The Sanctioning Authority of IDEA Hearing Officers

NYS Hearing Officer Training
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Reason commands us far more imperiously than a master. When we disobey the latter we are punished, when we disobey the former we are fools.

- Blaise Pascal

I. INTRODUCTION

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

B. IDEA hearing officers do, and must, wisely exercise broad authority to do all things that are reasonably necessary for the proper administration of the due process hearing. Unquestionably, hearing officers have inherent authority to control the hearing room to prevent disruption and to control the course of the hearing to ensure an effective, efficient and timely hearing.

C. Less apparent is the hearing officer's authority to discipline parties and/or their lawyers when a party or the lawyer has engaged in misconduct. A court's inherent authority to discipline parties and/or their lawyers is well recognized. But does the hearing officer's authority to do all things that are reasonably necessary for the proper administration of the due process hearing extend to sanctioning authority? The answer to this question is generally a matter of state law.[2]

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[1] *See* Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title 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.'").

[2] *Letter to Amstrong*, 28 IDELR 303 (OSEP 1997).

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D. This outline provides a review of hearing officer authority to impose disciplinary sanctions against a party or an attorney for actual misconduct during the hearing process, and identifies various factors to weigh when considering whether to sanction a party or an attorney.[3]

II. HEARING OFFICER AUTHORITY – GENERALLY

A. The IDEA and its implementing regulations delineate the specific rights accorded to any party to a due process hearing.[4] 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."[5] 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.[6] In this regard, apart from the hearing rights set forth in the 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.[7]

B. It is well established that 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.[8]

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[3] A sanction can be a penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with the rules and regulations. *Black's Law Dictionary*, 1341 (6th ed. 1990).

[4] *See* 34 C.F.R. § 300.512.

[5] *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995).

[6] *Id.*

[7] *Id.*

[8] *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) (the remedial authority of a court under § 1415(i)(2)(C)(iii) to award reimbursement also extends to hearing officers); *Cocores v. Portsmouth Sch. Dist.*, 779 F. Supp. 203, 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).

Ultimately, the due process hearing system established by a state should provide for such authority.[9]

C. The IDEA and its regulations do not comprehensively specify what particular procedural rules, penalties and sanctions are available to IDEA hearing officers to enable the hearing officers to effectively and efficiently manage the hearing process.[10] However, a hearing officer has broad powers and discretion to manage the hearing process under the IDEA.[11] 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.[12] Generally, decisions on procedural and

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

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

[11] *See, e.g.*, *Davis v. Kanawha Cty. Bd. of Educ.*, 53 IDELR 225 (S.D.W.V. 2009); *Stancourt v. Worthington City Sch. Dist. Bd. of Educ.*, 841 N.E. 2d 812, 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 1995); *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, 46704 (August 14, 2006).

[12] *See, e.g.*, *Davis v. Kanawha Cty. Bd. of Educ.*, 53 IDELR 225, 2009 WL 4730804 (S.D.W.V. Dec. 4, 2009) (finding that the hearing officer did not abuse his discretion in denying the parent's requests for a continuance); *Stancourt v. Worthington City Sch. Dist. Bd. of Educ.*, 841 N.E. 2d 812, 44 IDELR 166 (Ohio App. Ct. 2005) (finding that that the decision of the hearing officer to dimiss with prejudice for failure to provide discovery of the child's medical and psychological records was unduly draconian); *Renollett v. Independent Sch. Dist. No. 11*, 2005 WL 102967, 42 IDELR 201 (D. Minn. Jan. 18, 2005) *aff'd* 440 F.3d 1007, 45 IDELR 117 (8th Cir. 2006) (finding that the hearing officer acted appropriately in limiting the issues for hearing because state law required that the hearing officer oversee and facilitate a speedy hearing); *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).

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.[13] Thus, the test for reversal is *not* whether the reviewing judge would rule the same way as the hearing officer.[14]

D. Ultimately, the state educational agencies have the responsibility to ensure that hearing officers are given the authority required to effectively and efficiently manage the hearing process and resolve due process complaints.[15] Equally important, the state educational agencies are also tasked 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.[16]

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[13] *See, e.g.*, *Bougades v. Pine Plains Central Sch. Dist.*, 376 Fed. Appx. 95, 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.*, 427 F.3d 186, 44 IDELR 89 (2d Cir. 2005) *citing Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 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.*, 399 F.3d 298, 42 IDELR 229 (4th Cir. 2005) (faulting the district court for not giving the hearing officer's thorough and supported findings of fact due weight); *Kerkam v. District of Columbia*, 931 F.2d 84, 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.*, 62 F.3d 520, 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.*, 808 F. Supp. 523, 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).

[14] 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.

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

[16] *Id.*

III. INHERENT AUTHORITY TO SANCTION

A. An IDEA hearing officer's authority to issue disciplinary sanctions against a party and/or an attorney for hearing misconduct generally will be set forth in state law or regulation. Few states expressly grant IDEA hearing officers sanctioning authority.[17]

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[17] *See, e.g.*, CAL. GOV. CODE § 11455.30(a) (1997) ("The presiding officer may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure."); 5 CCR § 3088 (1997) (California) ("The presiding hearing officer may, with approval from the General Counsel of the California Department of Education, order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel, to the California Special Education Hearing Office…."); 801 CMR 1.01(8)(i) (2012) (Massachusetts) ("A Party may file with the Presiding Officer, subject to 801 CMR 1.01(7)(a), a motion to compel discovery if a discovery request is not honored, or only partially honored, or interrogatories or questions at deposition are not fully answered. If the motion is granted and the other Party fails without good cause to obey an order to provide or permit discovery, the Presiding Officer before whom the action is pending may make orders in regard to the failure as are just, including one or more of the following … [a]n order that designated facts shall be established adversely to the Party failing to comply with the order[] or [a]n order refusing to allow the disobedient Party to support or oppose designated claims or defenses, or prohibiting him or her from introducing evidence on designated matters."); 19 TEX. ADMIN. CODE § 89.1170(b) (2001) ("The hearing officer has the authority to … make any other orders as justice requires, including the application of sanctions as necessary to maintain an orderly hearing process."); MINN. RULES 3525.4110, Subp. 3 (2007) ("The hearing officer has the authority to take any actions necessary to ensure the compliance with all requirements of law and may dismiss the matter, with or without prejudice, if the party requesting the hearing fails to provide information required or ordered by the hearing officer."). *See also Nicholas W. v. Northwest Indep. Sch. Dist.*, 2009 WL 2744150, 53 IDELR 43 (E.D. Tex. Aug. 25, 2009) (upholding the sanction of a dismissal without prejudice because an alternative to dismissal, i.e., fines, costs or damages, against the plaintiffs was not available because plaintiffs proceeded *in forma pauperis*); *K.S. v. Fremont Unified Sch. Dist.*, 545 F. Supp. 2d 995 (N.D. Cal. 2008) (upholding an award of sanctions of $300 by the hearing officer against the parents' attorney for filing a motion that lacked merit and "had been filed in subjective bad faith and for the sole purpose of harassing" the school district); *Poway Unified Sch. Dist.*, 2007 WL 1620766 (Cal. Ct. App. June 6, 2007) (unpublished) (affirming an award of sanctions issued by a hearing officer in the amount of $3091.25 for untimely notice of withdrawal on the morning of

B. Many states, however, do not have laws that expressly provide for sanctioning authority. In these states, hearing officers who have exercised sanctioning authority have done so under the assumption that their authority is coextensive with that of the court and it is a power not derived from any express authority but arising from necessity.[18] Said authority is, therefore, implied.[19]

C. New York State does not have a law that expressly provides IDEA hearing officers with sanctioning authority.

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the hearing); *Ingram Indep. Sch. Dist.*, 43 IDELR 124 (SEA Tex. 2004) (finding that the conduct of Petitioner's counsel was willful, intentional, in bad faith and sufficiently egregious as to justify the sanction of a dismissal with prejudice); *Indianapolis Pub. Schs.*, 21 IDELR 423 (SEA 1994) (upholding a hearing officer's decision, premised on expressed statutory authority which has since been repealed, to sanction petitioner's attorney $500 for "sham objections" and the failure to comply with repeated discovery orders).

[18] *See, e.g., Bd. of Educ. of the Hillsdale Cmty. Sch.*, 32 IDELR 162 (SEA Mich. 1999) (relying on the state's administrative code providing hearing officers the authority "to control the conduct of the parties or participants in the hearing for the purpose of ensuring an orderly procedure" when awarding costs of $308.86 to the school district's lawyer based on the parents' attorney's "unexcusable failure to communicate with the District's counsel in a timely fashion"); *Okemos Pub. Sch.*, 29 IDELR 677 (SEA Mich. 1998) (relying on the state's administrative code also relied on in *Hillsdale*, *supra*, when dismissing the due process complaint with prejudice because of the parent's failure to cooperate and to comply with pre-hearing orders); *Dist. City 1 & Dist. City 2 Pub. Sch.*, 24 IDELR 1081 (SEA Minn. 1996) (relying on the notion that hearing officers have the "implied authority to control the conduct of the hearing and persons appearing there" when ordering the student's attorney to pay the school districts $2000 for pursuing a summary judgment motion "made without factual basis, upon unsupported and distorted facts, and upon illogical arguments"). *Cf. Las Cruces Pub. Sch.*, 44 IDELR 205 (SEA N.M. 2005) (overturning a hearing officer's recommendation to a court that the parents' be held responsible for the district's attorneys' fees).

[19] Courts, too, have provided support for the inherent, sanctioning authority of IDEA hearing officers. *See, e.g., Stancourt v. Worthington City Sch. Dist.*, 841 N.E. 2d 812, 44 IDELR 166 (Ohio Ct. App. 2005) (concluding that IDEA hearing officers are "vested with implied powers similar to those of a court" and have the discretionary power to dismiss due process complaints as a sanction for disregarding orders or failing to prosecute); *Moubry v. Indep. Sch. Dist. No. 696*, 32 IDELR 90 (D. Minn. 2000) (interpreting a Minnesota Rule of Civil Procedure, since repealed, which granted the hearing officer authority to "do additional things necessary to comply" with the special education rules, to include "the authority to assess sanctions against a party who files a frivolous request for a hearing")

IV. FACTORS TO CONSIDER

A. When determining what type of sanction is appropriate to address offensive conduct, the hearing officer must balance his interest in managing the hearing process with each party's interest in receiving a fair chance to be heard.

B. Factors to consider in determining whether an individual committed a sanctionable offense and what type of sanction would be appropriate to address offensive conduct include:

1. *Is the misconduct willful or committed in bad faith?* A distinction should be made between willful misconduct and inadvertent mistakes. Mere incompetence or inexperience resulting in inadvertent mistakes may be construed as willful misconduct only after multiple warnings.

   A finding of bad faith "'does not require that the legal and factual basis for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or *mala fides*…."[20]

2. *Was the offending individual put on notice of the possibility of sanctions being imposed?* When a party or attorney is acting inappropriately, the hearing officer should issue a stern warning that the behavior is not acceptable. In most instances, sanctions should only be imposed when the party or attorney continues with the offending conduct after being warned of the possibility of being sanctioned.[21]

3. *Has the individual continually engaged in the same offending behavior despite repeated warnings to stop?*

4. *Has a record been made of the intermediate steps taken, or the warnings issued, by the hearing officer prior to the imposition of sanctions?* Steps taken by the hearing officer to avoid the imposition of sanctions should be reflected on the record. Similarly, any warnings issued prior to the actual imposition of sanctions should be included on the record.

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[20] *Moser v. Bret Harte Union High Sch. Dist.*, 366 F. Supp. 2d 944, 42 IDELR 203 (E.D. Cal. 2005) *quoting Mark Industries, Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730 (9th Cir. 1995).

[21] *See, e.g., D.H. v. Bd. of Educ. of Toledo City Sch. Dist.*, 51 IDELR 102 (N.D. Ohio 2008) (requiring the parents to pay the sum of $1000 as and for attorneys' fees as a sanction for filing an insufficient motion for consideration).

Consideration should also be given to having the party and/or the attorney acknowledge on the record that s/he (they) understood from you what offensive conduct is to be discontinued and that s/he (they) agree(s) to discontinue the offensive conduct.

5. *Is it just?* A permissible sanction should be no more severe than required to satisfy a legitimate purpose.[22] When lesser sanctions may address the misconduct, the hearing officer should first test the effectiveness of the lesser sanctions.[23]

6. *Is there a direct relationship between the offensive conduct and the sanction?* The sanction should have a direct relationship to the misconduct and should be carefully devised.[24]

7. *Is the parent appearing pro se?* More leeway should be provided to the parent who is unrepresented.[25] Absent willful misconduct or bad faith, sanctions should not be imposed for inadvertent mistakes committed by an unrepresented parent.

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[22] *Ingram Indep. Sch. Dist.*, 43 IDELR 124 (SEA Tex. 2004).
[23] *See B.R. v. Dist. of Columbia*, 262 F.R.D. 11, 53 IDELR 78 (D.D.C. 2009). ("While dismissal with prejudice may be an unduly severe sanction for a single instance of attorney misconduct, it may be appropriate 'after unfruitful resort to lesser sanctions.'"); *Nicholas W. v. Northwest Indep. Sch. Dist.*, 2009 WL 2744150, 53 IDELR 43 (E.D. Tex. 2009) ("For a court to dismiss a case with prejudice for want of prosecution, there must be a clear record of delay or contumacious conduct by the Plaintiffs and lesser sanctions would not serve the best interests of justice."). *See also Epsom Sch. Dist.*, 31 IDELR 120 (SEA N.H. 1999) (dismissing the case without prejudice but subject to the parents agreeing to sign all the releases previously ordered before filing a new hearing request on the matters raised in the dismissed hearing request).
[24] *See Millay v. Surry Sch. Dep't*, 2010 WL 1634311, 54 IDELR 191 (D. Me. Apr. 21, 2010) (commenting that the hearing officer's decision to hold three days of due process hearings with only one side present, knowing that the parent claimed that a serious illness prevented her attendance, borders on an abuse of discretion and runs counter to fundamental concepts of due process).
[25] *See, e.g., Snyder v. New York State Educ. Dep't*, 348 F. App'x 601, 53 IDELR 37 (2d Cir. 2009) (unpublished) (holding that the district court erred in dismissing the pro se parents' FAPE claim just four days after a missed filing deadline and despite the parents being on notice that further delays might result in dismissal).

8. *Is the sanction directed to the individual(s) responsible for the offensive conduct?* The sanction should be directed to the individual(s) responsible for the misconduct (i.e., the attorney, the party, or both). Where the client is unaware of the attorney's misconduct, the sanction must be directed to the attorney and must be carefully devised so as not to severely prejudice the student and/or parent or the school district.

9. *Will the student be penalized for the parent or attorney's conduct?* The sins of the father should not be visited on the child.[26] The right to a FAPE rests not with the parent or the attorney, but with the child, and in sanctioning the parent and/or attorney, the hearing officer should strive not to penalize the student.[27]

10. *Is the compliant party likely to be prejudiced should the hearing officer not sanction the misconduct?* Any continued risk of prejudice (e.g., potential of having to defend and incur costs associated with multiple filings and dismissals) to the compliant party should be considered when weighing whether to impose sanctions against the non-compliant party.

C. In some cases, there may be a need to hold a limited hearing to determine the facts as a basis for whether a sanction is appropriate and, if so, against who.

V. SANCTIONS – RANGE OF OPTIONS

A. Because few states expressly grant IDEA hearing officers sanctioning authority, and because the few that do have no regulatory guidance as to the nature or scope of permissible sanctions, the range of options is largely dependent on the creativity of the hearing officer or reliance on analogous federal and state rules.

B. Below are illustrations of the range of options that hearing officers can consider but the reader is cautioned that the particulars of each situation should inform whether a sanction is appropriate and the form it should take. As Uncle Ben said to Peter Parker in Spider-Man, "With great power, comes great responsibility." Just because you can (or believe you can) sanction, it does not mean that you

[26] *See Exodus* 20:5.
[27] *Millay v. Surry Sch. Dep't*, 2010 WL 1634311, 54 IDELR 191 (D. Me. Apr. 21, 2010).

should wield such power indiscriminately.

1. Warnings, verbal/written reprimands, including directing counsel to instruct/control their client;

2. Removing a disruptive individual from the hearing;

3. Requiring a party and/or their counsel, or a *pro se* parent, to acknowledge and agree on the record to follow the hearing officer's directive;

4. Assessment of actual costs (paid to the party that incurred them);

5. Shifting the burden of production;

6. Shifting the order of presentation;

7. Exclusion of certain exhibits or testimony;

8. Limiting testimony;

9. Issuing an adverse inference;

10. Precluding affirmative defenses;

11. Advising the court in the decision whether a party or attorney's conduct should be considered when awarding attorneys' fees;

12. Dismissal of an issue or the case with or without prejudice, noting misconduct when the dismissal is predicated on the misconduct; and

13. Filing a grievance with the state bar when the attorney's conduct does not conform to the rules of professional conduct and responsibility.

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