Evidence, Ethics, and the IDEA Hearing Officer

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If it is a Miracle, any sort of evidence will answer, but if it is a Fact, proof is necessary.

- Mark Twain

I. INTRODUCTION

A. In 1975, when Congress passed the Education for All Handicapped Children Act (EHA), now known as the Individuals with Disabilities Education Act (IDEA),[1] it envisioned that disputes between parents and school districts would be resolved efficiently and amicably.

B. Since 1975, to the dismay of many, the IDEA hearing has grown in complexity. The parties have become more litigious, with each side steep in evidentiary and procedural brinkmanship.

C. As a general matter, the technical rules of evidence do not apply in administrative hearings unless the enabling statute specifies otherwise.

D. The IDEA does not provide adequate guidance on the specific set of legal procedures, including evidentiary standards, that a hearing officer must follow when conducting the hearing, suggesting that observance of the rules is not required. In fact, in the commentary to the

[1] In 2004, Congress reauthorized the IDEA as the Individuals with Disabilities Education Improvement Act. *See* Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act (IDEA). *See* Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) ("This chapter may be cited as the 'Individuals with Disabilities Education Act.'").

regulations, the IDEA defers to commonly applied State evidentiary standards, such as whether the testimony is relevant, reliable, and based on sufficient facts and data.[2]

E. This said, under the IDEA, as hearing officers, we must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard *legal* practice.[3] This requirement is sufficient to ensure that proper legal procedures are used, including as appropriate the use of the rules of evidence, even though we have the discretion to receive any evidence that is offered consistent with the five-day disclosure requirement.[4]

F. Though New York has considerable latitude in determining appropriate procedural rules for due process hearings as long as they are not inconsistent with the basic elements of due process hearings and the rights of the parties set out in the IDEA, New York has not adopted any specific evidentiary standards. Whether to apply the rules of evidence (by analogy) and to what extent is within our discretion.

G. Surprisingly, though we are not bound by the rules of evidence, this fact alone has not kept the lawyers who appear before us from exclaiming, "Objection," time and again. And, why? Because, as in any adjudicatory proceeding, what is admitted or excluded determines the outcome of the case.

H. But just because the technical rules of evidence do not apply to the IDEA hearing, the rules should not be ignored. The rules help us to determine which evidence is reliable,[5] relevant,[6] and credible[7] and, therefore, worthy of being admitted.

I. There are additional compelling reasons for their use, albeit by analogy.

1. The rules provide rational support for why a piece of evidence should be admitted. Because the rules have

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[2] *See*, *e.g.*, *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46691 (August 14, 2006).
[3] 34 C.F.R. § 300.511(c)(1)(iii) (emphasis added).
[4] *See* 34 C.F.R. §§ 300.512(a)(3) and (b).
[5] Evidence is reliable if it is trustworthy and has a high probability of confidence.
[6] Evidence is relevant if it helps to [dis]prove an alleged fact.
[7] Evidence is credible if it is reasonable and probable so as to make it easy to believe.

been shaped over a period of time and are widely accepted, the passage of time has created a strong bedrock of authority.

2. The rules help to establish uniformity from one hearing to the next. Any apparent consistency helps to make the hearing process more credible.

3. With uniformity, comes predictability. The rules establish some predictability in the hearing process to enable the parties to adequately prepare. A well-prepared party increases the chances that we would be provided with the necessary critical evidence to render an informed decision.

4. The rules promote due process. Evidence that is excluded because it does not meet the evidentiary standards set forth in the rules is likely to withstand constitutional challenge.[8]

J. As such, despite our discretion to admit any oral, documentary or tangible evidence that we determine to be relevant, material, and reliable even though said evidence would be excluded by application of the technical rules,[9] it is our responsibility (and, perhaps, obligation) to be versed in the important basic rules and their underlying policies. Understanding the rules and their underlying policies will help in deciding whether offered evidence is admissible because it is relevant, reliable, and credible and what weight (if any) to ultimately assign to evidence that is received. For these reasons, a "refresher course" on select rules of evidence and the handling of objections follows.

Note, however, it is not our intention to prompt hearing officers to overly apply the rules of evidence so as to make IDEA hearings even more legalistic than too many have already become.

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[8] *See* William H. Kuehnle, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829, 898 -900 (2005).
[9] *See* 8 NYCRR § 200.5(j)(3)(xii)(c).

II. EXERCISE APPROPRIATE JUDGMENT

A. Even though we enjoy discretion to admit any evidence that does not comply with the technical rules of evidence, it does not follow that we should receive all offered evidence.

B. When we permit irrelevant, immaterial, unreliable or unduly repetitious evidence to be admitted into the record, we risk a confused record, an unnecessarily prolonged hearing, and a potentially flawed decision that includes irrelevant findings and discussion and that exceeds the scope of the actual claim(s) included in the complaint. It is the responsibility of the hearing officer to monitor evidence as it is presented for its relevancy and redundancy. We should not wait for an objection if we question its admissibility. Rather, we should ask of the parties why it is relevant, not redundant, etc.

C. We must exercise prudent judgment when deciding what to admit. When we are sensible, we increase the likelihood that the hearing will be fair, efficient and timely. Further, we increase the chances of being upheld should our rulings be appealed. Given our broad discretion to make evidentiary rulings, it is rare that they are even appealed. The test is not how the reviewing body would have ruled. Usually rulings on evidentiary matters will at least be given "due deference" and often the stricter standard of "abuse of discretion" will need to be met for the ruling to be reversed.[10]

III. EVIDENTIARY DOCTRINES

A. Definitions – Generally.

1. Evidence – Any species of proof presented during the course of the hearing through witness testimony, documents, tangible objects, etc. for the purpose [dis]proving a fact at issue.[11]

2. Direct Evidence – Evidence communicated to the hearing officer from a witness who actually saw, heard or touched the subject of questioning.[12]

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[10] *See Lewis v. Sch. Bd. of Loudoun County*, 808 F. Supp. 523, 19 IDELR 712 (E.D. Va. 1992).
[11] *See Black's Law Dictionary* 555 (6th ed. 1990).
[12] *Id.* at 460.

3. Circumstantial Evidence – Testimony not based on actual personal knowledge or observation but from which the hearing officer may infer other connected facts that usually and reasonably follow to indirectly show the facts sought to be proved.[13]

4. Opinion Evidence – Evidence of what the witness thinks, believes, or infers based on the presented facts.[14]

5. Evidentiary Worth – Weight of Evidence

   a. Ultimately, whether we apply the rules or just rely on common sense in allowing evidence that would be otherwise inadmissible under the rules (e.g., hearsay not subject to an exception), it is our responsibility to weigh the evidence presented in order to reach an informed decision on the claim(s) included in the due process complaint notice.

   b. The weight of evidence is the measure of credible proof (i.e., believability or persuasiveness) that we assign to a piece of evidence that we have admitted, i.e., the probative value accorded to the admitted evidence.[15]

6. Presumptions – A presumption is a rule of law by which a finding of a basic fact or set of facts give(s) rise to the existence of a presumed fact that the hearing officer must accept, unless the presumption is rebutted.[16]

B. Authentication.

1. Generally. Prior to the hearing officer being able to determine whether a piece of evidence is relevant, the proponent must establish that what is being offered

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[13] *Id.* at 243.
[14] *Id.* at 1093.
[15] *See West's Encyclopedia of American Law, edition 2.* (2008). Retrieved December 22 2014 from http://legal-dictionary.thefreedictionary.com/weight+of+evidence.
[16] *See Black's Law Dictionary* 1185 (6th ed. 1990).

into evidence is what s/he claims it to be.[17] This requires the proponent to lay a foundation before said item can be offered into evidence, unless the opposing party stipulates to its authenticity.

The Federal Rules of Evidence provide examples of evidence that satisfies the requirement of authenticating or identifying an item of evidence.[18] For example, if the parent of a child with a disability (i.e., the proponent) is seeking to introduce an independent educational evaluation, testimony from the evaluator who prepared the report that the report is what it is claimed to be is sufficient to establish its authenticity.[19]

As hearing officers, we have the discretion to deviate from the technical rule – and many do. Some allow for the wholesale introduction into the record of the disclosure packets without consideration whatever (absent impassioned objection) of their authenticity and/or their relevance, reliability or materiality. Others will "admit" for purposes of identification disputed documents subject to the said documents being subsequently authenticated and properly moved into evidence.

Either approach is understandable given the volume of documents that are generally associated with IDEA hearings. However, caution is warranted. If we allow for the wholesale introduction of the disclosure packets, we risk admitting documents whose authenticity is questionable and that are irrelevant, immaterial, unreliable or unduly repetitious. Relying on the other party to object does not diminish the potential risks because there are many reasons why a party may choose not to object (e.g., expectation of the same courtesy in return; legal strategy). Similarly, if we allow disputed documents to be marked solely for identification purposes and subject to subsequent authentication, we might find ourselves in an awkward position (or worse, mistakenly relying on the document) if the proponent inadvertently fails to

[17] Fed. R. Evid. 901(a). Reference to the Federal Rules of Evidence is by way of analogy.
[18] *See* Fed. R. Evid. 901(b).
[19] *See* Fed. R. Evid. 901(b)(1).

authenticate the disputed documents prior to the conclusion of the hearing.

The better practice would be for the hearing officer to permit only the wholesale receipt of those documents (or items) for which the parties expressly stipulate on the record to their admission and, more specifically, to their authenticity, relevance and reliability. All other documents (or items) should be introduced piecemeal as witnesses testify and, if an objection is made, after a proper foundation has been established for each, or set of, document(s).

2. Documents. The elements of the foundation required to authenticate a document are generally straightforward. The key is for the proponent to ask sufficient questions of the witness to establish the witness's familiarity with the document. Said familiarity with the document must have been obtained independent of the hearing. The elements of the foundation would generally include:

    a. The witness is provided the document.
    b. The witness is asked to identify the document.
    c. The witness is asked to explain the basis for how s/he is familiar with the document. (For example, a person who was present when a handwritten letter was both written and signed could offer testimony that s/he was present when the author of the letter wrote it and that s/he witnessed the signing of the letter.)

3. Business Records. Authenticating a business record (like a document removed from a child's CSE file) is also a simple matter. What is essential is that proper custody is demonstrated. The elements of the foundation (if the person who removed the business record is testifying) would generally include:

    a. The witness has personal knowledge of the filing system.
    b. The witness is the person who removed the record from the [student's] file.
    c. The file from which the document was removed was the correct file.
    d. The witness recognizes the document as the document that s/he removed from the file.

e. The witness is asked to explain the basis on which s/he recognizes the document.

4. Government Records. As to copies of government records, it would be sufficient for the proponent to include with the record a certification from the custodian of records attesting to the authenticity of the copy of the record and that such copy is an accurate copy of the original record.

5. Audio Recordings. From time to time, a parent seeks to introduce the audio recording of a CSE meeting into evidence. A CSE must, with certain exceptions, permit a parent to audiotape a CSE meeting regarding the student.[20] Audio recordings, however, can be tampered with. A complete foundation as to the audio recording's authenticity is advisable.

   Generally, in the relaxed context of IDEA hearings, a witness's testimony (typically the parent's) that s/he was present for, or heard, the conversation and that the recording accurately reproduces what was said should be sufficient to authenticate the recording and allow its admissibility. When more is needed, however, the elements of the foundation should also include the following:

   a. Testimony that the witness recorded the conversation.
   b. The time and place of the conversation that was recorded by the witness.
   c. A description of the device used to record the conversation.
   d. The device was in working order when the conversation was being recorded.
   e. The audio recording accurately captured the conversation.
   f. The chain of custody between the date of the recording and its submission at the hearing.

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[20] *See Application of a Student with a Disability*, Appeal No. 08-090 *citing Application of a Child with a Handicapping Condition*, Appeal No. 90-18; *Application of a Child with a Handicapping Condition*, 30 Ed. Dep't Rep., Decision No. 12425; Office of Vocational and Educational Services for Individuals with Disabilities [VESID], guidance on "The Use of Audio- or Video Tape Recording of CSE/CPSE Meetings" (September 2003).

g. The audio recording continues to accurately depict the conversation.

6. Pictures. More and more we are seeing parents seeking to introduce pictures into evidence of injuries to their child or poor health and safety conditions to substantiate denials of a free and appropriate public education (FAPE) to the child. In civil litigation, it had been the practice that the actual photographer had to appear in court to verify the authenticity of the photograph(s). This practice has since been relaxed. Any person familiar with the object depicted in the photograph is permitted to verify its authenticity.

But with today's modern technology (e.g., digital cameras that allow the user to enhance and manipulate the photograph and the wide availability of photo editing software), it is critical that the proponent of the photograph establishes the necessary foundational elements to convincingly demonstrate the photograph's authenticity. Said elements would include:

a. The witness is familiar with the object(s) depicted in the photograph(s).
b. The witness is able to explain the basis for his/her familiarity with what is depicted in the photograph(s).
c. The witness recognizes what is depicted in the photograph(s).
d. The witness is able to verify the time the photograph(s) was (were) taken.
e. The photograph(s) have not been enhanced or otherwise tampered with.
f. The photograph(s) fairly and accurately depict(s) the object.

C. The Best Evidence Rule.

1. Generally. The best evidence rule requires that the proponent of a document, photograph, or recording produce the original (or duplicate original) document, photograph, or recording to prove its contents or satisfactorily explain why the original (or duplicate original) cannot be produced.[21] An "original" of a

[21] *See* Fed. R. Evid. 1002.

writing or recording means the writing or recording itself.[22] For electronically stored information, it would include any printout.[23] An "original" of a photograph includes the negative or a print from it.[24] A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.[25] A duplicate is admissible unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.[26]

2. Application. The rule applies when the proponent of the document, recording, or photograph seeks to prove the contents of the document, recording, or photograph.[27] If a fact exists independently of the document, the rule does not apply even though the document is convenient evidence of the existence of the fact, unless the material facts of consequence place the document at issue. For example, the parent can testify from memory as to who participated in the CSE meeting without having to produce the original signature page if the composition of the CSE team is not at issue. However, if there is a dispute as to the composition of the CSE meeting and the parent's copy of the signature page of the IEP, which purports to be a duplicate original, omits the signature of a required member but the school district's copy does not, the rule would require production of the original signature page by the parent unless there is an adequate explanation for why the original signature page cannot be produced (e.g., it's in the possession of the school district and the school district refuses to produce it or its destroyed[28]). In such instance, secondary evidence is admissible (e.g., testimony of parent or other individuals who were present at the meeting who can attest to who was present at the

[22] Fed. R. Evid. 1001(d).
[23] *Id.*
[24] *Id.*
[25] Fed. R. Evid. 1001(e).
[26] Fed. R. Evid. 1003.
[27] *See* Fed. R. Evid. 1002, Advisory Committee Notes.
[28] *See* Fed. R. Evid. 1004 (a) and (c).

meeting).[29]

3. Discretion. The hearing officer has discretion whether to hold parties to the best evidence rule. Where there is little or no doubt of the accuracy of a document, photograph or recording, requiring an original over a duplicate original is cumbersome and can lead to inefficiency. However, where there is legitimate concern as to authenticity of the duplicate original, the application of the rule may be appropriate.

D. Legal Relevance.

1. Generally. Evidence must have probative value otherwise it is excluded.[30] Evidence has probative value if it is material (i.e., it has some logical connection to the material facts of consequence in the hearing)[31] and can be authenticated. What is of consequence is determined by the claim(s) in the complaint and the applicable substantive law. The fact to be proved need not be an ultimate, intermediate, or evidentiary fact so long as it is of consequence in the determination of the action.[32] Once admitted, we must determine how much weight to accord it.

2. Legally Irrelevant. Evidence can be logically, but not legally, relevant. For example, the fact that the parent has a long history of battling the school district, though logically relevant (e.g., existence of an acrimonious relationship), it (without more – e.g., existence of hostile environment) may not be legally relevant to whether the school district denied the student FAPE this time around if the evidence has limited probative value and would be time consuming to present.[33]

Logically relevant evidence may be excluded at the discretion of the hearing officer if it can cause unfair prejudice or confusion of the issues, it is unduly

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[29] *See* Fed. R. Evid. 1004, Advisory Committee Notes.
[30] *See* Fed. R. Evid. 401.
[31] *Id.*
[32] *See* Fed. R. Evid. 401, Advisory Committee Notes.
[33] Alternatively, when appropriate, the hearing officer may allow some limited evidence not directed to matters in dispute as an aide to understanding. *See id.*

repetitious and, as the example above alludes to, its presentation would be unduly time consuming.[34] The test is whether, on balance, the probative dangers substantially outweigh the probative values.[35] If they do, the hearing officer can exclude the evidence. In doing so, the hearing officer should specifically explain on the record why s/he has determined to exclude such evidence. If the probative danger is slight, then the evidence should be admitted and weighed accordingly.

3. Habit Evidence. Evidence of a person's habit or an organization's routine practice is relevant to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice.[36] Said evidence need not be corroborated as a condition precedent to its admission in evidence nor is an eyewitness necessary.[37]

   For example, if the claim is that the parent never received a copy of an assessment prior to the IEP meeting, evidence that the school district has a practice of having the evaluator who conducted the assessment mail the assessment to the parent after the report is completed is admissible to prove that the evaluator performed the task. No additional corroboration is required (e.g., proof of mailing) or the testimony of a witness (who observed the evaluator mailing the report to the parent). The failure to submit any corroboration or to introduce an eyewitness relates to the sufficiency of the evidence rather than admissibility.[38]

   In allowing habit evidence, the hearing officer should require of the proponent the following:

   a. The witness is familiar with the person's habit or the organization's routine practice.

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[34] Fed. R. Evid. 403.
[35] *See id.*
[36] *See* Fed. R. Evid. 406.
[37] *Id.*
[38] *See* Fed. R. Evd. 406, Advisory Committee Notes.

b. The witness is familiar with said person or organization and acquired his/her familiarity over a considerable period of time.
c. The witness can establish that the person has a habit or that the organization has a routine practice.
d. The witness has observed said habit or routine practice on numerous occasions.

In addition, and for completion of the record, the hearing officer may also want to require the proponent to establish that there were no eyewitnesses to the conduct on the occasion that is the subject of the hearing or that said conduct cannot be corroborated by other means.

4. Discretion. New York State law requires that we exclude evidence that we determine to be irrelevant.[39] Whether evidence is relevant is a judgment call; we have only common sense to guide us. An expansive definition of what is relevant can lead to a prolonged hearing resulting in a confused record and in the hearing officer undertaking the arduous task of determining how much weight to accord each piece of overwhelming evidence received into the record. Careful consideration should be given when determining what to admit.

5. Unrepresented Parent. To the unrepresented parent, the word "relevant" will often, and understandably, lack contextual meaning. Sometimes using more common, non-legal words is helpful (e.g., "Will this testimony/document help me in deciding an issue? If so, which one? How?").

E. Opinion Evidence.

1. Generally. Common law prefers that witness testimony be limited to statements of observed facts. Naturally, however, opinion testimony can be helpful to the trier of fact and the common law has made exceptions to allow lay and expert witnesses to provide opinion testimony.[40]

2. Lay Witnesses. A lay witness may express an opinion when

[39] 8 NYCRR § 200.5(j)(3)(xii)(c).
[40] *See*, *e.g.*, Fed. R. Evid. 701, 702.

said opinion is based on first-hand knowledge or observation, and provided that it does not rely on scientific, technical, or other specialized knowledge typically limited to expert testimony and it would be helpful to clearly understanding the witness's testimony or to determining a fact in issue.[41]

Lay witnesses may give their opinion on a variety of subjects, including:

a. Observations – color, size, distance, speed, quantity
b. Other Sensations – taste, smell and touch (e.g., hot/cold; texture)
c. Emotions – happiness, sadness, friendliness, hostility
d. Physical or Mental Condition – strength, apparent illness, intoxication (e.g., slurred speech, smell of alcohol, bloodshot eyes), conduct (i.e., rational or irrational)
e. Age
f. Identification – of a person, of a voice, handwriting

3. Expert Witnesses. Unlike a lay witness who typically testifies to facts based on what s/he has observed or heard first-hand, or to opinions that do not rely on specialized knowledge, an expert witness can be called upon to offer factual testimony, teach the trier of fact scientific or technical principles needed by the trier of fact to evaluate the facts in the case, or offer opinion testimony based on "knowledge, skill, experience, training, or education.[42] The IDEA grants hearing officers, subject to State statute, rules, or procedures, the discretion to determine whether expert testimony should be admitted and what weight, if any, should be accorded to the expert's testimony.[43]

If scientific, technical, or other specialized knowledge will assist the hearing officer in understanding the evidence or determining a fact (or facts) in issue, and the proponent seeks to have the expert provide an opinion evaluating the facts in the case, the expert's testimony should include the qualifications of the expert, the basis for the expert's opinion, the opinion itself, and an explanation of the opinion. Each

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[41] Fed. R. Evid. 701.
[42] Fed. R. Evid. 702.
[43] Hearing officers can determine appropriate expert witness testimony. *See Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46691 (August 14, 2006).

topic requires a foundation.

a. Qualifications. To establish the qualifications of an expert, the foundation should include the following elements:

   i. Educational degrees acquired.
   ii. Other specialized training in the field of expertise.
   iii. Licenses obtained to practice in the field of expertise.
   iv. Practice in the field of expertise and the length of time practicing in said field.
   v. Teaching experience, if any, in the field of expertise.
   vi. Publications in the field of expertise.
   vii. Professional affiliations.
   viii. Prior qualification as an expert in a court of law or similar.

b. Bases. The expert's opinion may be based on facts personally observed (e.g., a treating physician), presentation of data provided prior to the hearing (e.g., review of third party reports or statements), or assumed facts shared with the expert during the hearing itself (either through hypothetical questions or having the expert hear the testimony establishing the facts).[44]

   i. To establish the basis of the expert's opinion through personal observation, the foundation should include the following elements:

      1. The location of where the expert observed the fact(s) (e.g., classroom).
      2. When the observation was made.
      3. Who, other than the expert, was present at the time the expert made the observation.
      4. How the observation was made (e.g., seated in the back of the classroom behind the student).
      5. A description of what was observed (e.g., fidgety, distracted, short attention span).

[44] Fed. R. Evid. 703, Advisory Committee Notes.

ii. To establish the basis of the expert's opinion through presentation of data provided to the expert prior to the hearing, the foundation should include the following elements:

1. Identification of data reviewed.
2. The source of the data (e.g., third-party reports or statements).
3. The content of the data.
4. It is customary for the expert in the field to reasonably rely on the data in forming an opinion on the subject.

iii. To establish the basis of the expert's opinion through assumed facts, the proponent either specifies the facts s/he wants the expert to assume as true in answering the questions presented or asks the expert to react to the testimony establishing the facts that s/he is to assume as true. Should the hearing officer permit expert opinion through assumed facts, s/he should be aware of its limitations. First, the hypothetical question presumes that the assumed facts are either in the record or will be made part of the record after the expert witness has testified. Second, unless the hypothetical question includes all of the assumed facts that are either in the record or will be made part of the record, the expert witness's testimony may not be accurate and its probative value is minimal. Third, if the expert witness's testimony is based on testimony s/he heard, absent any confirmation that the testimony was heard correctly, the validity of testimony is questionable.

c. Opinion. Next, the proponent elicits the ultimate opinion after establishing that the expert witness has formed an opinion that s/he believes to be reliable.[45]

d. Explanation. Finally, the expert witness should be asked to explain his or her opinion and how it relates to the bases relied upon when forming the opinion.

[45] *See* Fed. R. Evid. 702.

4. Practice Tips. The following practice tips should be kept in mind when considering or allowing expert witness testimony:

   a. The qualifications of an expert witness should be placed on the record. Having a party introduce the expert's curriculum vita as an exhibit often expedites doing so.

   b. If an expert witness's qualifications are disputed, allow *voir dire*. But, if necessary, take over the questioning to avoid spending a great deal of time on a matter that is ultimately within the your discretion.[46]

   c. Upon qualifying a witness as an expert, the hearing officer should place on the record the area(s) of expertise in which the witness is being qualified.

   d. As discussed above, expert opinion can be introduced into the record using a variety of methods, including through the use of hypothetical questions subject to actual evidence being admitted into the record, question-by-question, or narrative. It is within the discretion of the hearing officer as to which method s/he would allow.

   e. Avoid the record being cluttered with medical or clinical jargon. Intercede gently, if necessary, to ensure that questions and responses are understandable and helpful and explain the educational needs of the child in terms that are meaningful to parents and educators.

   f. Do not allow an expert witness to rehash what is already included in the expert witness's own, or third-party, evaluation or report. Suggest that the expert witness simply clarify or supplement the evaluation or report.

   g. Consider allowing multiple experts to discuss an issue with each other on the record and under oath, when appropriate. Though the consent of both parties is advisable, it is within the discretion of the hearing officer whether to sequester competing expert

[46] *See* Fed. R. Evid. 104(a).

witnesses.

h. Should circumstances necessitate the appointment of an expert vis-à-vis an independent educational evaluation ("IEE"),[47] the hearing officer may consider ordering the IEE at district expense. The 45-day timeline may be a determining factor on whether the hearing officer pursues this option.

i. Do not overlook the possibility that the parent may be qualified as an expert despite the absence of a degree in education. The parent may have the requisite specialized knowledge, skill, or experience given his/her on-the-job training.

j. If is likely that you will be called upon to make a credibility determination regarding an expert, after the parties have asked their questions, ask the expert about any areas that might require clarification and or completion of the record (e.g., alleged self-interest/conflicts of interest; basis for opinions, including whether the expert observed the student in school or outside school, talked to staff, considered other evaluations or reports). Doing so will make a record to cite later as the basis for your credibility determination.

F. Hearsay.

1. Generally. Admission of hearsay in IDEA hearings is permissible and does not deprive the other party of the right to confront witnesses.[48] Though admissible, ultimately, we must contend with how much weight to accord hearsay evidence.

Underlying the hearsay rule is a fear that permitting the admission of hearsay evidence would result in the trier of fact considering potentially unreliable and untrustworthy out-of-court statements of a declarant who is not subject to cross-examination. Without an opportunity to cross-exam the declarant, the opponent is not in a position to test before the trier of fact the declarant's sincerity, perception, and/or

[47] 34 C.F.R. § 300.502(d).
[48] *See Jalloh v. District of Columbia*, 535 F. Supp. 2d 13, 49 IDELR 190 (D.D.C. 2008).

memory.

2. Applicability. The rule is relatively narrow. It only applies to an (i) assertive statement (inclusive of oral and written assertions, as well as assertive nonverbal conduct) (ii) made by a declarant who is not a witness to the proceeding (iii) for the purpose of proving the truth of the declarant's assertion.[49] In other words, the rule only applies when the statement is being offered for a hearsay purpose (i.e., to prove the truth of the assertion) and the declarant is not subject to cross-examination. All three elements must be present otherwise the evidence is not considered hearsay.[50] For example, if the purpose of introducing a statement into evidence is to demonstrate that a statement was made, the statement is admissible because its not being offered to prove the truth of the declarant's assertion.

   The rule also has numerous exceptions.[51] The exceptions are premised on a showing that the statement is sufficiently reliable or trustworthy (e.g., declarant would not deliberately lie after a startling event)[52] and should be allowed out of necessity (e.g., declarant is unavailable because s/he exercise a privilege, refuses to testify despite being compelled to do so, or illness)[53].

   Understanding whether the rule or an exception to the rule applies is most helpful to determining which hearsay statements assure sufficient reliability and trustworthiness to warrant consideration by the hearing officer.

3. Assertive Statements or Acts. The rule excludes all evidence of conduct, verbal or nonverbal, not intended as an assertion.[54] The rule presumes that nothing is an assertion unless intended to be one.[55]

   Where the statement or conduct declares or asserts facts, including states of mind, it falls within the hearsay rule. Conduct that is clearly the equivalent of words and assertive in nature, such as the act of pointing to identify an individual

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[49] *See* Fed. R. Evid. 801.
[50] *See id.*
[51] *See* Fed. R. Evid. 803, 804.
[52] Fed. R. Evid. 803(2).
[53] Fed. R. Evid. 804(a)(4).
[54] Fed. R. Evid. 801, Advisory Committee Notes.
[55] *Id.*

or nodding in acquiescence, is regarded as a statement under the rule.[56]

To demonstrate that a piece of evidence is a nonassertive statement and, therefore, outside the hearsay rule, the proponent must establish the following foundation:

a. Where and when the statement was made.
b. Who was present when the statement was made.
c. The meaning of the statement and an explanation as to why it is nonassertive.
d. How the nonassertive statement is relevant to the material facts of consequence in the hearing.

4. Exceptions. When a hearsay exception applies (of which there are many), the hearsay evidence tends to be reliable and trustworthy and is otherwise admissible provided it is relevant.

a. Admissions. An admission, or statement against interest, is a statement or act offered by the proponent against his or her party-opponent (i.e., the declarant) which affirms some relevant fact that is contrary to the declarant's proprietary or pecuniary interest or has so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to liability.[57] The admission is considered reliable because it is presumed that an individual would not say things against his or her own interest unless true and has the option to take the stand to deny or explain the statement.[58]

The weight to be accorded to the admission is a matter for the hearing officer to decide after considering the totality of the circumstances surrounding the admission and any explanation proffered by the declarant.

There are three kinds of admissions: personal, adoptive, and vicarious.[59] A personal admission is a statement made by the declarant in his or her own

[56] *Id.*
[57] Fed. R. Evid. 804(b)(3)(A).
[58] *See* Fed. R. Evid. 804(b)(3)(A), Advisory Committee Notes.
[59] *See* Fed. R. Evid. 801(d)(2).

words or acts.[60] The foundation for a personal admission includes:

i. The witness heard the declarant make a statement at an earlier time.
ii. The declarant is the party-opponent.
iii. The statement is relevant to a material fact at issue.
iv. The statement or act is inconsistent with the position the opponent has taken in the hearing.

The foundation for an adoptive admission requires that the party-opponent assents (expressly or tacitly) to the statement made by the declarant.[61] Specifically, the proponent must establish:

i. The declarant made a statement.
ii. The party-opponent was present when the statement was made and heard and understood the statement.
iii. The party-opponent agreed with the declarant's statement either expressly or through silence (in the face of an accusation, for example) or failed to deny the statement.

Vicarious admissions require the proponent to establish a relationship between the declarant and the party-opponent (i.e., statement is made by someone authorized to make the statement or by the party's agent or employee).[62] Specifically, the proponent must establish:

i. The declarant is an individual authorized to make the statement by the party-opponent or is an agent or employee of the party-opponent.
ii. The party-opponent authorized the declarant to make the statement or the agent or employee made the statement within the scope of the agent's or employee's authority.
v. The statement is relevant to a material fact at issue.
iii. The statement or act is inconsistent with the position the opponent has taken in the hearing.

[60] Fed. R. Evid. 801(d)(2)(A).
[61] Fed. R. Evid. 801(d)(2)(B).
[62] *See* Fed. R. Evid. 801(d)(2)(C)-(D).

b. Business Records. A record of an act, event, condition, opinion, or diagnosis is admissible if the record was made at or near the time by – or from information transmitted by – someone with knowledge, if kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, and if making the record was a regular practice of that activity.[63] The elements of the foundation include:

i. An employee of the business or organization prepared the report.
ii. The informant has a business duty to report the information.
iii. The informant is someone with knowledge of the facts, act, transaction, occurrence or event reported.
iv. The report was reduced to writing.
v. The written report was compiled contemporaneously, or soon thereafter, with the facts, act, transaction, occurrence or event.
vi. It is routine practice for the business or organization to prepare such written reports.
vii. The record is kept in the course of the business or organization's regular course of business.
viii. The report is factual.

The witness neither has to be the informant or the preparer of the report. Testimony from the custodian of records or another qualified witness is sufficient.[64]

5. Discretion. When circumstances surrounding the making of the hearsay statement tends to demonstrate its reliability or trustworthiness, either because the requirements of an exception is met or the rule simply does not apply (e.g., the statement is non-assertive), we can feel more confident in admitting the hearsay evidence and weighing the statement more heavily. On the other hand, when the statement is purely hearsay, though admissible in IDEA hearings, it may nonetheless be rejected by the hearing officer in his or her discretion or, if received out of abundance of caution, afforded limited weight.

[63] Fed. R. Evid. 803(6)(A)-(C).
[64] Fed. R. Evid. 803(6)(D).

G. Privileges.

1. Generally. The extent and scope of a specific privilege is governed by Federal common law or state rules governing evidentiary privileges.[65]

New York law recognizes evidentiary privileges, including: self-incrimination; spousal; attorney-client; physician-patient, clergy-penitent; psychologist-client, and social worker-client.[66] Though the Civil Practice Law and Rules (CPLR) do not govern IDEA hearing proceedings,[67] like the Federal Rules of Evidence, the CPLR can be instructive when handling evidentiary privileges.

In general, privileges protect confidential communications (and any records or documents resulting from said communications) made during the protected relationships. A confidential communication is one that is made outside the presence of a third-party, and which is not to be disclosed absent an express waiver by the informant. In limited circumstances, the recipient of the confidential communication can be ordered, or might be otherwise required, to disclose the communication (e.g., where the client reveals the contemplation of a crime or harmful act or when a minor is the subject of a crime).

2. Evidentiary Privileges.

a. Attorney-Client. An attorney or his or her employee cannot disclose, or be allowed to disclose, a confidential communication unless the client waives the privilege.[68] The privilege might also extend to lay advocates and their clients.[69]

b. Physician-Patient. A physician (dentist, podiatrist, chiropractor or nurse) cannot disclose information obtained during the course of attending to the patient and which was necessary for treatment. The confidential communication includes both what the patient shared with the physician, as well as the

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[65] Fed. R. Evd. 501.
[66] *See* CPLR art 45.
[67] *See* CPLR 101.
[68] CPLR 4503(a)(1).
[69] *See Woods v. New Jersey Dept. of Educ.*, 858 F. Supp. 51, 19 IDELR 1092 (D.N.J. 1993).

physician's own observations of the patient.[70] Only the patient can waive the privilege.[71]

c. Psychologist-Patient. The confidential relations and communications between a psychologist and his client are privileged and only the client may waive the privilege.[72] There are statutory exceptions, including child abuse and maltreatment.[73]

d. Social Worker-Client. Similar to the psychologist-patient privilege, a social worker cannot reveal confidential communications disclosed the course of given advice or planning a program for the client.[74] The client may waive the privilege.[75]

3. Waiver. Professional privileges are increasingly being asserted by parents to deny access by school districts to the student's physicians, psychologists, social workers, etc., or their reports. But under the statutes, rules, and case law establishing such privileges, in most States, once the parent places at issue in an administrative proceeding the emotional or medical condition of the student, the parent either has the option of presenting no evidence from the professionals regarding the issues or waiving the privilege with regard to all professionals who diagnosed or treated the student regarding the condition at issue.[76] Hearing officer rulings on whether such privileges are waived and, if so, to what extent, often impact settlement discussions.

The school district would only have a right to educationally relevant portions of such records. Sometimes the parties can agree on a third party to review the records and to make such determinations or the hearing officer will be allowed to make such determinations by reviewing the records "in camera." Other times the records are provided to the school district's counsel who may make such determination with an agreement that the records will never become a part of the student's educational record or will be sealed and kept separate from the educational record.

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[70] CPLR 4504(a).
[71] *Id.*
[72] CPLR 4507.
[73] *See* Soc. Serv. Law §§ 413, 415.
[74] CPLR 4508(a).
[75] *Id.*
[76] *See, generally, I.D. v. Westmoreland*, 17 IDELR 417 (D.N.H. 1991).

If a party refuses to disclose records after the hearing officer has ordered such, the issue in question or, when appropriate, the entire appeal could be dismissed.[77]

4. Discretion. Whether to give effect to an asserted evidentiary privilege is within the discretion of the hearing officer. When an objection to offered evidence is made on the basis of a privilege, the hearing officer must determine whether the privilege has been waived by virtue of the parent placing at issue a matter that would otherwise be considered a confidential communication made during a protected relationship. If the parent has, then the parent has effectively waived the privilege and fairness would require that the hearing officer direct the witness to share the confidential communication but only after affording the parent an opportunity to withdraw the claim.

H. Judicial Notice.

1. Generally. Judicial notice occurs when the presiding hearing officer takes note of a fact that is not subject to reasonable dispute because it is a matter of common knowledge (e.g., geographic locations, periods of time, historical events) or that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned (e.g., location of streets, distances, calendar dates).[78] If notice is taken, the notice fact is conclusive and the party with the responsibility to prove such fact is relieved of having to prove such fact.[79]

2. Personal Observation of Hearing Officer, Not Permitted. Facts that are known only by personal observation of the hearing officer should not be judicially noticed.[80]

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[77] *See*, *e.g.*, *Epsom Sch. Dist.*, 31 IDELR 120 (SEA N.H. 1999) (dismissing the case without prejudice but subject to the parents agreeing to sign all the releases previously ordered before filing a new hearing request on the matters raised in the dismissed hearing request); *Sch. Dist. of Sevastopol*, 24 IDELR 482 (SEA WI 1996) (upholding the hearing officer's dismissal of the complaint after the parent failed to submit medical evaluations); *Bd. of Ed. of Oak Park Pub. Sch.*, 20 IDELR 414 (SEA Mich. 1993) (dismissing an issue in the complaint because the parent failed to provide complete psychiatric treatment records).

[78] *See* Fed. R. Evid. 201(b).

[79] *See* Fed. R. Evid. 201(f).

[80] *Town of Nantucket v. Beinecke*, 379 Mass. 345, 352 (1979).

3. Opportunity to Contest. A party would be entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed.[81]

4. Record. Any fact judicially noticed should be clearly noted in the record during the course of the hearing.

IV. IDEA RELATED PROCEDURES WITH EVIDENTIARY IMPLICATIONS

A. Resolution Process.

1. Meeting. Prior to the opportunity for an impartial due process hearing, the LEA shall convene a meeting with the parents and the relevant member(s) of the IEP team who have specific knowledge of the facts identified in the due process complaint –

   a. within 15 calendar days of receiving notice of the due process complaint;

   b. which shall include a representative of the LEA who has decision-making authority on behalf of the LEA;

   c. which may not include an attorney of the LEA unless the parent is accompanied by an attorney; and

   d. where the parents discuss their due process complaint, and the facts that form the basis of the complaint, and the LEA is provided the opportunity to resolve the complaint.[82]

2. Failure to Participate / Hold Meeting.

   a. Except where the parties have jointly agreed in writing to waive the resolution process or to use mediation, the failure of the parent to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.[83]

   b. When the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented, the LEA

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[81] Fed. R. Evid. 201(e).
[82] *See*, *generally*, 34 C.F.R. § 300.510.
[83] 34 C.F.R. § 300.510(b)(3); 8 NYCRR § 200.5(j)(2)(vi).

may request that the due process complaint be dismissed at the conclusion of the 30-day period.[84]

c. Should the LEA fail to hold the resolution meeting within 15 calendar days of receiving notice of the parent's due process complaint or fails to participate in the meeting, the parent may seek the intervention of the hearing officer to begin the 45-day timeline.[85]

3. Evidentiary Implications. The IDEA speaks of participation at the resolution meeting, and not mere attendance. The expectation is that the parties engage in meaningful discussions. The failure to participate has consequences. For the parent – dismissal. For the school district – the commencement of the hearing timeline.

The failure to participate is an instance in which the hearing officer may be called upon to intervene during the resolution period, usually because the school district filed a motion to dismiss for failure of the parent to either appear at the meeting or participate in the meeting. Deciding whether the parent attended the meeting is relatively easy to establish – the parent was either present or not. The evidence required to enable the hearing officer to determine whether the parent was present is straightforward. The school district must establish, through eyewitness testimony and documentary evidence, that the parent was not present and submit documentary proof of the school district's reasonable efforts to get the parent to attend the meeting.

Deciding whether the parent actually participated is not as easy and may require the hearing officer to convene a more involved limited hearing to hear from select witnesses who can attest to what transpired during the meeting.

B. Resolution Meeting Discussions. Discussions held during the resolution meeting are not confidential and, therefore, admissible,[86] provided that said discussions are reliable and have some logical connection to the material facts of consequence in the hearing.[87]

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[84] 34 C.F.R. § 300.510(c)(4); 8 NYCRR § 200.5(j)(2)(vi)(a).
[85] 34 C.F.R. § 300.510(c)(5); 8 NYCRR § 200.5(j)(2)(vi)(b).
[86] Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Act, 61 IDELR 232, Question D-17 (OSEP 2013); Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, Page 46704 (August 14, 2006); Letter to Baglin, 53 IDELR 164 (OSEP 2008).
[87] *See Friendship Edison Pub. Charter Sch. v. Smith*, 561 F. Supp. 2d 74, 50

Nothing in the IDEA or the regulations would prevent the parties from voluntarily agreeing to keeping the resolution meeting discussions confidential, including prohibiting the introduction of those discussion at any subsequent due process hearing.[88] If this is the case, however, it is imperative that the parties enter into evidence the confidentiality agreement.

C. Prehearing Preparation. Just like the parties and/or their representatives are expected to prepare for the prehearing conference, the hearing officer too must prepare for the prehearing conference. An initial step is for the hearing officer to carefully review the due process complaint and any response or prehearing statements provided. When doing so, the hearing officer should tentatively identify questions intended to help clarify the issue(s) and/or the relief sought included in the due process complaint. To the extent possible, the hearing officer should draft a rough outline of the issues, as well as the standard(s) (and the elements within each standard) to be applied in deciding each issue.

This simple exercise allows the hearing officer to generally review with the parties the relevant evidence needed to decide each issue and determine/fashion relief, should the hearing officer ultimately find a denial of a free and appropriate public education.

D. Record of Prehearing Conference. The prehearing conference may be conducted by telephone or in person.[89] Discretion lies with the hearing officer. A transcript or written summary of the prehearing conference, however, must be entered into the record.[90] Typically, a verbatim record is preferable when the hearing officer can anticipate unusual circumstances, e.g., important motion/argument, a need for testimony to make a factual determination or to have a record of what was said by an attorney or by the hearing officer to the attorney. The hearing officer can always have it recorded by a conference call provider or by having a court reporter on the line. If it is recorded by the use of a conference call provider, the hearing officer must make the audio recording part of the record and provide a copy of the audio recording to the

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IDELR 192 (D.D.C. 2008) (where the District Court held that the hearing officer erred in excluding relevant evidence from a resolution session).

[88] Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 52 IDELR 266, Question D-4 (OSERS 2009).

[89] 8 NYCRR § 200.5(j)(3)(xi).

[90] *Id.*

parties.

E. Motions.

1. As hearings have become more legalistic, there has been an increase in motion practice. While the IDEA does not expressly provide for any type of motion practice, given the broad authority granted hearing officers to manage the process, hearing officers have the authority to entertain and determine motions.[91]

2. Although both parties have a right to a fair hearing, the matters heard need to be arguably hearable, unnecessary delays avoided, any abuse of the process addressed, and judicial economy fostered.[92] Motions, usually addressing these matters, provide the hearing officer the opportunity to fairly manage the hearing process and the receipt of evidence.

3. In handling motions, hearing officers should prompt the parties to file all motions as soon as possible; schedule how and when they will be resolved, preferably at a prehearing conference, (including, if factual disputes require determination, how the record to do so will be made); and, decide them promptly to give the parties direction early on in their preparation as to the issues which will be heard and how the hearing on them will be conducted.[93] Most importantly, since court rules do not apply to the IDEA hearings, neither should those pertaining to motion practice. But, analogies to certain court rules in some situations do provide appropriate guidance and might be drawn upon.

4. Motions that require the resolution of a fact dispute require different handling by the hearing officer than motions that address pure questions of law or that can be decided on the initial submissions of the parties. A record is essential, and there is a menu of options to choose from in order to resolve a fact dispute underlying a motion and that allow for the necessary record to be made. The options include: seeking a

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[91] *See* Dist City 1 & Dist City 2 Pub. Sch., 24 IDELR 1081 (SEA MN 1996).
[92] Also consider that since there is typically no discovery (save the 5-day rule and access to records), in the IDEA hearing context, sometimes "discovery" must take place during the hearing itself.
[93] The ruling must be based on, and should refer to, the record, including any findings of fact. It must also set forth the legal standard for the ruling and note the competing factors the hearing officer considered/balanced.

stipulation of fact(s); receiving affidavits from key witnesses; ordering discovery by way of interrogatories; or conducting a limited hearing (whether in person or by telephone) to hear from relevant witnesses.

F. Scheduling Witnesses. When there are a large number of witnesses, hopefully the parties can agree on a schedule to avoid witnesses having to appear more than once or wait an unduly length of time to testify. For example, the parties can agree to take witnesses out of turn or accommodate a particular witness at a specific time, even if it means interrupting another witness' testimony, if necessary. If the parties cannot agree upon such accommodations, the hearing officer has the authority to order such considering what is fair to both parties in terms of each presenting his/her case and not being prejudiced, while getting all of the relevant testimony on the record in an expeditious manner.[94]

Specifically, the hearing officer can exercise reasonable control over the order of examining witnesses and presenting evidence so as to make those procedures effective for determining the truth, avoid wasting time, and protect witnesses from harassment or undue embarrassment.[95]

G. Excessive Number of Witnesses. Either party to the hearing has the right to present the testimony of witnesses and compel the attendance of witnesses.[96] The parties, however, are not given *carte blanche* to determine who gets to testify. The hearing officer has the authority to limit examination of a witness by either party whose testimony the hearing officer determines to be irrelevant, immaterial or unduly repetitious.[97] Similarly the hearing officer may limit the number of additional witnesses to avoid unduly repetitious testimony.[98]

While typically the actual number of witnesses expected to testify at the hearing is not known until disclosure lists are exchanged, it is within the hearing officer's authority to require the parties during the prehearing conference to identify the witnesses expected to provide testimony, subject to the five-day rule.[99] If too many witnesses are suspected, the hearing officer can choose to give warnings or directives and, ultimately, limit during the hearing any

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[94] *See* Fed. R. Evid. 611(a).
[95] Fed. R. Evid. 611(a).
[96] 34 C.F.R. § 300.512(a)(2).
[97] 8 NYCRR § 200.5(j)(3)(xii)(d).
[98] 8 NYCRR § 200.5(j)(3)(xii)(e).
[99] *See* 8 NYCRR § 200.5(j)(3)(xi)(d).

testimony that s/he determines to be irrelevant, immaterial, or unduly repetitious.[100] Though the discussion during the prehearing conference may take some time, it will take a lot less time than hearing from all of the witnesses on irrelevant matters.

H. Oaths. Generally, before testifying, a witness must give an oath or affirmation to testify truthfully and, in New York, the hearing officer is authorized to administer oaths in connection with the hearing.[101] The hearing officer, however, can exercise flexibility in the words used to affirm a witness's undertaking to tell the truth.[102] This is especially helpful when presented with a child witness or an adult witness whose intellectual functioning is limited.

I. Handling Witnesses.

1. Consider also that there are generally two ways to manage the hearing itself. First, the traditional approach of "micromanaging" the evidence as it is introduced. Second, by setting a time in hours that each party has to present their case. Like some judges, this could be done at a prehearing conference based upon the issues, their complexity, and other relevant factors. The hearing officer would keep time, considering cross-examination and objections. Adjusting the time set for good cause might be necessary. When used, attorneys seem to initially object. But, after the fact, the attorneys often welcome the "nudge" to be efficient. It is not recommended that this latter approach be utilized if a party is unrepresented.

2. Only one person for each party should question a witness. The scope and duration of cross-examination rests largely within the discretion of the hearing officer but should only be restricted within reasonable bounds.[103] The number of times of re-direct and re-cross is also within the discretion of the hearing officer. If the hearing officer determines a witness is hostile or adverse, the questioning can be leading.[104]

3. Where a witness and attorney are just "jousting" or the witness is nervous to the point of not being able to understand, the hearing officer might restate the question fairly (i.e., to get to the point) and to protect the witness from

[100] 8 NYCRR § 200.5(j)(3)(xii)(c).
[101] 8 NYCRR § 200.5(j)(3)(iv).
[102] *See* Fed. R. Evid. 603, Advisory Committee Notes.
[103] *See* Fed. R. Evid. 611(a), (b).
[104] Fed. R. Evid. 611(c)(2).

harassment or undue embarrassment.[105]

4. In some circumstances, the opposing party may have the right to review any notes or file of a witness,[106] including when a party introduces all or part of a writing or recorded statement and the adverse party seeks to introduce any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time.[107]

5. A hearing officer has discretion to forbid a witness to discuss his/her testimony with others, including counsel, during a recess.[108]

J. Mode of Interrogating Witnesses. The hearing officer also has discretion to determine the mode of examining witnesses.[109] Ultimately, the hearing officer can decide whether testimony is in the form of a free narrative or responses to specific questions.[110] However, permitting free narrative testimony can create difficulties, especially when ruling on objections. Caution is advised when weighing whether to allow free narrative responses.

Typically, the *pro se* parent is more likely to engage in free narrative testimony absent any instructions to the contrary. To avoid a "confused" record, the IHO might want to require the parent to write down questions s/he would ask himself/herself (i.e., the parent) through either a friend of the family or family member, the IHO, or the parent himself/herself.

K. Student Witness. The parent has the right to determine whether the child testifies.[111] Either the parent or the school district might want the child to testify or have the hearing officer meet the child. Should it be decided by the parent that the student will testify, the hearing officer should nonetheless be concerned about cross-examination, the environment of the hearing, etc. The hearing officer has the authority to explore other options (e.g., the hearing officer meeting or observing the child informally with all present,

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[105] *See* Fed. R. Evid. 611(a)(3).
[106] *I.D. v. Westmoreland Sch. Dist*, 17 IDELR 417 (D.N.H. 1991); *Somerset County Pub Sch.*, 21 IDELR 942 (SEA MD 1994).
[107] Fed. R. Evid. 106.
[108] *Geders v. U.S.*, 425 U.S. 80, 83 (1976).
[109] Fed. R. Evid. 611(a).
[110] Fed. R. Evid. 611(a), Advisory Committee Notes.
[111] *See* 34 C.F.R. 300.512(c)(1) ("Parents involved in hearings must be given the right to … [h]ave the child who is the subject of the hearing present."). *See also* 8 NYCRR § 200.5(j)(3)(xiv).

the hearing officer asking the child questions proposed by the parties). If neither party raises any of the concerns listed above, the hearing officer should initiate the discussion with the parties.

L. Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony.[112] There are numerous exceptions, including:

1. the witness who is hostile, unwilling, or biased.
2. the child witness or the adult with communication problems.
3. the witness whose recollection is exhausted.
4. undisputed preliminary matters.[113]

It is within the discretion of the hearing officer whether and when to allow leading questions.[114]

M. Hearing Officer Involvement. The hearing officer has the authority (and perhaps the obligation) to question the witness after the parties were given an opportunity for the purpose of clarification or completeness of the record.[115] The hearing officer should ask questions (subject to objection) on points the hearing officer believes might be necessary to have on the record in order to render an appropriate decision.[116] Attorneys might object that such is an intrusion in the adversary process, but the entire process should result in a record upon which a decision in the best interest of the student can be based. Hearing officers, however, should be sensitive to strategies of counsel and not assume the role of advocate.

N. Calling Additional Witnesses. Hearing officers can call additional witnesses or request to review certain documents if the hearing officer has reasonable cause to believe such might be necessary as part of the record.[117] But, before doing so, the hearing officer should ask if one of the parties is willing to do so, giving the party the opportunity to present evidence on such points as part of their

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[112] Fed. R. Evid. 611(c).
[113] Fed. R. Evid. 611(c), Advisory Committee Notes.
[114] *See id.*
[115] *See* 8 NYCRR § 200.5(j)(3)(vii). *See also* Fed. R. Evid. 614(b) ("The court may examine a witness regardless of who calls the witness").
[116] An impartial hearing officer has the authority "to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record." 8 NYCRR § 200.5(j)(3)(vii).
[117] *See* Fed. R. Evid. 614(a) ("The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness").

case.

O. Sequestration. The parent's decision on whether the hearing is open or closed does not control whether witnesses are sequestered. Whether witnesses are sequestered is in the discretion of the hearing officer.[118] Though a request to sequester witnesses is frequently granted, there may be circumstances when it is appropriate to allow a potential witness in the hearing room while another witness testifies (e.g., to allow experts to hear the testimony of other witnesses).[119]

When a sequestration order is in place, counsel should be directed to instruct the witnesses not to discuss their testimony with each other. If it is alleged that a sequestration order was violated, the hearing officer should inquire on the record of the witness and counsel as to the facts to determine whether a violation has, in fact, occurred. If the hearing officer finds that a violation has occurred, depending on the circumstances, the hearing officer may prohibit the witness from testifying or allow the witness to testify but consider the violation among other factors in weighing the witness's testimony.

P. Telephonic Testimony. Whether to allow testimony by telephone or video conferencing is within the discretion of the hearing officer, subject to appellate review.[120] The witness should be provided with copies of all relevant exhibits in advance of his or her testimony. The hearing officer must also confirm that the witness is alone, in a confidential area and is not reading from the exhibits (unless permission to look at a document is granted). If necessary, a court reporter may need to be with the witness.

Q. Scope of Testimony.

1. To what extent should evidence regarding distant events be admitted is a question that often hearing officers must address. Whether the evidence is relevant is the key factor. But, generally, a three-year rule of thumb is a good starting point for an outside limit given it coincides with the period

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[118] *See* Fed. R. Evid. 615.
[119] *See Vandalia-Butler City Sch. Dist.*, 501 IDELR 348 (SEA Ohio 1979).
[120] 8 NYCRR § 200.5(j)(3)(xii)(c). *See also Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995) (noting various factors to consider, e.g., delay in the hearing, nature and length of the testimony, and the cost of needing to appear); *Hampton Sch Dist v Dobrowolski*, 17 IDELR 518 (D.N.H.); *Las Virgenes Unified Sch. Dist.*, 17 IDELR 373 (SEA Cal. 1991). *Cf. Walled Lake Consolidated Sch. v. Jones*, 24 IDELR 738 (E.D. Mich. 1996).

required for automatic reevaluation under the IDEA. If the event is older, the hearing officer should request a reason as to why it is relevant and/or not "stale" (e.g., contextual background).

With respect to the statute of limitations and its effect on the permissible scope of evidence, the two-year limitations period bars claims that accrue outside the limitations period. Evidence that is relevant to establish claims that accrued within the limitations period is generally admissible.[121]

2. Sometimes a party or an attorney in response to a hearing officer evidentiary ruling will contend that s/he has "the right to make a record" or "a right to put on my case." While both contentions are true in keeping with due process, neither is without limitation. The hearing officer must fairly manage the hearing process, which extends to exercising discretion in what is allowed in because it is relevant and what is kept out because it is redundant or unreliable.

R. Stipulations. Any stipulation must be made a part of the record. If it was arrived at during the prehearing conference, it should be confirmed in the prehearing order. If it was arrived at during the hearing, it should be confirmed on the record by both parties/counsel. If it is in writing, the document should be admitted and marked as a joint exhibit.

S. Exhibits. Keep close track of exhibits marked for identification in terms of whether they are ultimately admitted on the record. Check into the offering party's intention as to an exhibit marked for identification before a witness who can speak to its authenticity and relevance leaves the stand or before the record is closed. Return an exhibit not admitted to the party who offered it.

T. Articles, Policies, Decisions and Regulations. If you are asked to consider articles and you find them relevant they should be made an exhibit. The same is true regarding State or school district policies, but State regulations need not be introduced since they are law. Decisions need not be admitted but the hearing officer can request a copy.

U. Separate Record. If a party requests to make a separate record of an exhibit for appeal purposes, it is within the discretion of the hearing officer whether to do so. Typically, the request should be granted. The exhibit should be placed in an envelope marked

[121] *J.Y. v. Dothan City Bd. of Educ.*, 63 IDELR 33 (M.D. Ala. 2014).

"separate record" and included with the record.

V. Compel Attendance / Production of Documents. Hearing officers have the authority to compel the appearance of witnesses, including non-school district employees, and to require the production of documents.[122] In considering any application for a subpoena, the hearing officer should ascertain that the request is not unreasonable, excessive in scope, or unduly burdensome. Questions of admissibility of documentary evidence should be tabled until such time as the document is presented for admission.

W. Handling Objections. As a matter of fairness, the hearing officer should try to be consistent throughout the course of the hearing with regard to rulings on objections. Where the objection will arise again, the hearing officer can note a continuing objection on the record.[123] When deciding a difficult objection, or its implications for the hearing are uncertain, the hearing officer can take a recess to think before ruling on the objection.

When attorneys spend too much time stating, or responding to, an objection, the hearing officer should establish ground rules. For example, the hearing officer can just allow one or two words as the basis for an objection (e.g., "Objection. Relevancy."), and then ask for more information should clarification or a response be warranted.

X. Closing Arguments/Briefs. When a party raises an alleged fact for the first time in a closing argument or brief, the hearing officer should not simply ignore it. The hearing officer should discuss with the parties whether the alleged fact should be considered. Alternatively, the hearing officer can acknowledge the alleged fact in his or her decision and explain why it was not considered (i.e., because it was not presented as part of the record).

Y. Maintaining An Accurate Record. A hearing officer's most important responsibility is to ensure an accurate, verbatim record. In this regard, try to always be mindful of problems that will adversely affect the record being made, such as overlapping conversations, the use of acronyms, improper spelling of names, failure of the questioners/witnesses referring to exhibits by number, use of clarifying gestures, etc. The record is extremely important if the decision is appealed.

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[122] *See Letter to Steinke*, 28 IDELR 305 (OSEP 1997). *See also* 8 NYCRR § 200.5(j)(3)(xii).
[123] *See* Fed. R. Evid. 103(b).

The failure to provide a complete transcript or recording of the hearing is not necessarily a denial of a free and appropriate public education unless the student's substantive rights under the IDEA were affected.[124]

V. INTERPLAY OF ETHICAL AND EVIDENTIARY RULES AND THE ROLE OF THE HEARING OFFICER

A. Loophole Lawyering.

1. Manifest Tension. There is manifest tension between a lawyer's professional responsibility, evidence law, and trial conduct.

The rules of evidence govern the admissibility of evidence "so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[125] The rules of professional conduct provide a framework for the ethical practice of law, but do not comprehensively regulate trial conduct,[126] raising the question whether the ethics rules impose appropriate limitations on the use of the evidence rules.

The answer lies on how the lawyer uses the rules of evidence themselves. The rules of evidence are "rife with possibilities of loophole lawyering."[127] For example, though the hearsay rule prohibits the introduction of out-of-court statements when the declarant is unavailable, the clever lawyer seeking to surreptitiously get the hearsay evidence before a jury with the hope that the jury accepts it as true may succeed simply by convincingly arguing that the statement is being introduced for some other purpose than its truth (e.g., proof of a conversation rather than the truth of what was said). Here, the clever lawyer, through loophole lawyering, uses the rules as a "tool" to introduce information that presumably would be favorable to his client rather that as a "template

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[124] *Kingsmore v. District of Columbia*, 466 F.3d 118, 46 IDELR 152 (D.C. Cir. 2006). *See also J.R. v. Sylvan Union Sch. Dist.*, 50 IDELR 130 (E.D. Ca. 2008) (holding that the ALJ had to rehear the last day of testimony because the missing testimony was so significant).

[125] Fed. R. Evid. 102.

[126] *See*, *generally*, Rules of Professional Conduct (22 NYCRR 1200.0).

[127] Daniel J. Capra, *Ethics and Evidence, Introduction*, 76 Fordham L. Rev. 1225 (2007).

that governs the proof process" to ascertain the truth.[128]

2. The Rules of Professional Conduct. Whether the clever lawyer in the example above violated any of the rules of professional conduct is arguable. The rules relating to candor[129] and fairness to opposing parties[130] do not seem to be implicated under the circumstances presented. The lawyer neither made a false statement nor used evidence that s/he knew to be false.[131] Though Rule 3.3(a)(1) is premised on the lawyer's obligation to prevent the trier of fact from being misled, its narrow focus is on false evidence.[132] Arguing that the statement is offered for other than a hearsay purpose – an argument permissible under the rules of evidence – does not equate to offering false evidence.

   Neither does the clever lawyer's conduct rise to illegal conduct nor conduct that is contrary to the rules of professional conduct.[133] As the comments to Rule 3.4 clearly specify, "[t]he procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties."[134] It would seem that the rules of professional conduct sanction the clever lawyer's conduct. The lawyer neither destroyed nor concealed evidence from his opponent, nor did he improperly influence witnesses.[135] The lawyer simply, as is expected of him, used the rules of evidence in his client's favor.[136]

3. Rules as a Template. Whether it is expected that lawyers and courts strive to conform all proof to the requirements of the rules of evidence or use the rules to shape the form and content of the testimony and exhibits as lawyers see fit, is a

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[128] For a thorough discussion of lawyers using the rules of evidence as a tool versus a template, *see* Daniel D. Blinka, Ethics, Evidence, and the Modern Adversary Trial, 19 Geo. J. Legal Ethics 1 (2006).
[129] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.3.
[130] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.4.
[131] *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.3(a)(1), (3).
[132] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.3, Comment [5].
[133] *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.4(a)(6).
[134] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.4, Comment [1].
[135] *See id.*
[136] Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.3, Comment [1] ("A lawyer should … take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor").

matter of individual perspective.[137] But if a purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, as hearing officers,[138] we must strive to require that the parties view the rules of evidence as a "template through which proof is filed for the trier of fact" rather than as "tools" that lawyers use to outwit their opponents.[139] Only then can we be assured that we are presented with competent evidence free of tactical or strategic purpose intended to block or undermine the truth-seeking process.

B. *Pro Se* Litigants.

1. Inherent Conflict. The hearing officer must take steps to ensure that any party not represented by an attorney has the opportunity to have his or her case fully heard on all relevant points.[140] A critical component when working with pro se parents is managing the receipt of evidence without compromising the integrity of the process and independence of the hearing officer.[141]

Typically, as a consequence of working with a pro se parent, the hearing officer finds him or herself (perhaps reluctantly) explaining to the parties what is needed to establish the required foundational facts to determine the matter(s) at issue or asking evidentiary questions of the witnesses designed to clarify or complete the record. Though it may seem as if the hearing officer is placing his or her hand on one side of the scales of justice, said assistance is allowable to assure the efficient conduct of administrative justice, ensure the rights of the parties, and equalize the field for the

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[137] Daniel J. Capra, *Ethics and Evidence, Introduction*, 76 Fordham L. Rev. 1225 (2007).
[138] 34 C.F.R. § 300.1(a).
[139] Daniel J. Capra, *Ethics and Evidence, Introduction*, 76 Fordham L. Rev. 1225 (2007).
[140] *See* NYSBA Model R. Jud. Conduct for State Administrative Law Judges Canon 3(B)(8) (2009). Reference to the NYSBA Model Rules of Judicial Conduct for State Administrative Law Judges is by way of analogy.
[141] *See* NYSBA Model R. Jud. Conduct for State Administrative Law Judges Canon 1 (2009).

parties.[142]

2. Neutrality ≠ Passivity. Where the hearing officer deems it necessary to advance the ability of a litigant not represented by an attorney or other relevant professional to be fully heard, the model rules permit the hearing officer to provide needed assistance,[143] which would include:

   a. liberally construing and allowing amendment of papers that a party not represented by an attorney has prepared;
   b. providing brief information concerning statutory procedures and substantive law;
   c. providing brief information about what types of evidence that may be presented;
   d. questioning witnesses to elicit general information and to obtain clarification;
   e. modifying the traditional order of taking evidence;
   f. minimizing the use of complex legal terms;
   g. explaining the basis for a ruling when made during the hearing or when made after the hearing in writing; and/or
   h. making referrals to resources that may be available to assist the party in the preparation of the case.[144]

   The hearing officer must ensure that any steps taken in fulfillment of these accommodations are reflected in the record of the proceeding.[145]

3. Appropriate Evidence. The rules of evidence are not applicable. But, as discussed above, just because the technical rules of evidence do not apply, the rules should not be ignored (for the reasons already discussed). The hearing officer must exclude evidence that s/he determines to be irrelevant, immaterial, unreliable or unduly repetitious. The *pro se* parent, however, is not expected to understand the technical requirements of even the simplest evidentiary rules. A more common sense approach to receiving reliable

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[142] *See* NYSBA Model R. Jud. Conduct for State Administrative Law Judges Canon 3, Comment [3.16] (2009).
[143] NYSBA Model R. Jud. Conduct for State Administrative Law Judges Canon 3(B)(8)(a) (2009).
[144] NYSBA Model R. Jud. Conduct for State Administrative Law Judges Canon 3(B)(8)(a)(i)-(ix) (2009).
[145] NYSBA Model R. Jud. Conduct for State Administrative Law Judges Canon 3(B)(8)(b) (2009).

evidence to reach a just outcome should be adopted (e.g., narrative testimony; the hearing officer posing the questions).

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