enable him/her to

decide an issue/defense and to craft an appropriate remedy, when necessary. The PHC affords the IHO an early opportunity to confirm his/her understanding of the issue(s) to be decided (i.e., the precise question(s) to be answered) and the proposed remedies being requested.

When clarification is necessary, obtaining it must be done with great care, and the IHO should first explain to both the school district and the parent how the requested information will help the IHO with understanding what s/he is being asked to do. The IHO should further explain to the school district and the parent that the PHC is not the time for the presentation of evidence.

If an issue is the alleged inappropriateness of the IEP or that some part of it was allegedly violated, the IHO should confirm with the parent what aspects s/he believe are inappropriate or have been violated. To assist the IHO, the IHO should consider reviewing the actual IEP with the parties during the PHC. This exercise will also assist the IHO in understanding what relief it is the parent is asking the IHO to award, should the IHO determine that the child has been denied FAPE.

e. The discussion regarding clarification of the issues has other benefits. It allows the IHO to lead a discussion on what needs to be shown/presented for the IHO to be able to determine the issue(s). This discussion is extremely important in ensuring a complete record and can be of assistance to the unrepresented parent in properly preparing for the hearing.[17]

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[17] Manual, *supra* at 119 (the HO should ask the unrepresented party “what the party’s contentions are and what the party intends to prove”).

f. While in no way asking the parent (or district) to present their case, some general discussion regarding who the parties might call as witnesses and what documents they might submit offers the IHO the opportunity to explain to the parent how the submission of evidence will work and generally what the parent will need to present regarding the issues to be decided and relief requested.

g. In order to make it easier and more orderly to take the testimony of the parent one option is to suggest the parties agree that the parent's opening statement will be considered testimony with the district being able to cross-examine the parent later. Another is to ask/direct the parent to write out the questions s/he will ask her/himself on cards with either someone who accompanies them or the IHO reading the parent the questions at the hearing. It not only helps the parent get their testimony organized but provides some structure to it.

h. Estimating the time it will take to hear the case is sometimes difficult but usually more so with an unrepresented parent.

   Consider also the extent to which the IHO may become involved in the hearing process, e.g., taking over the questioning of certain witnesses (and other strategies noted and to be discussed in Part IV of this outline regarding the hearing below) and the format. Other than the right to "confront and cross-examine" witnesses,[18] IDEA and New York law set forth no requirements regarding the format of the actual hearing. For several years after IDEA became law in 1975, hearings in many parts of the country were held in an informal meeting-like

[18] 34 C.F.R. §300.512(a)(2).

format with the IHO leading a discussion with the witnesses and attorneys. Everyone was sworn in and parties were given the opportunity to cross-examine. This format can be very effective with an unrepresented parent for it is quicker, less acrimonious and usually provides the IHO with a far better record to decide the issues and determine appropriate relief. The IHO might suggest using this format if s/he feels comfortable in leading the discussion – and the district's attorney is as well.

i. Go over the Hearing Process Guidelines, if the IHO used such a document, to see if the parent has questions. If the IHO didn't use such a document go over the matters it addresses that the IHO finds appropriate/necessary given the situation.

j. Typically, an unrepresented parent will have process questions after the PHC as s/he prepare for the hearing. The IHO might discuss and determine how the parent will present such questions to the IHO, e.g., by conference call (possibly recorded), letter or email, with a copy to the district.

k. The IHO will usually need to spend a good deal of time explaining the many details of the process that we all take for granted but are understandably totally foreign to most parents, e.g., the five day rule[19] and its importance, the possible option of telephone testimony, the right to subpoena witnesses and how and when to do it, requests regarding problems or concerns (really motions), the right to open or closed hearing[20], having the child present[21], the

[19] 34 C.F.R. §300.512(b).
[20] 34 C.F.R. §300.512(c)(2).
[21] 34C.F.R. §300.512(c)(1).

format of hearing (including maybe providing a copy), the burden of proof (i.e., production/persuasion), the election regarding a written/electronic decision[22] and the need for the parties to let you know if problems arise before the hearing. All explanations should be confirmed in a PHO (possibly also providing the parties with a recording of the PHC).

IV. THE HEARING

A. Whether an IHO has a court reporter and/or is recording the hearing, I suggest the IHO explain to the parent why it is being done and how it works, e.g., what going on and off the record means, speaking up to be heard by the reporter, the need to use any mic and not talking over someone else so the reporter/recording can get it down.

B. After the IHO's opening statement, possibly in addition to what an IHO might normally do, be sure to take a moment to ask the parties if they have any problems or questions about going ahead with the hearing. Often the parent will want to go over the format again, have questions about a witness getting there or an exhibit or what they can do versus their advocate.

C. An IHO should again explain to the parent the purpose of an opening statement versus testifying. But, even when this is done, the parent will often stray into testifying.

D. Prior to the hearing an IHO should review the results of the PHC (and 5 day disclosures if the IHO got them) in order to be prepared to be more engaged in the questioning of

[22] 34 C.F.R. §300.512(a)(5).

witnesses. Here are some strategies to consider:

- When a witness is called to the stand (for both parties), ask of the parent/district attorney what things/points they intend to question the witness about. This gives an IHO the chance to rule on irrelevant areas and subtly inquire if other areas were going to be addressed. In short, this approach assists the parent in providing only possibly relevant testimony.

- I already suggested above that the IHO have the parent write down questions s/he would ask himself/herself with either a supporter or the IHO reading the questions.

- If a parent is struggling with forming an appropriate question to ask a witness for certain information, ask the parent what information s/he thinks the witness can provide (maybe dismissing the witness from the hearing room during the discussion) and suggest the form of the question(s). Or, ask the parties if the IHO might ask the question(s).[23] Often there will be no

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[23] *See* Manual, *supra* at 120, (noting HO may have the responsibility to question the unrepresented party when the party does not know how to conduct a meaningful examination and cross examination). *See also Oko v. Rogers*, 466 N.E.2d 658 (Ill. App. 3d 1984) (court upheld judge who stopped a *pro se* defendant's narrative testimony and directly questioned the *pro se* defendant and directed the defendant on how to properly form a question on cross examination. After the plaintiff objected several times to the *pro se* litigant's questions the *pro se* litigant asked: "Is there any way I can accomplish that?" and the court advised the pro se litigant: "Ask him what is customary." The court stated: "As any judge or lawyer knows, the conduct of a jury trial with a *pro se* litigant who is unschooled in the intricacies of evidence and trail practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation

objection. In any event, the IHO's assistance should be directed toward accomplishing the party's own strategy, not in suggesting a different or better strategy.

- The IHO could lead the questioning of a particular witness, giving each party a chance to ask follow up questions.

- A problem unique to non-attorney advocates is the potential for them either calling themselves, or being called as a witness. The issue involves whether a non-attorney advocate/client privilege exists analogous to the attorney/client privilege.[24] If so, there is the potential the parent might waive the privilege should the advocate voluntarily take the stand. And, if called to the stand, can the non-attorney advocate invoke the privilege?

E. A problem which is far more likely to arise with an unrepresented parent is the lack of a record to determine the issues presented. Whether, and to what extent, an IDEA HO has the duty or obligation to develop an incomplete record was discussed above.[25] But, New York regulations provide

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rests directly on the trail judge… Such an undertaking requires patience, skill and understanding on the part of the trail judge with an overriding view of a fair trial for both sides." (at 661) The dissent noted: "To condone such actions of the trail court here is to invite *pro se* representation in difficult trials which would make a mockery of the judicial process, even though to fully inform a jury is a commendable purpose." (at 662)).

[24] *See Woods v. New Jersey Dept. of Educ*., 19 IDELR 1092 (D.C. NJ 1993) (stating in the context of the IDEA hearing, policy supports recognition of a lay advocate privilege).

[25] *See* Manual, supra 120 (HO "may have the responsibility to question the unrepresented party, not only to develop the facts, but also assist the party in

express authority for you to do so stating at 8 NYCRR § 200.5(j)(3)(vii):

> "Nothing contained in this subparagraph shall be construed to impair or limit the authority of an impartial hearing officer to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record."

However, how you do it is as important as if you do it. Care should be taken that the questions are unbiased and presented in a manner that does not reveal the IHO's concerns for a particular witness' credibility or the merits of the case. Also, whether you are considering asking a question/line of questions[26], request to review certain documents or even call a witness[27], explain why you think such is necessary/relevant and get the party's reaction. They often will then agree to do it. If not and a party objects, rule on it explaining why the IHO is doing it in terms of completing the record to determine an issue and not to reflect an opinion or be an advocate for a party. Allow each party the opportunity to respond to what the IHO has done by way of cross or additional testimony.

Another possible option to complete the record in some situations is for an IHO to order an independent educational

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presenting the party's case fully"). *See also Sudbury*, *supra* note 14 (where the district's challenge to the IHO's impartiality for, among other things, extensive questioning of witnesses was rejected. The court found that the efforts of the IHO "reflect a commendable effort to assure that all contentions were fully developed and evaluated.")

[26] *See* Fed. R. Evid. 614(b) (allowing a judge to examine "a witness regardless of who calls the witness").

[27] *Id*., (also permitting a judge to call a witness).

evaluation (IEE)[28]. But, usually to do so presents problems in meeting the 45-day timeline even if previously extended because an IHO cannot initiate an additional extension.

F. During the course of the hearing be sensitive to offering the parent breaks to collect their thoughts and get organized. It can sometimes actually speed things up.

G. Maybe the day before the hearing will end, explain again to the parent the purpose of a closing statement or written argument and discuss what might work best for the parties under the circumstances. Doing so will give the parties, particularly the parent, a chance to get their thoughts organized. Be ready to very possibly ask some questions of the parent/district regarding what each thinks they have or have not shown.

V. THE DECISION

A. If the parent in the closing statement or written argument brings up new alleged facts or issues, do not ignore it. Rather, state that the IHO will not consider it and why doing so would be unfair. Or, address it with the parties via correspondence or a telephone conference call.

B. The last on-site training focused on decision writing. Some of the points made then are particularly appropriate when writing a decision in a case with an unrepresented parent:

- Remember who you are writing for and keep the language plain and understandable.

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[28] 34 C.F.R. §300.502(d).

- Avoid use of legal jargon, or if the IHO feels the need to use it, offer explanation of it in plain English.

- In fashioning an appropriate remedy, do not "split the baby" by giving each party some of the programs/services and accommodations they believe are appropriate. That approach short changes the child. Rather, use words to show the IHO heard and appreciated their positions/requests and note the IHO's understanding/agreement/disagreement.