MANAGING THE HEARING PROCESS: The Hearing Officer's Authority Under The IDEA And Good Practice In Exercising It

NYSED IMPARTIAL HEARING OFFICER TRAINING WEBINAR

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I. INTRODUCTION

A. In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act.[1]

B. The special education due process hearing should be distinguished from court litigation in several ways. Granted, the due process hearing should provide a legal resolution to the dispute. However, it should also serve additional functions. Unlike in court litigation, in special education due process hearings, the parties must continue to interact with one another after the hearing in order to educate the student. The hearing process, therefore, should attempt to establish a post-decision basis for the parties to work together as partners to

[1] *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.'").

educate the student.

C. A few parents, school districts, and their advocates/attorneys, for a variety of motivations, abuse due process procedures by refusing to cooperate, acting uncivilly/unprofessionally, being an overly zealous advocate and/or attacking the other party's motives. Such actions can be the result of a party's love for "the fight," the lack of an advocate/attorney knowledgeable in special education, a dysfunctional family/administration, or other reasons. The price for abuse of due process procedures is twofold. Such abuse can consume extraordinary amounts of time and expense. In addition, during the ensuing "battle," the parent/district relationship deteriorates and often the student suffers educationally and otherwise.

D. How the hearing officer manages the process (i.e., conducts himself/herself, allows the parties to conduct themselves, handles the prehearing conference and the hearing, and articulates the decision) is all extremely important in accomplishing <u>all</u> of the above functions (i.e., legal resolution, basis to work together).

E. The hearing officer's primary responsibility in resolving the dispute is to implement the law (i.e., the IDEA and its regulations, and related NY statute and regulations) to assure the student receives the programs and services the IDEA mandates – even if that means intruding, to some extent, on the adversary aspect of the process (e.g., taking witnesses out of order; requiring all direct and cross examination of a witness at one time to avoid delay and inefficiency; or asking questions of a witness over the objection of a party).

F. Hearing officers do, and must, wisely exercise broad authority in their handling of the hearing process. This outline provides a review of hearing officer authority under the IDEA to manage the hearing process, and identifies various strategies which can lead to a:

1. more efficient and effective use of the due process procedures; and

2. resolution of the dispute by decision or settlement that perhaps will serve as the basis for a collaborative working relationship between the parent(s) and school district staff in the future.

II. THE BASIC PROCEDURAL REQUIREMENTS AND/OR SUPPORTS

A. Under the IDEA, the parent has the right to -

1. Written notice when the district proposes, or refuses, to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child (a.k.a. Notice of Recommendation).[2] The parent is also entitled to related information, notably sources for parent's to contact to obtain assistance in understanding the IDEA's provisions.[3]

2. A hearing on any matter for which notice is required.[4]

3. Information on any available free or low cost legal or other relevant service.[5]

4. An award of reasonable attorney's fees if a "prevailing party."[6]

5. An impartial hearing officer not involved in the education of the child or having a personal/professional interest conflicting with his or her objectivity.[7]

6. An appeal of the decision within a prescribed timeline[8] either to State or Federal court.[9]

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[2] 34 CFR § 300.503(a).
[3] 34 CFR §§ 300.503(b) – (c).
[4] 34 CFR § 300.507(a). A parent (or the school district) may file a due process complaint on any of the matters relating to the identification, evaluation or educational placement of a child with a disability or the provision of a free appropriate public education ("FAPE") to the child. *Id.*
[5] 34 CFR § 300.507(b).
[6] 34 CFR § 300.517(a)(1)(i).
[7] 34 CFR § 300.511(c).
[8] The party bringing the action shall have 90 days from the date of the decision of the hearing officer or, if applicable, the decision of the State review official, to file a civil action, or, if the State has an explicit timeline limitation for bringing civil actions under the IDEA, in the time allowed by that State law. 34 C.F.R. § 300.516(b). In New York, the written decision of the State review officer shall be final, provided that either party may seek judicial review by means of a proceeding pursuant to article 4 of the Civil Practice Law and Rules or 20 U.S.C. § 1415. NY Educ. Law § 4404(d)(3)(a); 8 NYCRR § 200.5(k)(3). Any such proceeding shall be commenced within four months after the determination to be

B. Hearing Rights

1. The IDEA mandates that <u>any</u> <u>party</u> to a hearing has the right to –

   a. be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

   b. present evidence and confront, cross-examine, and compel the attendance of witnesses;

   c. prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

   d. obtain a written or, at the option of the parents, an electronic verbatim record of the hearing; and

   e. written or, at the option of the parents, an electronic findings of fact and decisions.[10]

2. The IDEA also provides that, not less than five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date, and recommendations on the offering party's evaluations, that the party intends to use at the hearing.[11] However, unlike the right of a party under § 300.512(a)(3) to prohibit any evidence which has not been disclosed within five business days of the hearing, under § 300.512(b)(2), the hearing officer has discretion on whether to bar any party that fails to comply with § 300.512(b)(1) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.[12]

3. The IDEA provides the parent with three additional hearing rights.

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reviewed becomes final and binding on the parties. NY Educ. Law § 4404(d)(3)(a).

[9] 34 CFR 300.516(a).

[10] 20 U.S.C. § 1415(h)(1) – (4); 34 C.F.R. § 300.512(a)(1) – (5).

[11] 20 U.S.C. § 1415(f)(2)(A); 34 C.F.R. § 300.512(b)(1).

[12] 20 U.S.C. § 1415(f)(2)(B); 34 C.F.R. § 300.512(b)(2).

a. The right to have the child who is the subject of the hearing present;

b. The right to open the hearing to the public; and

c. The right to have the record of the hearing and the findings of fact and decisions provided to the parent at no cost.[13]

4. Each hearing must be conducted at a time and place that is reasonably convenient to the parents and child involved.[14]

5. Judicial Decisions / Federal Policy/Guidance

a. The IDEA permits a non-attorney advocate to *accompany* and *advise* a party at a hearing. *See* 20 U.S.C. § 1415(h)(1); 34 C.F.R. § 300.512(a)(1). However, the IDEA does not address whether non-attorney advocates who have "special knowledge or training with respect to the problems of children with disabilities" can *represent* parties at hearings. The issue of whether non-attorney advocates may *represent* parties to a due process hearing is a matter that is left to each State to decide.[15] *Analysis and Comments to the Regulations*, Federal Register, Vol. 73, No. 156, Page 73017 (December 1, 2008). If State law is silent on the issue, and doing so would not be deemed to constitute "the unauthorized practice of law" in the state, a non-attorney advocate may *represent*, not just *accompany* and *advise*, a party at a hearing. *Analysis and Comments to the Regulations*, Federal Register, Vol. 73, No. 156, Page 73018 (December 1, 2008).

In New York, non-attorney advocates may accompany and advise parties to the hearing. Although the State regulation does not expressly authorize non-attorney advocates to represent parties at hearings,[16] the New

[13] 34 C.F.R. § 300.512(c).
[14] 34 C.F.R. § 300.515(d).
[15] There are a number of States that expressly prohibit representation by non-attorney advocates while others expressly permit it. *See* Perry A. Zirkel, *Lay Advocates and Parent Experts under the IDEA*, 217 EDUC. L. REP. 19 (2007).
[16] Specifically, New York State regulation provides, "The parties to the proceeding may be accompanied and advised by legal counsel and by individuals with special

York Rules of Professional Conduct do not prohibit the practice.[17]

C. Hearing Officer Qualifications

1. Competence.

a. IDEA 2004 sets forth minimum qualifications for hearing officers who preside over IDEA hearings.[18] Specifically, an IDEA hearing officer shall -

i. possess knowledge of, and the ability to understand, the provisions of the IDEA, Federal and State regulations pertaining to the IDEA, and legal interpretations of the IDEA by Federal and State courts;

ii. possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

iii. possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.[19]

b. However, because standard legal practice will vary depending on the State in which the hearing is held, the requirements that the hearing officer possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice, are general in nature.[20]

c. Equally, the IDEA does not provide for training requirements.[21] However, each State must ensure

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knowledge or training with respect to the problems of students with disabilities." 8 NYCRR § 200.5(j)(3)(vii).

[17] The prohibition against the unauthorized practice of law applies only to lawyers licensed by New York State. *See* N.Y. R. Prof. Conduct 5.5 (2011).

[18] *See*, *generally*, 20 U.S.C. § 1415(f)(3)(A).

[19] 20 U.S.C. § 1415(f)(3)(A)(ii) – (iv).

[20] *See*, *generally*, *id.*

[21] *See*, *generally*, 20 U.S.C. § 1415(f)(3)(A); *see also C.S. by Struble v. California Dep't of Educ.*, 50 IDELR 63 (S.D. Cal. 2008) (denying the parent's request for a temporary restraining order to enjoin the California's Department of Education from contracting with the Office of Administrative Hearings on the grounds that the parent did not have standing to challenge the Department's training

that individuals selected to conduct impartial due process hearings are sufficiently trained.[22] Each State is tasked with determining the required training and the frequency of the required training, consistent with State rules and policies.[23]

d. New York State sets forth specific qualifications for hearing officers. Specifically, the hearing officer must be admitted to the practice of law in New York; have a minimum of two years practice/experience in education/special education/disability rights/civil rights; have access to support/equipment necessary to perform duties; and be certified by the Commissioner as an impartial hearing officer, which requires, among other things, successful completion of training/update programs and annual submission of a certification that these requirements have been met.[24]

2. Impartiality.

a. The IDEA recognizes the importance of an independent, fair and impartial hearing system. The IDEA prohibits –

i. an employee of the SEA or LEA involved in the education or care of the child from serving as a hearing officer.[25]

ii. persons having a personal or professional interest that conflicts with the person's objectivity in the hearing.[26]

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requirements, as the requirement is not in the IDEA but an obligation between two contracting parties); *Carnwath v. Grasmick*, 115 F. Supp. 2d 577, 33 IDELR 271 (D. Md. 2000) (dismissing the parent's claims against the State education agency because there is no federal right to a competent or knowledgeable ALJ); *Cavanagh v. Grasmick*, 75 F. Supp. 2d 446, 31 IDELR 158 (D. Md. 1998) ("Standards for ALJ competency and training are not found within the statutory provisions of the IDEA....Thus, ALJ competency and training appear to be governed solely by state law standards.")

[22] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46705 (August 14, 2006).

[23] *Id.*

[24] 8 NYCRR § 200.1(x)(1) – (4).

[25] 20 U.S.C. § 1415(f)(3)(A)(i)(I).

[26] 20 U.S.C. § 1415(f)(3)(A)(i)(II).

b. However, IDEA does not establish standards for the ethical conduct of hearing officers. The application of State judicial code of conduct standards is a State matter. NYSED by analogy has drawn upon the New York State Model Code of Judicial Conduct for Administrative Law Judges.[27]

3. Immunity. Hearing officers have the same absolute immunity as judges.[28]

4. Judicial Decisions / Federal Policy/Guidance

a. The absence of information on the ALJ's biographical blurb demonstrating expertise required to decide an IDEA claim does not mean that the ALJ is not qualified to hear IDEA claims or that s/he has not received special education training. Parents can seek disqualification of the ALJ, or raise the ALJ's qualifications as a point of error on appeal, if necessary. *Wooley v. Valley Center-Pauma Unified Sch. Dist.*, 47 IDELR 66 (S.D. Cal. 2007).

b. Hearing officers need only meet minimum standard of impartiality set out in the IDEA and "enjoy[] a presumption of honesty and integrity, which is only rebutted by a showing of some substantial countervailing reason to conclude that [the hearing officer] is actually biased with respect to factual issues being adjudicated." *L.C. v. Utah State Bd. of Educ.*, 125 F. App'x 252, 43 IDELR 29 (10th Cir. 2005) *quoting Harline v. Drug Enforcement Admin.*, 148 F.3d 1199 (10th Cir. 1998).

c. Administrative adjudicators are entitled to a "presumption of honesty and integrity," and in order to overcome this presumption and establish bias

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[27] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46705 (August 14, 2006).

[28] *See, e.g., B.J.S. v. State Educ. Dep't*, 699 F. Supp. 2d 586 (W.D.N.Y 2010); *Stassart v. Lakeside Joint Sch. Dist.*, 53 IDELR 51 (N.D. Cal. 2009); *J.R. ex rel. W.R. v. Sylvan Union Sch. Dist.*, 49 IDELR 253 (E.D. Cal. 2008); *DeMerchant v. Springfield Sch. Dist.*, 47 IDELR 94 (D. Vt. 2007); *Sand v. Milwaukee Pub. Sch.*, 46 IDELR 161 (E.D. Wis. 2006); *Walled Lake Consol. Sch. v. Doe*, 42 IDELR 3 (E.D. Mich. 2004); *Weyrich v. New Albany-Floyd County Consol Sch. Corp.*, 2004 WL 3059793 (S.D. Ind. 2004); *cf. M.O. v. Indiana Dep't of Educ.*, 635 F. Supp. 2d 847 (N.D. Ind. 2009) (IDEA review officers).

"evidence is required that the decision maker 'had it in' for the party for reasons unrelated to the officer's view of the law." *B.H. v. Joliet Sch. Dist.*, 54 IDELR 121 (N.D. Ill. 2010) *citing Keith v. Massanari*, 17 Fed. Appx. 478 (7th Cir. 2001).

By analogy, the recusal standards for federal justices, judges, and magistrates can be looked to, namely: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. 28 USC § 455(a). The Court in *Liteky v. United States*, 510 U.S. 540, 548 (1994), explained this statute as one which "forbids partiality whether grounded in an interest or relationship or a bias or prejudice; and it forbids not only the reality of partiality but its objective appearance as well." These standards have also been applied to an administrative decision-maker. *See Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). Bottom line, the legal standard is an objective one, i.e., whether a "reasonable and informed observer" would question the decision-maker's impartiality.

III. EXTENT OF AUTHORITY

A. The IDEA and its implementing regulations delineate the specific rights accorded to any party to a due process hearing.[29] The 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."[30] It is further expected that the hearing officer "ensure that the due process hearing serves as an effective mechanism for resolving disputes between parents" and the school district.[31] In this regard, apart from the hearing rights set forth in IDEA and the regulations, "decisions regarding the conduct of [IDEA] due process hearings are left to the discretion of the hearing officer," subject to appellate review.[32]

B. The IDEA and its regulations do not comprehensively specify the available procedural rules, penalties, and sanctions to enable the hearing officer to effectively and efficiently manage the hearing

[29] *See* 34 C.F.R. § 300.512. *See also* Section II.A. and B., *supra*.
[30] *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995).
[31] *Id.*
[32] *Id.*

process.[33] However, a hearing officer has broad powers and discretion to manage the hearing process under the IDEA.[34] This authority extends to various procedural and evidentiary matters, provided that any decision made by the hearing officer is consistent with basic elements of due process hearings and the rights of the parties set out in the statute and the regulations.[35] Generally, decisions on procedural and evidentiary matters are given due deference and often the stricter standard of an "abuse of discretion" will need to be met for the ruling to be reversed.[36] Thus, the test for

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[33] New York has by regulation established some specific procedures at 8 NYCRR § 200.5(j), which will be discussed below.

[34] *See*, *e.g.*, *Forrest Grove Sch. Dist. v. T.A.*, 52 IDELR 151, n. 11 (U.S. 2009); *Davis v. Kanawha Cty. Bd. of Educ.*, 53 IDELR 225 (S.D.W.V. 2009); *Renollett v. Independent Sch. Dist. No. 11* (D. Minn. 2005); *Stancourt v. Worthington City Sch. Dist. Bd. of Educ.*, 44 IDELR 166 (Ohio App. Ct. 2005); *O'Neil v. Shamokin Area Sch. Dist.*, 41 IDELR 154 (Pa. Comwlth. 2004) (unpublished). *See also Letter to Anonymous*, 23 IDELR 1073 (OSEP 1994); *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, 46704 (August 14, 2006); 8 NYCRR § 200.5(j)(3)(xi)(e) (stating that the prehearing conference is for the purpose of, among other things, "[a]ddressing other administrative matters as the impartial hearing officer deems necessary to complete a timely hearing.").

[35] *See*, *e.g.*, *Davis v. Kanawha Cty. Bd. of Educ.*, 53 IDELR 225 (S.D.W.V. 2009) (finding that the hearing officer did not abuse his discretion in denying the parent's requests for a continuance); *O'Neil v. Shamokin Area Sch. Dist.*, 41 IDELR 154 (Pa. Comwlth. 2004) (unpublished decision) (finding that the hearing officer did not abuse his discretion by denying the parent's motion to continue the due process hearing due to her child's illness made two hours into the hearing because the parent was aware of the need at the beginning of the hearing); *In re Student with Disability*, 109 LRP 56222 (SEA NY 2009) (finding that the hearing officer properly dismissed the due process complaint with prejudice for the parent's failure to prosecute and comply with reasonable directives issued during the proceeding). *See also Letter to Steinke*, 18 IDELR 739 (OSEP 1992) (regarding the applicability of the five-day rule and the discretion of the hearing officer to grant continuances); *Letter to Stadler*, 24 IDELR 973 (OSEP 1996) (advising that IDEA does not prohibit or require the use of discovery proceedings and that the nature and extent of discovery methods used are matters left to discretion of the hearing officer, subject to State or local rules and procedures).

[36] *See*, *e.g.*, *Bougades v. Pine Plains Central Sch. Dist.* 54 IDELR 181 (2d Cir. 2010) (unpublished) (cautioning that "independent review of the evidence is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities [that] they review"); *Cerra v. Pawling Cent. Sch. Dist.*, 44 IDELR 89 (2d Cir. 2005) *citing Walczak v. Florida Union Free Sch. Dist.*, 27 IDELR 1135 (2d Cir. 1998) ("'[D]eference is particularly appropriate when, as here, the state hearing officer's review has been thorough and careful.'"); *County Sch. Bd. v. Z.P.*, 42 IDELR 229 (4th Cir. 2005) (faulting the district court for not giving the hearing officer's thorough and

reversal is *not* whether the reviewing judge would rule the same way as the hearing officer.[37]

C. In addition, the IDEA and its regulations do not comprehensively specify the remedial authority of due process hearing officers. Ultimately, the state educational agencies have the responsibility to ensure that hearing officers are given the authority required to grant whatever relief is necessary to effectively and efficiently resolve due process complaints.[38] Nonetheless, a hearing officer has the authority to grant whatever relief he deems necessary, under the particular facts and circumstances of each case, to ensure that a child receives the free and appropriate public education to which the child is entitled.[39] The due process hearing system established by a State must provide for such authority.[40]

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supported findings of fact due weight); *Kerkam v. District of Columbia*, 17 IDELR 808 (D.C Cir. 1991) (observing that a hearing officer decision without "reasoned and specific findings" deserves "little deference"); (*Carlisle Area Sch. Dist. v. Scott P.*, 22 IDELR 1017 (3d Cir. 1995), *amended*, 23 IDELR 293 (3d Cir. 1995) (observing that an administrative review is not a hearing de novo, and due deference must be given to the decision of the hearing officer below); *Lewis v. School Bd.*, 19 IDELR 712 (E.D. Va. 1992) (stating that the rulings of the hearing officers are entitled to more than the customary "due weight" and must be accorded review on a more deferential "abuse of discretion" standard).

[37] When ruling on a matter of any significance, it is important that the hearing officer include in the record the factors considered, and how said factors were balanced, to give the reviewing court a better basis to defer.

[38] *Letter to Armstrong*, 28 IDELR 303 (OSEP 1997). Equally important, the state educational agencies are also charged with the responsibility to ensure that a hearing officer's orders are implemented, and that whatever actions are necessary to enforce those orders are taken. *Id.*

[39] *See Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985) (IDEA empowers courts [and hearing officers] with the broad authority to fashion appropriate relief, considering equitable factors, which will effectuate the purposes of IDEA); *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 52 IDELR 151, n. 11 (2009); *Cocores v. Portsmouth Sch. Dist.*, 18 IDELR 461 (D.N.H. 1991) (finding that a hearing officer's ability to award relief must be coextensive with that of the court); *Letter to Kohn*, 17 EHLR 522 (OSEP 1991). *See also Letter to Riffel*, 34 IDELR 292 (OSEP 2000) (discussing a hearing officer's authority to grant compensatory education services); *Letter to Armstrong*, 28 IDELR 303 (OSEP 1997) (relating to a hearing officer's authority to impose financial or other penalties on local school districts, issue an order to the state educational agency who was not a party to the hearing, and invoke stay put when the issue is not raised by the parties).

[40] *Letter to Armstrong*, 28 IDELR 303 (OSEP 1997).

IV. RESOLUTION MEETING PERIOD

A. Resolution Session

1. Party's Failure to Participate. When a party fails to participate in the resolution meeting,[41] the other party may seek the hearing officer's intervention.[42] The hearing officer's intervention will be necessary to either dismiss the complaint[43] or to commence the hearing,[44] depending on the circumstances.

2. Inaction. Inaction by a parent or school district following the filing of the due process complaint does not relieve the State education agency ("SEA") of its duty to enforce the timeline for issuing a final decision. If the parties have failed to take any action on a complaint that does not raise any disciplinary issues pursuant to 34 C.F.R. § 300.532, on the 31st day after receipt of the due process complaint, the SEA may refer the complaint to the hearing officer (if it has not already done so) and ask the hearing officer to contact the parties for a status report and/or to convene a hearing.[45] In this situation, on day 31, the timeline for conducting the hearing and issuing a decision starts.[46]

3. Procedural Violation. Unless the parent can demonstrate substantive harm, the failure of the school district to hold the

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[41] The IDEA does not define the term "participate." However, the purpose of the resolution meeting is for the parent and the school district to discuss problems and the proposed resolutions expressed in the complaint to afford the school district an opportunity to resolve the dispute. Given this purpose, the hearing officer has the discretion to determine whether each party participated within the meaning of IDEA and, if not, what action, if any, should be taken.

[42] *See Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 52 IDELR 266, Question D-8, (OSERS 2009).

[43] The school district may request at the conclusion of the 30-day resolution period that the hearing officer dismiss the due process complaint when the school district has been unable to obtain the participation of the parent in the resolution meeting despite making reasonable efforts to do so. 34 C.F.R. § 300.510(b)(4).

[44] The parent may seek the intervention of a hearing to begin the due process hearing timeline when the school district fails to hold a resolution meeting within the required timelines or to participate. 34 C.F.R. § 300.510(b)(5). There is no requirement, however, that the parents seek the intervention of the hearing officer. *Dep't of Educ. v. T.G.*, 56 IDELR 97 (D. Haw. 2011).

[45] *Letter to Worthington*, 51 IDELR 281 (OSEP 2008).

[46] *See id.*

resolution meeting within the statutory fifteen days is not a denial of a free and appropriate public education.[47]

B. Pleadings

1. Opportunity to Amend if Complaint Insufficient. Should the hearing officer determine that the due process complaint is insufficient, the hearing officer may dismiss the complaint but not before granting the complaining party an opportunity to amend the complaint.[48]

If the hearing officer determines the complaint is not sufficient, the hearing officer's decision must identify how the complaint is insufficient, so that the complainant can amend the complaint, if appropriate.[49] Should the complainant not amend, the complaint may be dismissed.[50]

2. Sufficient Insufficiency. There is no requirement that the party who alleges that a notice is insufficient state in writing the basis for the belief.[51] The complaining party, however, is not required to include in the due process complaint all the facts relating to the nature of the problem. Nor is the complaining party required to set forth in the due process complaint all applicable legal arguments in "painstaking detail."[52] The IDEA's due process requirements imposes "minimal pleading standards."[53]

An initial purpose of the due process complaint is to set the

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[47] *J.D.G. v. Colonial Sch. Dist.*, 55 IDELR 197 (D. Del. 2010).
[48] *See Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 52 IDELR 266, Question C-4 (OSERS 2009).
[49] *Id. Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46698 (August 14, 2006).
[50] *Id.*
[51] *Id.*
[52] *Escambia County Bd. of Educ. v. Benton*, 44 IDELR 272 (S.D. Ala. 2005)." *See also Anello v. Indian River Sch. Dist.*, 47 IDELR 104 (Del. Fam. Ct. 2007) (finding that the alleged facts and requested relief contained in the parents' due process complaint were consistent with a child find claim and that the school district was not denied ample notice to prepare for a child find claim because of the parents' failure to explicitly cite the child find provisions of the IDEA).
[53] *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005). *But see M.S.-G., et. al v. Lenape Regional High Sch. Dist. Bd. of Ed.*, 51 IDELR 236 (3d Cir. 2009) (refusing to accept the suggestion that Schaffer's "minimal" pleading standard equates to a "bare notice pleading requirement").

agenda for the resolution meeting. Usually, additional clarification will be necessary if the matter proceeds to hearing, which the hearing officer should address at a prehearing conference.

In all, the available decisions on hearing officer interpretations of the IDEA's sufficiency requirements provide little guidance, and said decisions turn on subjective interpretations of the requirement for minimal pleadings. However, it is much clearer that a hearing officer lacks the authority to dismiss a due process complaint in the absence of an objection having been filed within 15 calendar days of receipt of the due process complaint.[54]

3. Insufficiency Distinguished from Motion to Dismiss. Notices of Insufficiency should be addressed in accordance with the IDEA's requirements noted above and the 5-day timeline, separately from any motion. Motions should be addressed at the prehearing conference only after the resolution meeting process has concluded in one way or another, to avoid influencing the dispute resolution process.

V. PRE-HEARING ISSUES

A. Record

1. A transcript or written summary of the pre-hearing conference must be entered into the record.[55] 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 it a part of the record and provide a copy of same to the parties.

2. When a party requests that the pre-hearing conference be recorded, good practice would typically dictate that the request be granted.

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[54] *Alexandra R. v. Brookline Sch. Dist.*, 53 IDELR 93 (D.N.H. 2009) (unpublished).

[55] 8 NYCRR § 200.5(j)(3)(xi).

B. No Response or Inadequate Response. If the district has failed to provide a prior written notice regarding all the issues raised in the complaint, the district must, within 10 calendar days of receiving the due process complaint, send a response to the parent.[56] The response must address each of the items required in a prior written notice.[57] If the district fails in either of these regards, the hearing officer has the discretion to determine the appropriate action given the circumstances, e.g., order a response to be filed/amended by a deadline, declare certain facts.[58] Note, however, the IDEA does not specify default as the penalty for failure to serve an appropriate response to a due process complaint. Granting a default judgment would subvert the administrative process and assign the student to the parent's preferred placement without a full examination of the record or his needs.[59]

C. Amendments to Complaint Generally. A party may amend its complaint only if the other party consents or the hearing officer grants permission and the non-complaining party is given the opportunity to convene a resolution meeting. But, such permission may only be granted not later than 5 calendar days before the hearing.[60] In addition, the timelines begin again for both the resolution meeting and the decision.[61] However, if a parent is not able to amend the complaint, a separate complaint may be filed on the issue.[62]

For the sake of expediting resolution of the student's educational situation and judicial economy (i.e. avoiding a separate hearing)

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[56] *See* 34 C.F.R. § 300.508(e).
[57] *Id.*
[58] In responding to requests that the authority of hearing officers be clarified to resolve pre-hearing issues, such as the sufficiency of a response, OSEP noted, among other things the following:

> Nothing in IDEA prohibits a hearing officer from making determinations on such procedural matters not addressed in the Act so long as they are made in a manner consistent with party's right to a timely hearing.

Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, Page 46704 (August 14, 2006).
[59] *Sykes v. District of Columbia*, 49 IDELR 8 (D.D.C. 2007). *See also Jalloh v. District of Columbia*, 49 IDELR 190 (D.D.C. 2008) (the fact that the LEA issued a general denial of wrongdoing in response to the parent's due process complaint did not entitle the parent to a default judgment).
[60] 34 C.F.R. § 300.508(d)(3).
[61] 34 C.F.R. § 300.508(d)(4).
[62] 34 C.F.R. § 300.513(c).

hearing officers should consider encouraging school districts to agree to amendments after the 5-day deadline but prior to commencement of the first hearing session, and possibly further agreeing to waive returning to a resolution meeting and the restarting of the timelines when a quick informal discussion would suffice or a resolution meeting would be futile. If prejudice is alleged an attempt should be made to address it in order to encourage the agreement. (It might also be pointed out that any separate due process complaint filed later may be consolidated with the pending matter.)

D. Motions

1. As hearings have become more legalistic, there has been an increase in motion practice. While IDEA does not expressly provide for any type of motion practice, given the broad authority granted hearing officers to manage the process[63], hearing officers have the authority to entertain and determine motions.[64]

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.[65] Motions, usually addressing these matters, provide the hearing officer the opportunity to fairly manage the hearing process.

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.[66] 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

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[63] *See Notes* 27 to 31, *supra*, and accompanying text.
[64] *See Dist City 1 & Dist City 2 Pub. Sch.*, 24 IDELR 1081 (SEA MN 1996).
[65] 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.
[66] The ruling must be based on, and should refer to, the record, including any findings of fact, set forth the legal standard for the ruling, note the competing factors the hearing officer considered/balanced and rule on the action requested.

provide appropriate guidance and might be drawn upon.

E. Jurisdiction

1. Non-enrolled Student. The fact that the child is not enrolled in, but a resident of, the school district does not necessarily divest the hearing officer of jurisdiction.[67] The same may be true when the student's residency changes.[68]

2. New Issues. Only an impartial hearing officer can make the determination of whether a parent's request for a hearing is based on new issues, as compared to a prior complaint.[69]

3. Issues Raised by Non-Complaining Party. The IDEA does not address whether the non-complaining party may raise other issues at the hearing that were not raised in the due process complaint. The comments specify that such matters should be left to the discretion of hearing officers in light of the particular facts and circumstances of a case.[70]

4. Issues Raised in State Complaint. Hearing officers may hear issues that were previously subjected to IDEA's State

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[67] *D.S. v. District of Columbia*, 54 IDELR 116 (D.D.C. 2010) (noting that school enrollment is not a precondition to the filing of a due process complaint because the IDEA's child find requirement creates an affirmative, ongoing obligation to identify, locate and evaluate all children with disabilities residing within the jurisdiction).

[68] *See, e.g., D.H. v. Lowndes Cnty. Sch. Dist.*, 57 IDELR 162 (M.D. Ga. 2011); *Alexis R. v. High Tech Middle Media Arts Sch.*, 53 IDELR 15 (S.D. Cal. 2009); *Grand Rapids Pub. Sch. v. P.C.*, 308 F. Supp. 2d 815 (W.D. Mich. 2004). *Accord Letter to Goetz and Reilly*, 57 IDELR 80 (OSEP 2011). *But see Thompson v. Bd. of Educ.*, 28 IDELR 173 (8th Cir. 1998) (interpreting Minnesota law to mean that if a student changes districts without first requesting a due process hearing, the right to challenge the prior district's actions is foreclosed).

[69] *Analysis and Comments to the Regulations*, Federal Register, Vol. 64, No. 48, Page 12613 (March 12, 1999).

[70] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46706 (August 14, 2006). A plain reading of § 1415(f)(3)(B) prevents only "the party requesting the due process hearing" from raising any new issues not included in the due process complaint. § 1415(f)(3)(B) does not address whether a respondent may raise new issues. Nonetheless, and in contrast to the Comments, one court has held that the non-complaining party can only contest issues raised in the due process complaint and that hearing officers do not have discretion to hear issues raised by the non complaining party which are not included in the due process complaint. *Saki v. State of Hawaii, Dep't of Educ.*, 50 IDELR 103 (D. Haw. 2008).

complaint process.[71] However, whether hearing officers have jurisdiction to review decisions made through the State complaint process is arguable.[72]

5. Children in Private Schools When FAPE is Not At Issue. Under the IDEA, hearing officers do not have jurisdiction over FAPE issues for students enrolled by their parents in private, including religious, schools or facilities with one notable exception, child find.[73] However, in New York, hearing officers have jurisdiction over issues arising from students enrolled by their parents in non-public schools.[74]

6. Agreed Upon / Prior IEP. Hearing officers have jurisdiction for parental challenges to an IEP that was initially agreed to or is not the student's most recent one, provided it is not time barred.[75] However, such agreement and/or delay in appealing may in some situations be a valid consideration in fashioning any equitable relief.

7. 504/ADA Claims. Generally, IDEA hearing officers have no jurisdiction to hear and determine such claims.

8. Consent. The IDEA requires parental consent for an initial evaluation.[76] The school district must also obtain informed parental consent prior to conducting any reevaluation of a child with a disability.[77] However, the school district may

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[71] *See*, *e.g.*, *Grand Rapids Pub. Sch. v. P.C.*, 47 IDELR 7 (W.D. Mich. 2004) ("[T]he IDEA is better read to permit more process (a due process hearing following a separate investigation) as opposed to less process (the investigation foreclosing a later statutorily referenced due process hearing)."); *Lewis Cass Intermediate Sch. Dist. v. M.K.*, 40 IDELR 8 (W.D. Mich. 2003) (concurring with the hearing officer that "complaint issues" are within the jurisdiction of the hearing officer); *Donlan v. Wells Ogunquit Cmty. Sch. Dist.*, 37 IDELR 274 (D. Me. 2002) (agreeing with the hearing officer that the State complaint investigator's findings were not binding on the hearing officer); *Letter to Douglas*, 35 IDELR 278 (OSEP 2001); *Letter to Chief State Sch. Officers*, 34 IDELR 264 (OSEP 2000).

[72] *See*, *e.g.*, *Virginia Office of Protection and Advocacy v. Virginia*, 109 LRP 199 (E.D. Va. 2003). *Cf. Letter to Chief State Sch. Officers*, 34 IDELR 264 (OSEP 2000).

[73] 34 C.F.R. § 300.140(b). *See*, *e.g.*, *E.W. v. Sch. Bd.*, 40 IDELR 257 (S.D. Fla. 2004); *Gary S. v. Manchester Sch. Dist.*, 38 IDELR 93 (D.N.H. 2003)

[74] NY Educ. Law § 3602-c.

[75] *Letter to Lipsitt*, 52 IDELR 47.

[76] 34 C.F.R. § 300.300(a).

[77] 34 C.F.R. § 300.300(c)(1)(i).

proceed with the reevaluation without informed parental consent if the school district has taken reasonable measures to obtain consent and the *parent has not responded*.[78] The school district, however, must document its attempts to obtain parent consent using the procedures in § 300.322(d).[79] If the *parent has refused* to consent, the school district may, but is not required to, pursue the reevaluation by using the consent override procedures.[80]

a. Refusal to Consent – Initial. Unless State law says otherwise, a school district may use mediation and the due process hearing procedures to pursue an initial evaluation of a child when the parent refuses to consent or fails to respond to a request for consent.[81]

   i. The school district, however, is not required to pursue an initial evaluation of a child suspected of having a disability if the parent does not provide consent for the initial evaluation. The school district is in the best position to determine whether, in a particular case, an initial evaluation should be pursued.[82]

   ii. The override procedures are not available for children who are home-schooled or placed by

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[78] 34 C.F.R. § 300.300(c)(2); *see also Questions and Answers on IEPs, Evaluations, and Reevaluations*, 111 LRP 63322, Question D-3 (OSERS 2011).
[79] These procedures include detailed records of telephone calls made or attempted and the results of those calls, copies of correspondence sent to the parent and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits. 34 C.F.R. § 300.322(d).
[80] 34 C.F.R. § 300.300(c)(1)(ii). Should the LEA elect not to pursue the reevaluation by using the consent override procedures, the LEA is not required to continue to provide a free and appropriate public education to child if a review of the existing data indicates that the child is no longer eligible. The LEA, however, must provide the parent with prior written notice of its proposal to discontinue special education and related services. *Questions and Answers on IEPs, Evaluations, and Reevaluations*, 111 LRP 63322, Question D-4 (OSERS 2011).
[81] 34 C.F.R. § 300.300(a)(3).
[82] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46632 (August 14, 2006); *see also Questions and Answers on IEPs, Evaluations, and Reevaluations*, 111 LRP 63322, Question D-2 (OSERS 2011). Informal methods may be attempted before the LEA opts for mediation and the due process hearing procedures. Such measures include parent conferences. *Letter to Williams*, 18 IDELR 534 (OSEP 1991).

their parents in private school.[83]

iii. A school district is required to make reasonable efforts to obtained informed consent from the parent of a child who is a ward of the state for an initial evaluation to determine whether the child is a child with a disability. However, informed consent is not required if the parent cannot be found, parental rights have been terminated, or a judge has appointed an individual who has been granted educational decision-making authority.[84]

b. Refusal to Consent – Reevaluation. Should the school district opt not to use the consent override provision, the school district does not need to continue to provide FAPE if it has determined based on existing data that the student is no longer eligible for special education and related services. The school district, however, must provide the parent with written prior notice of its proposal to discontinue the provision of FAPE.[85]

c. Provision of Initial Services. Hearing officers do not have jurisdiction to override a parent's refusal to consent for initial services or for a parent's subsequent revocation of consent for continued services.[86]

d. Disputing Parents. Hearing officers do not have jurisdiction to hear disputes between two parents, both of which have legal authority to make educational decisions, who disagree on whether the child should undergo an initial evaluation. When one parent consents but the other submits written refusal to consent, the parents may need to litigate (in civil court) their respective right to make educational decisions for the student but, in the meantime, the

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[83] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46653 (August 14, 2006).
[84] 34 C.F.R. §§ 300.300(a)(2)(i) – 300.300(a)(2)(iii). A child is not a ward of the state if s/he has a foster parent. *See* 34 C.F.R. § 300.30(a)(2).
[85] *Questions and Answers on IEPs, Evaluations, and Reevaluations*, 111 LRP 63322, Question D-2 (OSERS 2011).
[86] 34 C.F.R. §§ 300.300(b)(3)(i), 300.300(b)(4)(i).

school district cannot evaluate the student.[87]

9. Educational Records. Issues concerning the educational records of the child may be heard by hearing officers when the issues are interrelated with the identification, evaluation, educational placement or the provision of FAPE to the child.[88] In this regard, a hearing officer, as part of her/his broad authority to manage the process, may address disputes regarding access to records by either the parent or the school district, e.g., obtaining a copy, parent's right to student's records that fall outside the scope of "educational records," and the right of the school district to records of parent's independent evaluators or home based programs.

10. Settlement Offers. A parent's refusal of a school district's settlement offer that provides for all of the relief sought by the parent does not necessarily divest the hearing officer of subject matter jurisdiction.[89] Courts are split on whether the school district's offer must also address a claim for attorneys fees, and if so, how.

11. Enforcement of Private Settlement Agreements. Whether hearing officers have the authority to review and/or enforce settlement agreements, including those reached outside of the mediation or resolution processes is not altogether clear.[90] In an unpublished decision, however, the Second Circuit has said that hearing officers do not have the

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[87] *J.H. v. Northfield Public Sch. Dist.*, 52 IDELR 165 (D. Minn. 2009) (unpublished). *See also Zeichner v. Mamaroneck Union Free Sch. Dist.*, 52 IDELR 264 (N.Y. Sup. Ct. 2009) (finding that it was the LEA's obligation to fulfill its statutory duty to obtain a hearing to address the father's opposition to his son being evaluated over the objection of the mother who shared educational decision making authority with the father); *Letter to Cox*, 54 IDELR 60 (OSEP 2009).

[88] 34 C.F.R. §§ 300.507(a) and 300.613-300.621. *Cf. Bourne Pub. Sch.*, 37 IDELR 261 (Mass. SEA 2002); *Northwest R-1 Sch. Dist.*, 40 IDELR 221 (Mo. SEA 2004); *Fairfax County Pub. Sch.*, 38 IDELR 275 (Va. SEA 2003).

[89] *A.O. v. El Paso Indep. Sch. Dist.*, 54 IDELR 42 (5th Cir. 2010) (unpublished). *Cf. Dist. of Columbia v. Strauss*, 52 IDELR 126 (D.D.C. 2009) (dismissing the school district's attempt to recover attorney's fees from the parent's attorney despite its technical victory, which resulted from the hearing officer's dismissal of the due process complaint as moot).

[90] *See*, *e.g.*, *H.C. v. Pierrepont Cent. Sch. Dist.*, 52 IDELR 278 (2d Cir. 2009) (unpublished); *Sch. Bd. of Lee County v. M.C.*, 35 IDELR 273 (Fla. Dist. Ct. App. 2001). *Cf. Mr. J. v. Bd. of Educ.*, 32 IDELR 202 (D. Conn. 2000); *State ex. rel. St. Joseph Sch. v. Missouri Dep't of Elementary and Secondary Educ.*, 54 IDELR 124 (Mo. Ct. App. 2010); *Norwood Pub Sch*, 44 IDELR 104 (SEA MA 2005).

authority to enforce private, IDEA settlement agreements between the parent and the school district.[91]

12. Enforcement of Previous Decision. Hearing officers do not have jurisdiction to enforce prior hearing officer decisions. Enforcement of prior hearing officer decisions is available through the State complaint process[92] or the courts.[93]

F. Stay put. Hearing officers have authority to decide the child's pendency, or stay put,[94] placement under the IDEA even in the absence of a request by either party.[95]

Determining stay put, particularly when there are issues of fact, (i.e., process), can be problematic given time constraints. Consider using (by agreement of the parties if possible) a more expeditious, less formal proceeding, e.g., swearing in persons in a transcribed mini hearing held via a conference call, for just this limited purpose, with later adjustments to the ruling possible upon either party's request.

Under the regulations a hearing officer has the authority to consider a district's belief that maintaining the current placement of the student is substantially likely to result in injury to the student or others, as well as review interim alternative placements (and manifestation determinations) in an expedited hearing.[96]

G. Extensions. Hearing officers have discretion to deny requests for extensions.[97] However, hearing officers must be sure to do so in

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[91] *H.C. v. Pierrepont Cent. Sch. Dist.*, 52 IDELR 278 (2d Cir. 2009) (unpublished).
[92] *See, e.g., Wyner v. Manhattan Beach Unified Sch. Dist.*, 33 IDELR 98 (9th Cir. 2000); *Bd. of Educ. of Wappingers Cent. Sch. Dist.*, 47 IDELR 115 (N.Y. SEA 2006); *Crown Point Cent. Sch. Dist.*, 46 IDELR 269 (N.Y. SEA 2006); *Newtown Bd. of Educ.*, 41 IDELR 201 (Conn. SEA 2004).
[93] *See, e.g., Jeremy H. v. Mount Lebanon Sch. Dist.,* 24 IDELR 831 (3d Cir. 1996); *Dominique L. v. Bd. of Educ. of City of Chicago*, 56 IDELR 65 (N.D. Ill. 2011); *L.J. v. Audubon Bd. of Educ.*, 47 IDELR 100 (D.N.J. 2006).
[94] 20 US.C. § 1415(j); 34 C.F.R. § 300.518 *See also Letter to Wessels*, 16 IDELR 735 (OSEP 199); *Letter to Stohrer*, 17 IDELR 55 (OSEP 1990); *Letter to Heldman*, 20 IDELR 621 (OSEP 1993).
[95] *See Letter to Armstrong*, 28 IDELR 303 (OSEP 1997).
[96] *See, generally*, 34 CFR § 300.532.
[97] *See, e.g., P.J. v. Pomona Unified Sch. Dist.* 107 LRP 47645 (9th Cir. 2007) (unpublished); *J.D. v. Kanawha County Bd. of Educ.*, 53 IDELR 225 (S.D. W.Va. 2009); *J.R. ex rel. W.R. v. Sylvan Union Sch. Dist.*, 49 IDELR 253 (E.D. Cal. 2008); *Lessard v. Wilton-Lyndborough Cooperative Sch. Dist.*, 47 IDELR 299

accordance with the important requirements under the IDEA and New York regulations.[98]

H. 5-Business Day Rule

1. Generally. The five-day rule has two purposes. First, is to prevent the non-moving party from having to defend against undisclosed evidence produced at the last minute in the hearing. Second, is to ensure the prompt resolution of disputes.[99]

   Preferably, the date should be confirmed during the prehearing conference. Additionally, the date can be altered at any time by mutual agreement of the parties. In a multi-day hearing, OSEP has opined that additional submissions can be made at any time provided the disclosure is made five business days before the next session and the introduction of the evidence is not the sole reason for the hearing delay.[100] As a matter of fairness, this ruling is questionable, and not consistent with good standard, legal practice.

2. Witnesses. The list of witnesses to be exchanged must reveal the "general thrust" of the witnesses' testimony.[101] The mere fact that a witness appears on the other party's list does not necessarily entitle the non-disclosing party to call the witness to testify unless the parties reached an agreement to the contrary. The hearing officer should also watch for abuses (e.g., excessive witnesses just to cover everyone possible) and address any concerns during the pre-hearing conference.[102]

3. Exhibits. If a party seeks to admit an exhibit not on the five-day list and the opposing party objects, the hearing officer should –

(D.N.H. 2007); *O'Neil v. Shamokin Area Sch. Dist.*, 41 IDELR 154 (Pa. Commw. Ct. 2004).

[98] For an extensive discussion of these requirements and related suggestions, *see* "Timeliness – The 45-Day Deadline and Extensions" outline presented at the first in-person training in November and December, 2011.

[99] *L.J. v. Audobon Bd. of Educ.*, 51 IDELR 37 (D.N.J. 2008).

[100] *Letter to Steinke*, 18 IDELR 739 (OSEP 1992).

[101] *Letter to Bell*, 211 IDELR 166 (OSEP 1979).

[102] *See* 8 NYCRR § 200.5(j)(3)(xiii)(f) ("The IHO may limit the number of additional witnesses to avoid unduly repetitious testimony.") *See also* 8 NYCRR § 200.5(j)(3)(xii)(c) ("[T]he IHO … shall exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious.").

a. ascertain why it was not on the five-day list;

b. inquire as to how the objecting party would actually be prejudiced, if at all; and

c. determine whether the prejudice can be cured (e.g., provide other party time to review, etc.).

Copies of proposed exhibits must be exchanged under the five-day rule unless the parties agree otherwise (e.g., because they already have a copy). Under the IDEA each party also has the right to a copy of all "completed evaluations" at least five business days prior to the first session of the hearing.[103]

Encourage the parties to discuss their exhibits to avoid duplications (i.e., joint exhibits) and to identify which they find objectionable. Have them mark all their exhibits and provide the hearing officer with a list and a copy before the hearing (with the possible exception of exhibits objected to in some circumstances).

4. 5-Day Disclosure – Discipline. Unless the parties agree to disclose relevant information to all other parties less than five business days prior to a disciplinary due process hearing, the hearing officer does not have any authority to shorten the 5-day timeline.[104]

I. Discovery

1. Generally. Other than the five-day rule and the right to examine educational records, the IDEA does not provide for pre-hearing discovery.[105] The IDEA, however, does not prohibit or require the use of discovery proceedings and the nature and extent of discovery methods used are matters left

[103] 34 CFR § 300.512(b).
[104] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46706, 46726 (August 14, 2006).
[105] *Horen v. Bd. of Educ. of City of Toledo Pub. Sch. Dist.*, 53 IDELR 79 (N.D. Ohio 2009). *See also Hupp v. Switzerland of Ohio Local Sch. Dist.*, 51 IDELR 131 (S.D. Oh. 2008) (holding that the parent is not entitled to information about all students within the LEA's borders who received special education services); *B.H. v. Joliet Sch. Dist.*, 54 IDELR 121 (N.D. Ill. 2010) (holding that IDEA hearings do not provide for the sort of extensive discovery that often occurs in litigation).

to discretion of the hearing officer, subject to State or local rules and procedures.[106]

2. Allowance of Limited Discovery. Allow discovery in limited circumstances and only when *necessary* for proper presentation or preparation of a party's case subject to limitations in the event of privileges or harassment. The hearing timeline is a factor to weigh when considering limited discovery.

3. Conducting Further Evaluations. A school district may request the opportunity to conduct further evaluations of the student. In addition to the factors relating to allowing discovery generally, as noted immediately above, the hearing officer must consider, among other things, what evaluations the school district has done already, why it claims to need another, and the parent's reason for objecting (e.g., harm to the student, possible delay of the hearing, etc.).

J. Hearing Days. Hearing officers may limit the number of days for the hearing, provided that the parties are afforded a meaningful opportunity to exercise their hearing rights.[107]

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 almost seem to welcome the "nudge" to be efficient. It is not recommended that this latter approach be utilized if a party is unrepresented.

K. Scheduling witnesses. When there are a large number of witnesses, hopefully the parties can agree on a schedule to avoid witnesses

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[106] *Letter to Stadler*, 24 IDELR 973 (OSEP 1996). *But see S.T. v. Sch Bd. of Seminole County*, 34 IDELR 230 (Dist. Ct. App. 2001) (holding that in the absence of State law, the hearing officer lacked authority to order discovery).
[107] *Letter to Kerr*, 23 IELR 364 (OSEP 1994). *See also* 8 NYCRR § 200.5(j)(3)(xiii) ("Each party shall have up to one day to present its case unless the impartial hearing officer determines additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision. Additional hearing days shall be scheduled on consecutive days whenever practicable.").

having to appear more than once or wait an unduly length of time to testify. The parties can also agree on taking witnesses out of order (i.e., the parent puts on a witness before the school district completes its case) or a set time for a witness might be necessary, interrupting another witness' testimony. 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 their case and not being prejudiced, while getting all of the relevant testimony on the record in an expeditious manner.

L. Excessive Number of Witnesses. While typically not known until witness lists are exchanged, if it appears that a school district is being asked to have available witnesses whose testimony would not be relevant, the school district may request relief. (A school district could also call several unnecessary witnesses to prolong the hearing and harass a parent.) The hearing officer would then have to inquire of the moving party as to the reason the witness is being called and determine whether such is appropriate considering relevancy, the best person to testify as to the alleged fact/opinion, cumulative testimony, etc., considering fairness to both parties and the need to obtain relevant facts.[108] This may take some time during a prehearing conference call, but it will take a lot less time than hearing all of the witnesses on irrelevant matters.

If excess witnesses, or even documentary evidence, are suspected, the hearing officer might choose to give warnings or directives.

M. Telephonic Testimony. Whether to allow testimony by telephone or video conferencing is within the discretion of the hearing officer, subject to appellate review.[109] If permitted, the witness should be provided with copies of all relevant exhibits. 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

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[108] *See* 8 NYCRR § 200.5(j)(3)(xii)(c) ("The impartial hearing officer may receive any oral, documentary or tangible evidence except that the impartial hearing officer shall exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious.").

[109] 8 NYCRR § 200.5(j)(3)(xii)(c) ("The impartial hearing officer may receive testimony by telephone, provided that such testimony shall be made under oath and shall be subject to cross-examination."). *See also Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995) (noting various factors which might be considered e.g. delay in the hearing, the 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).

with the witness.

N. Compel Attendance / Production of Documents. Hearing officers have the authority to compel the appearance of witness, including non-school district employees, and to require the production of documents.[110]

O. Observations. Home and school visits by district staff, parents, or their experts often pose problems (e.g., union concerns regarding evaluation use, disruptions, talking to staff, etc.). However, in order to meaningfully utilize a right granted under the IDEA (e.g., the right to present evidence from an expert witness or obtain an IEE) an observation of the student may be necessary. Additionally, resolution by the hearing officer that enables a party to see the student in the other party's setting sometimes results in changed views/positions by the school district and/or parent. The hearing officer may have to establish conditions on the observation.

VI. THE HEARING

A. Hearings In-Absentia. Hearing officers have the authority to move forward with the hearing in the absence of a party, provided that the absent party has been given notice of the hearing and ample opportunity to participate in the hearing.[111] Before doing so good practice would dictate the hearing officer try to check with the party/counsel as to possible problems/misunderstandings and place the results of such efforts on the record together with the reasons for why the matter will be continued or proceed.

B. Who Sits at the Table. Sometimes the parent does not want more than one district staff person at the table with the district's attorney. How many district staff and whether an expert (e.g., psychologist) can assist either party's attorney is again in the discretion of the hearing officer. The hearing officer should consider the assistance the attorney needs in presenting the case, being fair to both parties if the witnesses are sequestered and considering alternatives, e.g., opportunities for the attorney to confer with their expert before cross examination, etc.

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[110] 8 NYCRR § 200.5(j)(3)(iv) ("The impartial hearing officer shall be authorize … to issue subpoenas in connection with the administrative proceedings before him/her.") *See also Letter to Steinke*, 28 IDELR 305 (OSEP 1997).

[111] *See Horen v. Bd. of Educ. of City of Toledo Pub. Sch. Dist.*, 53 IDELR 79 (N.D. Ohio 2009); *Davis v. Kanawha Cty. Bd. of Educ.*, 53 IDELR 225 (S.D.W.V. 2009)

C. Rules of Evidence. Clearly, the rules of evidence used in courts are not applicable. Rather, 8 NYCRR § 200.5(j)(3)(xii)(c) provides that a "hearing officer may receive any oral, documentary or tangible evidence except that the hearing officer shall exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious."

Irrelevant testimony without objection too often unduly prolongs a hearing. Testimony regarding the alleged bad faith of either party, lack of cooperation, prior violations, unnecessary historical matters, etc., should be cut off, preferably subtly. However, the hearing officer should be careful in that sometimes such testimony is relevant with respect to compensatory education, retroactive reimbursement, deference to an IEP or evaluation, etc.

Admission of hearsay is permissible and does not deprive the other party of the right to confront witnesses.[112]

D. Student Witness. The parent has the right to determine whether the child testifies.[113] 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, the hearing officer asking the child questions proposed by the parties). The hearing officer may have to raise this issue with the parties due to neither party considering any of these types of options.

E. Experts. The qualifications of an expert should be placed on the record.[114] Having a party introduce the expert's vita as an exhibit often expedites doing so. But having the witness declared/accepted as an expert is not necessary. Anyone who can offer testimony beyond the knowledge of the common layperson is an expert to some degree and their background, among other factors (e.g., contact with/knowledge of student) will determine the weight their testimony should be given.

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[112] *Jalloh v. District of Columbia*, 535 F. Supp. 2d 13, 49 IDELR 190 (D.D.C. 2008).

[113] *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.")

[114] 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).

The hearing officer must clarify if necessary the area of expertise (e.g., diagnosis versus programming). Additionally, consideration should be given to having conflicting experts discuss an issue with each other on the record. The consent of both parties is advisable.

F. 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. 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.

G. Handling Witnesses

1. Only one person for each party can 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. 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.

2. 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.

3. Testimony can also be taken by affidavit. 8 NYCRR 200.5(j)(3)(xii)(f) provides the hearing officer with the option of allowing “direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination.”

4. In some circumstances, the opposing party may have the right to review any notes or file of a witness.[115]

5. A hearing officer has discretion to forbid a witness to discuss his/her testimony with others, including counsel, during a recess.[116]

H. Sequestration. The parents' decision on whether the hearing is open or closed does not control whether witnesses shall be sequestered. Such is in the discretion of the hearing officer. While sequestering is frequently granted, there may be circumstances where it is appropriate to allow potential witnesses in the hearing room, despite a sequestering request (e.g., to allow experts to hear the testimony of other witnesses).[117] Counsel should also instruct the witnesses not to discuss their testimony with each other.

I. Privileges. 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 an issue in an administrative proceeding regarding the emotional or medical condition of the student, the parent either has the option of presenting no evidence of professionals regarding the issues or waiving the privilege with regard to all professionals who diagnosed or treated the student regarding the condition at issue.[118] Hearing officer rulings on whether such privileges are waived and, if so, to what extent, often impact settlement discussions. (An outside professional might attempt to assert a privilege despite the parent's waiver.)

The district really only has a right to educationally relevant portions of such records. Sometimes the parties can agree on a third party to review the records and 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 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 those records.

If a party refuses to disclose records after the hearing officer has

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[115] *I.D. v. Westmoreland Sch Dist*, 17 IDELR 417, 684 (D.N.H. 1991); *Somerset County Pub Sch*, 21 IDELR 942 (SEA MD 1994).
[116] *Geders v. U.S.*, 425 U.S. 80, 83 (1976).
[117] *See Vandalia-Butler City Sch. Dist.*, 501 IDELR 348 (SEA Ohio 1979).
[118] *See, generally, I.D. v. Westmoreland*, 17 IDELR 417, 684 (D.N.H. 1991).

ordered such, an issue or the entire appeal could be dismissed.[119]

J. Moving the Hearing Along. In terms of starting and ending times, breaks, irrelevant or cumulative testimony, the reading of documents into the records, etc., all should be dealt with to move the hearing along as expeditiously as reasonably possible. On the other hand, sometimes giving attorneys time to think about the questions they want to ask on cross-examination and to confer with their party can actually save time.

K. Hearing Officer Involvement. The hearing officer has the authority (and perhaps the obligation) to question the witness after the parties were given an opportunity.[120] 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.[121] 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.

L. 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.[122] 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 case. The hearing officer can also seek an independent educational evaluation ("IEE").[123] But, doing so would usually create problems in meeting the timeline to issue the decision, unless a party requests an extension of the timeline.[124]

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[119] *See*, *e.g.*, *Bd. of Ed. of Oak Park Pub. Sch.*, 20 IDELR 414 (SEA Mich. 1993); *Sch. Dist. of Sevastopol*, 24 IDELR 482 (SEA WI 1996).

[120] *See* 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.")

[121] 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).

[122] *See* notes 30 – 32, 34 – 35, *supra*, and accompanying text.

[123] 34 CFR § 300.502(d). The cost of the evaluation must be at public expense. *Id.*

[124] The hearing officer cannot unilaterally extend the 45-day timeline or ask for a request to do so.

M. Disciplinary Sanctions. Persuasive authority suggests that hearing officers can issue sanctions for misconduct against a party or the party's representative.[125] When misconduct is afoot, in addition to off-the-record conferences, the hearing officer can warn the party or the party's representative to discontinue such conduct on the record. Should the party's attorney-representative be engaging in misconduct, the hearing officer can: consider commenting on the conduct in the decision as an adverse factor which should be considered in any claim for attorney's fees; seek the assistance of a court if litigation is pending; warn, restrict, award costs/sanctions; or actually remove an attorney from continuing to handle the matter.

N. Rebuttal Testimony. The hearing officer is given wide discretion on whether to allow rebuttal testimony by either party. Rebuttal testimony should not merely reiterate issues but respond, explain, or contradict new matters raised by the responding party. The five-day rule on witnesses likely would not apply, but fairness must still be considered.

O. Closing Arguments/Briefs. The hearing officer should discuss with the parties whether they would prefer to submit oral closing arguments or written briefs. Ultimately, the hearing officer decides after considering, for example, the timeline and the complexity of the issues raised during the hearing. The hearing officer should also consider providing the parties' specific direction as to what issues should be addressed.

P. The Record. Establishing an accurate record is the hearing officer's most important responsibility. The hearing officer should be mindful of problems that will adversely affect the record being made, such as overlapping conversations, use of acronyms, proper spelling of names, questioners/witnesses referring to exhibits without citing to exhibit numbers, and the use of clarifying gestures. The record is extremely important if your decision is appealed.

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[125] *Letter to Armstrong*, 28 IDELR 303 (OSEP 1997). *See also Moubry v. Indep. Sch. Dist. No. 696*, 32 IDELR 90 (D. Minn. 2000) (upholding hearing officer sanction against parent's attorney); *Stancourt v. Worthington City Sch. Dist.*, 44 IDELR 166 (Ohio Ct. App. 2005) ("Because a due process hearing is quasi-judicial in nature and consists of a hearing resembling a judicial trial, we conclude that a hearing officer in such a proceeding is vested with implied powers similar to those of a court."); *K.S. v. Fremont Unified Sch. Dist.*, 49 IDELR 182 (N.D. Cal.) (upholding a hearing officer's sanctions against the parent's attorney); *Indiana Pub. Sch. No. 729-93*, 21 IDELR 423 (SEA Ind. 1994); *District City 1 and District City 2 Pub. Sch.*, 24 IDELR 1081 (SEA MN 1996).

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.[126]

VII. WRITTEN DECISIONS

A. Amendment of Decision.

1. For Technical Errors. Hearing officers are allowed to amend their decisions for technical errors, subject to State procedures and provided proper notice is given.[127]

2. Reconsideration. Reconsideration of the hearing decision is subject to State procedures and may not delay or deny the parents' right to a decision within the required timeline.[128] As a practical matter, in New York, requests for reconsideration cannot be entertained.

B. *Res Judicata* / Collateral Estoppel.

One Circuit Court has opined that hearing officers do not have the authority to dismiss a due process hearing on *res judicata* or collateral estoppel grounds.[129]

C. Consent Decree Status.

Hearing officers have the authority to confer consent decree status to a settlement agreement reached by the parties only on those issues raised in the due process complaint notice, and provided that there has been a proper order entered by the hearing officer.[130]

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[126] *Kingsmore v. District of Columbia*, 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).

[127] *Analysis and Comments to the Regulations*, Federal Register, Vol. 64, No. 48, Page 12613 (March 12, 1999).

[128] *Id. See also Letter to Wiener*, 57 IDELR 79 (OSEP 2010).

[129] *See T.G. v. Baldwin Park Unified Sch. Dist.*, 57 IDELR 33 (9th Cir. 2011) (unpublished) (finding each school year is a separate issue under the IDEA).

[130] *A.R. v. New York City Dep't of Educ.*, 43 IDELR 108 (2d Cir. 2005). *Cf. Maria C. v. Sch. Dist. of Philadelphia*, 43 IDELR 243 (3d Cir. 2005); *Traverse Bay Intermediate Sch. Dist. v. Michigan Dep't of Educ.*, 49 IDELR 156 (W.D. Mich. 2008).

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