THE PREHEARING CONFERENCE

NYSED IMPARTIAL HEARING OFFICER TRAINING
Albany, NY November 17, 2011 New York, NY December 7, 2011

Deusdedi Merced
Deusdedi Merced, P.C.
Ardsley, New York
(914) 231-9370
(914) 231-5461 (fax)
dmerced@me.com

Lyn Beekman
Special Educations Solutions, LLC
Williamston, MI
517-290-2555
ses@spedsolutions.com

I. INTRODUCTION

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

B. IDEA hearings have grown in complexity and, arguably, the parties have become more litigious. A competent and impartial hearing system, nonetheless, promotes either the early resolution of disputes – through mediation, the resolution meeting, or traditional settlement discussions – or, should a hearing be necessary, the fair and timely conduct of the hearing.

C. Even in a well-defined impartial hearing system, however, there are common practice hurdles that can compromise the early resolution of disputes or the fair, orderly and timely conduct of hearings. Initially, it is critical that the hearing officer accept the responsibility to efficiently and effectively manage the entire hearing process. The primary purpose of this presentation is to focus on the key management tool a hearing officer has – the pre-hearing conference – and propose strategies that would advance efficient and effective practices in its use.

[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.'").

II. HEARING OFFICERS ENJOY VAST DISCRETION AND AUTHORITY TO MANAGE THE HEARING PROCESS

A. IDEA and its implementing regulations delineate the specific rights accorded to any party to a due process hearing.[2] 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."[3] 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.[4] 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.[5]

B. Such discretionary authority also extends to various pre-hearing procedural 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.[6] In this regard, the Comments to the Regulations are informative.[7]

---

[2] *See* 34 C.F.R. § 300.512.
[3] *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995).
[4] *Id*.
[5] *Id*.
[6] *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 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).
[7] Specifically, the Comments say, in part –

> We do not believe it is necessary to regulate further on the other pre-hearing issues and decisions mentioned by the commenters because we believe that States should have 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 rights of the parties set out in the Act and these regulations. The specific application of those procedures to particular cases generally should be left to the discretion of hearing officers who have the

C. IDEA and its regulations do not comprehensively specify what particular remedies, including penalties and sanctions, are available to due process hearing officers.[8] 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.[9] 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.[10] The due process hearing system established by a State must provide for such authority.[11]

> knowledge and ability to conduct hearings in accordance with standard legal practice. There is nothing in the Act or these regulations that would prohibit a hearing officer from making determinations on procedural matters not addressed in the Act so long as such determinations are made in a manner that is consistent with a parent's or a public agency's right to a timely due process hearing.
>
> …
>
> The Act does not address whether the non-complaining party may raise other issues at the hearing that were not raised in the due process complaint, and we believe that such matters should be left to the discretion of hearing officers in light of the particular facts and circumstances of a case. The Act also does not address whether hearing officers may raise and resolve issues concerning noncompliance even if the party requesting the hearing does not raise the issues. Such decisions are best left to individual State's procedures for conducting due process hearings.

See Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, Pages 46704, 46706 (August 14, 2006).

[8] Unlike the specific rights accorded to any party to a due process hearing that are listed, primarily, at 34 C.F.R. § 300.512, the few remedies, penalties and sanctions specified in IDEA and its regulations are infused throughout various provisions. For example, when the school district is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented, the school district can request that a hearing officer dismiss the parent's due process complaint. 34 C.F.R. § 300.510 (b)(4).

[9] *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*.

[10] *See Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985) (IDEA empowers courts [and hearing officers] to grant the relief that the court determines to be appropriate); *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*

D. Al Capone Maxim. Al Capone is reported to have said, "You can get much farther with a kind word and a gun than you can with a kind word alone." IDEA empowers hearing officers to do what is required for the child and, as such and when necessary, hearing officers should use the full breath of their authority and discretion to carry out the IDEA's hefty objectives.

III. COMMON PRACTICE HURDLES

A. Pre-Hearing Conference

1. Utility – Necessity – Authority. IDEA and its regulations do not require a pre-hearing conference. 8 NYCRR § 200.5(j)(3)(xi) provides that a pre-hearing conference may be scheduled. Further, it states that the purposes of the conference are: (i) simplifying or clarifying the issues; (ii) establishing date(s) for the hearing; (iii) identifying evidence to be entered into the record; (iv) identifying witnesses expected to provide testimony; and/or (v) addressing other administrative matters as the hearing officer deems necessary to complete a timely hearing. Although the pre-hearing conference is not mandated, "appropriate standard legal practice" under IDEA dictates that the hearing officer exercise discretion to hold a pre-hearing conference in every case regardless of whether it initially appears to the hearing officer that the matter may ultimately settle. How the conference is structured and the tone set by the hearing officer leading up to the pre-hearing conference is pivotal to the hearing officer taking control of the hearing process and the management of its participants.

2. Structure and Tone. Immediately after being appointed, the hearing officer should determine whether any of the events described in 34 C.F.R. § 300.510(c) require the hearing officer to adjust the timeline.[12] An effective

---

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).

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

[12] Pursuant to 34 C.F.R. § 300.515(a), a decision in a due process hearing must be reached and mailed to each of the parties not later than 45 days after the expiration of the 30-day resolution period under 34 C.F.R. § 300.510(b), or the adjusted time periods described in 34 C.F.R. § 300.510(c). Under 34 C.F.R. § 300.510(c), the 45-day timeline for the due process hearing starts the day after one of the following events: (1) both parties agree in writing that no agreement is possible; (2) after either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or (3) if both parties agree in writing to continue

approach may be to issue an order requiring the parties to provide the hearing officer with information pertaining to the resolution process. (*See*, *e.g.*, Order – Resolution Process, Attachment A.) While it may be more expedient to call the parties, or simply shoot them an email, the more structured approach sets the stage and, more importantly, the tone for the pre-hearing conference.[13]

Soon after determining that the timeline should be readjusted, the hearing officer should issue a Notice of Start of 45-Day Timeline[14] (*see*, *e.g.*, Attachment B) and a Notice of Scheduled Pre-Hearing Conference setting forth the agenda for the call (*see*, *e.g.*, Attachment C). The pre-hearing conference should be held early on in the 45-day time period,[15] and consideration should be given to the five-day rule,[16] the ten-day attorneys' fee rule,[17] and the time the parties will need to prepare for the hearing.

3. Unavailability of Party(ies). All efforts should be made to hold a pre-hearing conference; any given party should not be allowed to delay it without good cause. When a party becomes "unavailable" for the initially scheduled pre-hearing conference, the hearing officer should consider –

---

the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

[13] The apparent formality of this approach does not necessarily have to be carried over to the actual pre-hearing conference. Individual hearing officers should adopt whatever style works best within their comfort and circumstances (e.g., where the parent is unrepresented and school personnel are representing the district), but avoid any appearance of bias, unfairness or prejudgment. *See*, *e.g.*, *Massachusetts Dept. of Educ.*, 18 IDELR 286 (OCR 1991) (where the parents filed a complaint with the Office of Civil Rights complaining that they were denied a fair hearing because the hearing officer, among other conduct, said in an off-the-record discussion that she had heard a particular witnesses "spiel" before).

[14] The Notice of Start of 45-Day Timeline should also set forth the dates and times for the due process hearing. The parties should be provided with a reasonable opportunity to request new dates and times, within the 45-day timeline, in the event of conflict.

[15] Some hearing officers prefer to hold the pre-hearing conference prior to the resolution period. While there is no reason that this cannot be done, the hearing officer should be mindful that what he says during the pre-hearing conference might sway the discussion during the resolution meeting. Note, however, in NYS, when the school district files the due process complaint, the pre-hearing conference (or hearing) has to commence within the first 14 days after the date the hearing officer is appointed. 8 NYCRR § 200.5(j)(3)(iii)(a). When the parent files the due process complaint, the pre-hearing conference (or hearing) has to commence within the first 14 days after the expiration of the resolution period. 8 NYCRR § 200.5(j)(3)(iii)(b).

[16] *See* 34 C.F.R. § 300.512(a)(2) and (b)(1).

[17] *See* 34 C.F.R. § 300.517(c)(2)(i)(A).

a. adjourning the conference to another day. The hearing officer should document the reason for the adjournment and issue a Notice of Rescheduled Pre-Hearing Conference.

b. adjourning the conference to non-business hours or days (e.g., early morning, late evening, weekend).

c. issuing an order setting the pre-hearing conference for an adjourned date and time and requiring the party to appear. The order should advise that the failure to appear could result in a dismissal for failure to prosecute (where the non-attending party is the parent and/or his representative) or, for example, limiting affirmative defenses (where the non-attending party is the school district).

4. Pre-Hearing Conference Summary and Order. Upon completion of the pre-hearing conference, and within three business days, the hearing officer should issue a Pre-Hearing Conference Summary and Order that confirms the matters discussed during the pre-hearing conference.[18] (*See*, *e.g.*, Pre-Hearing Conference Summary and Order, Attachment D.) The parties should be held to the matters agreed upon, ordered, or otherwise set forth in the Order unless the hearing officer is advised immediately (e.g., three business days) of any corrections or objections. The Pre-Hearing Conference Summary and Order shall be entered into the record.[19]

B. Identifying the Issues with Precision – Managing the Issues Presented

1. Authority. Hearing Officers have expansive discretionary authority when handling pre-hearing procedural matters.[20] Said authority extends to requiring specification of the issues raised in the due process complaint, even in the absence of a sufficiency challenge.[21] OSEP, too, suggests that hearing officers have a role

[18] Most pre-hearing conferences are not recorded, but consideration should be given to recording the conference when the parties are scheduled to discuss a significant motion, a party (the parties) is (are) difficult, or there is a need for limited testimony to decide a motion or an issue. A transcription is allowed under § 200.5(j)(3)(xi) and if utilized shall be entered into the record. Further, consideration should be given to the meaning of 34 C.F.R. § 300.512(a)(4) (any party has the right to obtain a written or verbatim record of the hearing.) *But see School District of Sevastopol*, 24 IDELR 482 (WI SEA 1996) (finding that a pre-hearing conference is an "optional" component of the hearing process and IDEA's hearing rights were inapplicable). In any case, the hearing officer should take accurate and complete notes of the pre-hearing conference.

[19] 8 NYCCR § 200.5(j)(3)(xi).

[20] *See* Section II, *supra*.

[21] *See Ford v. Long Beach Unified School District*, 37 IDELR 1, (9th Cir. 2002) (holding that the parents due process rights were not violated when the hearing officer, in her

to play in managing the issues presented. Specifically, the Comments to the Regulations state:

> To assist parents in filing a due process complaint, § 300.509 and section 615(b)(8) of the Act require each State to develop a model due process complaint form. While there is no requirement that States assist parents in completing the due process complaint form, resolution of a complaint is more likely when both parties to the complaint have a clear understanding of the nature of the complaint. Therefore, the Department encourages States, to the extent possible, to assist a parent in completing the due process complaint so that it meets the standards for sufficiency. However, consistent with section 615(c)(2)(D) of the Act, the final decision regarding the sufficiency of a due process complaint is left to the discretion of the hearing officer.
>
> …
>
> With regard to parents who file a due process complaint without the assistance of an attorney or for minor deficiencies or omissions in complaints, we would expect that hearing officers would exercise appropriate discretion in considering requests for amendments.

Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, Page 46699 (August 14, 2006).

2. Purpose. Managing the issues presented is critical to effective and efficient management of the hearing process. When the issues in the due process complaint are clear, the responding party is able to prepare for the hearing, the evidence presented at hearing is more focused, there is meaningful opportunity for resolving the complaint during the resolution meeting or thereafter, the decision will be sharper, and the hearing officer is able to better determine whether he has jurisdiction over the specific issues.[22]

3. Notice to Parties and Preparation of Hearing Officer. The pre-hearing conference is the first thing that really focuses parties/counsel to work on a case. Therefore, to be fair to them the Notice of Scheduled Pre-hearing Conference (e.g., Attachment C) must not only advise the parties/counsel that clarification of the issues will be addressed but also that they are to be prepared to meaningfully participate. And, the hearing officer can reasonably anticipate that the parties/counsel will grumble a bit or more when forced to do so.

---

written decision, formulated the issues presented in words different from the words in the due process complaint).

[22] *See Letter to Wilde* (OSEP 1990) (unpublished) ("Determinations of whether particular issues are within the hearing officer's jurisdiction … are the exclusive province of the impartial due process hearing officer who must be appointed to conduct the hearing.").

In addition, the hearing officer needs to prepare for the pre-hearing conference by reviewing the due process complaint and response. Questions to clarify the issue(s)/relief and a rough outline organizing them should be prepared. The hearing officer will then also be ready, if necessary, to generally identify for the parties the evidence needed to decide each issue and determine relief, if necessary, providing greater assurance of a record to do so (e.g., to fashion compensatory educational services relief, if necessary).

4. Sufficient Notice. IDEA requires the complaining party to provide sufficient notice to the other side. Failure to provide sufficient notice may result in the complaining party not having a hearing or in a reduction of attorneys' fees if the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint.[23] The content of the due process complaint must include –

a. the name of the child;

b. the address of the residence of the child[24];

c. the child's attending school;

d. a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and,

e. a proposed solution to the problem, to the extent known and available to the complaining party at the time.

See 34 C.F.R. § 300.508(b).

The complaining party, however, is not required to include in the due process complaint all the facts relating to the nature of the problem.[25] Nor is the complaining party required to set forth in the due process complaint all applicable legal arguments in "painstaking detail".[26] IDEA's due process requirements imposes "minimal pleading standards."[27]

---

[23] 34 C.F.R. § 300.507(c); 34 C.F.R. § 300.517(c)(4)(iv).
[24] Should the child be homeless, the complaining party must provide available contact information and the name of the school the child is attending. 34 C.F.R. § 300.508(b)(4).
[25] *Escambia County Bd. of Educ. v. Benton*, 44 IDELR 272 (S.D. Ala. 2005).
[26] *Id*. *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). *But see Lago Vista Independent*

5. Notice of Insufficiency. The due process complaint must be deemed sufficient unless the party receiving the complaint notifies the hearing officer and the complaining party in writing, within 15 days of receipt of the complaint, that the receiving party believes the complaint does not include the requisite content.[28] There is no requirement that the party who alleges that a notice is insufficient state in writing the basis for the belief.[29]

Within five days of receipt of the notification, the hearing officer must decide on the face of the complaint whether the complaint includes the requisite content.[30] Should the hearing officer agree that the complaint is insufficient, the hearing officer must notify the parties in writing of that determination and identify how the complaint is insufficient.[31] The complaining party may amend the complaint.[32] An amended complaint resets the timelines for the resolution meeting and the resolution period.[33]

Sch. Dist. V. S.F., 50 IDELR 104, (W.D. Tex. 2007) (finding that the hearing officer acted outside the scope of his authority by deciding the appropriateness of the 2006 – 2007 IEP despite the issue not being properly raised in the due process complaint).

[27] *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").

[28] 34 C.F.R. § 300.508(d).

[29] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46698 (August 14, 2006).

[30] 34 C.F.R. § 300.508(d)(2).

[31] *Id.*; *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46698 (August 14, 2006).

[32] The party may amend the complaint if the other party consents in writing and is given the opportunity to resolve the complaint through a resolution meeting or the hearing officer grants permission not later than five days before the due process hearing begins. 34 C.F.R. § 300.508(d)(3)(i) and (ii).

[33] 34 C.F.R. § 300.508(d)(4). The resolution meeting, however, should not be postponed when the school district believes that a parent's due process complaint is insufficient. OSEP advises that the resolution meeting should nonetheless go forward:

> While the period to file a sufficiency claim is the same as the period for holding the resolution meeting, parties receiving due process complaint notices should raise their sufficiency claims as early as possible, so that the resolution period will provide a meaningful opportunity for the parties to resolve the dispute.

Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, Page 46698 (August 14, 2006).

6. Sufficient Insufficiency. Determining whether the complaint is sufficient can be problematic. Citing court decisions is not entirely helpful given that each due process complaint is to be judged on whether the requisite content is included in the complaint. Given that a primary objective of the due process complaint – and, specifically the requirement that the complaint includes a description of the nature of the problem – is to serve as the basis for the discussion at the resolution meeting, the following are illustrative examples of what the hearing officer can do to effectively manage the issues presented and assist the parties in identifying the issues with precision.

a. Dismissal. When the complaining party contends that all that is required is "bare notice pleading," even after the hearing officer identified how the complaint is insufficient, the hearing officer should warn the party of possible dismissal. The party's refusal to amend the complaint after a warning of possible dismissal could result in dismissal.

b. Addressing the Issue at the Pre-Hearing Conference. Whether the requirement that the hearing officer must determine the sufficiency of the due process complaint "on the face" of the complaint precludes the hearing officer from discussing the notice of insufficiency with the parties in a conference call is arguable. Given that OSEP has opined that parties should raise their sufficiency claims as early as possible to enable the parties to have a meaningful opportunity to resolve the dispute during the resolution meeting, it would seem that the hearing officer who elects to discuss the complaint with the parties in a conference call would be promoting the purpose of the resolution meeting, and such practice would be consistent with OSEP's expressed opinion.

But, whether during a conference call in conjunction with a notice of insufficiency, or a normal pre-hearing conference, considering these reasons, the hearing officer should –

(i) Get specifics by reviewing the IEP in question (even if line-by-line), the allegation(s) that the IEP was not implemented and/or the alleged inappropriate evaluation and the parties' relative position on each issue in dispute;

(ii) Ask clarifying questions (Why do you disagree with the classification? What classification do you believe would be appropriate? How would the student's IEP be different if the classification was changed?)

(iii) Ask clarifying questions regarding the requested relief (What compensatory education is being sought? What amount of reimbursement is being sought and for what?)

(iv) Consider starting from the end, when the complaining party is a pro se parent who has difficulty identifying the issues. Ask the parent to identify the remedy.

(v) Consider issuing an order listing specific questions that would need to be answered by the complaining party when more time is needed to respond. A schedule should be set identifying by when the complaining party should submit the answers and by when the responding party should submit his relative position on each identified issue.

The statement and organization of the issues and relief sought in the Pre-hearing Summary and Order should normally serve as the statement of such in the decision. These are the only issues the hearing officer can decide (and must decide), given the notice and fairness requirements inherent in due process.

c. Be Flexible. Other than the parents' right to inspect and review any education records relating to their children prior to an IEP meeting, resolution meeting or hearing, or the right to a response to reasonable requests for explanations and interpretations of the records,[34] IDEA does not provide for discovery. Naturally, some discovery takes place during the hearing process and hearing officers should encourage allowing new issues to be added during the hearing (or post the filing of the complaint) when it can be done fairly and without undue delay.[35] The alternative might be a second hearing, resulting in the additional expenses of time and money.[36]

d. Document Issues Not in Dispute. Identifying issues (and facts) not in dispute will focus settlement discussions and, should a hearing be necessary, the hearing. When at all possible, encourage (order) the parties to stipulate to facts.

---

[34] 34 C.F.R. § 300.613(a) and (b)(1).

[35] Be mindful of the language in 34 C.F.R. § 300.508(c), requiring notice before a hearing. Note, however, the use of the permissive word, "may." Remember also that the complaining party may amend the complaint only if the non-complaining party consents or the hearing officer grants permission not later than five days before the hearing. 34 C.F.R. § 300.508(d)(3). (Should the complaint be amended, the applicable timeline(s) recommence with the filing of the amended complaint. 34 C.F.R. § 300.508(d)(4).)

[36] Prohibiting the complaining party from raising new issues at the time of the hearing could result in additional complaints or protracted conflict and litigation. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46747 (August 14, 2006).

e. Eliminate Non-Hearable Issues. Issues that are not the appropriate subject of an IDEA due process hearing, or that are no longer viable, should be disposed of early on to avoid unnecessary preparation for, and prolonging, the hearing.[37] The hearing officer has authority to determine whether an issue is within his jurisdiction.[38]

Consideration should also be given to whether the parents can properly exercise their right to an administrative due process hearing when parents do not first address their concerns (of which they are now complaining) with the IEP Team or school district.[39] At the heart of IDEA, "is the cooperative process that it establishes between parents and schools." *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005) *citing Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982).

> Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, … as it did upon the measurement of the resulting IEP against a substantive standard.

Rowley, 458 U.S. at 205-06. "The central vehicle for this collaboration is the IEP process," and parents play a significant role in this process. *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005). Given this envisioned cooperative process, the hearing officer should weigh whether the issues in the due process complaint stem from the IEP Team or school district's proposal and/or refusal to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free and appropriate public education to the child.[40]

Should the hearing officer determine that the parents failed to raise an issue at an IEP Team meeting, the hearing officer may dismiss the hearing, provided there are no remaining hearable issues; remand the issue to the IEP Team but, if more than one issue is raised in the due process complaint, proceed to hearing on those that the hearing officer deems to have jurisdiction over; direct the parties to discuss settlement of the issue

---

[37] For example, matters that are beyond the two-year statute of limitations, absent an exception, or previously litigated and determined (i.e., *res judicata* and/or collateral estoppel) might warrant dismissing the issues (or the case) prior to the actual hearing.
[38] *Letter to Wilde* (OSEP 1990) (unpublished).
[39] A parent [or a school district] may file a due process complaint on matters relating to the identification, evaluation or educational placement of a child with a disability, or the provision of a free an appropriate public education to the child. 34 C.F.R. 300.507(a)(1).
[40] *See* 34 C.F.R. § 300.503(a)(1) and (2).

informally; or proceed to hearing if the hearing officer determines that further discussions might not be fruitful.[41]

7. The Kitchen Sink. The impracticalities of the following due process complaint should be obvious:

Issues Presented[42]:

- Child find/Failure to identify.
- Failure to classify.
- Failure to evaluate in all areas of suspected disability.
- Failure to evaluate despite parent's request.
- Timeline to evaluate.
- Failure to perform an FBA and develop/implement BIP.
- Failure to convene an SEP meeting to develop an evaluation plan.
- Failure to convene an MDT/IEP meeting to review evaluation reports.
- Failure to convene a meeting with all relevant and necessary team members.
- Failure to invite parent and child to the meeting.
- Failure to provide the parent's counsel access to the student's school records despite request.
- Failure to make an appropriate placement.

Relief Sought:

- A finding that the school district denied the student a free and appropriate public education by failing to [insert each issue presented here].
- An appropriate district placement or a private school placement.
- Compensatory education services.

Clearly, the identified issues will necessitate a sequential approach. How the hearing officer manages and resolves the issues presented prior to the hearing will impact the length of the hearing, and whether a hearing is even necessary. There are many approaches to address The Kitchen Sink Complaint. For example, the

[41] *But see Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181, 54 IDELR 71 (9th Cir. 2010) (rejecting the school district's argument that the prior written notice procedures limit the jurisdictional scope of the hearing to those issues that the school district included in the notice to the parent); *Letter to Zimberlin*, 34 IDELR 150 (OSEP 2000) (expressing the view that Connecticut's statute barring any issue at a due process hearing that was not raised at a planning and placement team meeting, to be inconsistent with IDEA).

[42] These excerpts are typical of due process complaints filed before the undersigned, even when attorneys represent the parents.

hearing officer can render a decision on what can be decided now, reserving the remaining issues for another due process complaint by –

a. determining whether the student is entitled to an evaluation as a matter of right. If so, the hearing officer should consider mandating the evaluations.[43]

b. issuing an Order requiring the school district to convene an IEP Team meeting upon completion of the evaluation.

c. reserving the complaining party's other issues not addressed in the Order.

A second approach is to have the hearing officer render a decision on what can be decided now, with a scheduling order being issued to address the remaining issues during a subsequent day of hearing. For example, the hearing officer would –

a. set a deadline by when the evaluations must be completed, even if the parent is granted the right to an independent educational evaluation.

b. determine eligibility after a due process hearing and, if the child is determined eligible, require the parties to hold an IEP Team meeting on an agreed upon date and time. The parties are then ordered to inform the hearing officer of their agreement on the IEP and, if no agreement is reached, the specific objections to the IEP. A subsequent day of hearing is agreed upon, as well as when the decision is now due.

c. remand the issue of compensatory education services to an IEP Team to propose a compensatory education plan for the hearing officer's consideration.[44]

---

[43] The same analysis would be applicable to a request for a reevaluation. For example, a reevaluation of a child with a disability must be conducted if the "educational or related services needs … of the child warrant a reevaluation" or the "child's parent or teacher requests a reevaluation." 20 U.S.C. § 1415(a)(2); 34 C.F.R. § 300.303(a)(1) and (2). "From the statute and regulation, it is clear that the obligation to conduct reevaluations 'if conditions warrant' is distinct from the obligation arising from a parent or teacher request." *Herbin v. Dist. of Columbia*, 43 IDELR 110 (D.D.C. 2005) *citing Policy Letter in Response to Inquiry of Deborah S. Tinsley*, 16 Education for the Handicapped Law Report 1076, 1078 (1990); *Cartwright v. Dist. of Columbia*, 39 IDELR 94 (D.D.C. 2003) ("A request made by either a parent or a teacher, however, is set apart as a separate clause to which no articulated standard applies.").

[44] The hearing officer should be careful not to delegate his authority to the IEP Team. *See*, *e.g.*, *Reid v. District of Columbia*, 43 IDELR 32 (D.C. Cir. 2005).

This second approach might require specific extensions of time beyond the 45-day timeline and must be requested by either party.[45]

NOTE: REDISTRIBUTION OF THIS OUTLINE WITHOUT EXPRESSED, PRIOR WRITTEN PERMISSION FROM ITS AUTHORS IS PROHIBITED.

THIS OUTLINE IS INTENDED TO PROVIDE WORKSHOP PARTICIPANTS WITH A SUMMARY OF SELECTED STATUTORY PROVISIONS AND SELECTED JUDICIAL INTERPRETATIONS OF THE LAW. THE PRESENTERS ARE NOT, IN USING THIS OUTLINE, RENDERING LEGAL ADVICE TO THE PARTICIPANTS.

[45] 34 C.F.R. § 300.515(c).