


**MANAGING THE HEARING  
PROCESS: THE HEARING  
OFFICER'S AUTHORITY UNDER  
THE IDEA**

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Tuesday, May 1, 2012*




**Course Code: 198**

## INTRODUCTORY REMARKS

- Parent and the school district must continue to interact with one another after the hearing
  - The hearing should –
    - provide a legal resolution to the dispute; and
    - establish a post-decision basis for the parent and school district to work together
  - How the HO manages the process is extremely important
  - Today's presentation provides a review of HO authority under the IDEA
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## HO AUTHORITY - GENERALLY

- IDEA identifies the specific rights accorded to any party to a due process hearing
  - The HO is tasked with ensuring that each party is provided a meaningful opportunity to exercise the hearing rights
  - Decisions regarding the conduct of IDEA hearings are left to the discretion of the HO, subject to appellate review
  - Any decision made by the HO must be consistent with basic elements of due process and the rights of the parties set out in the IDEA
  - Abuse of discretion standard applies
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**IN A CASE WHERE THE PARENT FILED FOR THE HEARING, DOES THE FAILURE BY EITHER THE LEA OR THE PARENT TO PARTICIPATE IN THE RESOLUTION MEETING REQUIRE THE HEARING OFFICER'S INTERVENTION TO EITHER DISMISS THE DUE PROCESS COMPLAINT OR TO COMMENCE THE HEARING?**

*The answer is, yes.*

CAN THE HO EXERCISE DISCRETION WHEN DECIDING WHETHER TO DISMISS THE DUE PROCESS COMPLAINT OR TO COMMENCE THE HEARING?

- The answer is also, yes.
- Neither 34 C.F.R. § 300.510(b)(4) nor 34 C.F.R. § 300.510(b)(5) mandate that the HO dismiss the due process complaint or commence the hearing
- The resolution meeting was introduced in an effort to resolve disputes earlier and less expensively
- The failure of the parent to participate without justifiable excuse may be grounds for dismissal
- Absent reasonable explanation, the hearing timeline should be commenced when the LEA fails to hold, or participate in, the resolution meeting within 15-calendar days

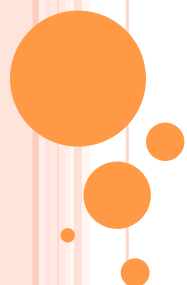
## DOES THE IDEA DEFINE THE TERM PARTICIPATE?

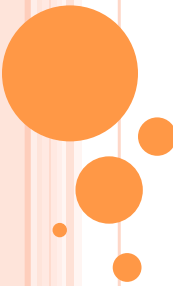
- IDEA requires participation, not mere attendance
- Determining whether a party participated in the resolution meeting can be difficult
- When confronted with a motion to dismiss for failure to participate or a request for the commencement of the hearing timeline, HO has discretion to inquire as to the nature and extent of the discussions in order to gauge participation



**IF, AFTER THE PARENT FILES FOR A HEARING, THE PARTIES NEITHER WAIVE NOR HOLD THE RESOLUTION MEETING WITHIN THE 30 DAYS, DOES THE 45-DAY HEARING TIMELINE FOR CONDUCTING THE HEARING AND ISSUING THE DECISION BEGIN?**

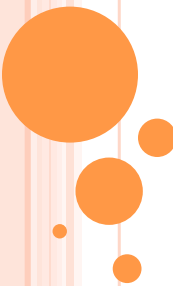
*Yes, according to OSEP.*





**IS A DELAY IN HOLDING THE RESOLUTION MEETING WITHIN 15 CALENDAR DAYS FROM RECEIPT BY THE LEA OF THE DUE PROCESS COMPLAINT A DENIAL OF A FREE AND APPROPRIATE PUBLIC EDUCATION?**

*Not necessarily.*



**MUST THE PARTY WHO ALLEGES THAT A NOTICE IS INSUFFICIENT EXPLAIN THE BASIS FOR THE BELIEF?**

*The answer is, no.*

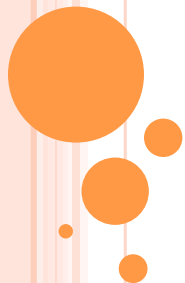
IS THERE ANY GUIDANCE INTERPRETING *SCHAFFER*  
V. *WEAST'S* MINIMAL PLEADING STANDARD?

- The answer is, no
- Available decisions provide little guidance, and turn on subjective interpretations of the standard
- The complaining party is not required to include all of the facts relating to the problem or to include legal arguments in the complaint
- HOs enjoy considerable discretion in determining whether there is sufficient insufficiency



**CAN THE HEARING OFFICER DISMISS THE  
DUE PROCESS COMPLAINT FOR  
INSUFFICIENCY IN THE ABSENCE OF AN  
OBJECTION HAVING BEEN FILED WITHIN  
15 CALENDAR DAYS OF RECEIPT OF THE  
DUE PROCESS COMPLAINT BY THE NON-  
COMPLAINING PARTY?**

*The answer is, no.*



MUST THE HEARING OFFICER GRANT THE COMPLAINING PARTY AN OPPORTUNITY TO AMEND AN INSUFFICIENT COMPLAINT?

- According to OSEP, yes
- HO may dismiss but not before granting the complaining party an opportunity to amend
- HO's insufficiency decision must identify how the complaint is insufficient
- HO should identify a date by when the amended complaint is due
- Should the complainant not amend or amend within the specified timeline, the complaint may be dismissed

CAN THE HEARING OFFICER DEFAULT AN LEA FOR ITS FAILURE TO SUBMIT A RESPONSE OR AN ADEQUATE RESPONSE?

- The answer is, it depends
- A response is due within 10-calendar days of the LEA receiving the complaint
- An LEA may not determine the form of its response
- In civil litigation, default may be entered when the defendant fails to answer
- IDEA does not specify any penalty for failure of an LEA to respond, and wholesale default may not be appropriate
- Partial default may be appropriate, depending on the particular facts and circumstances

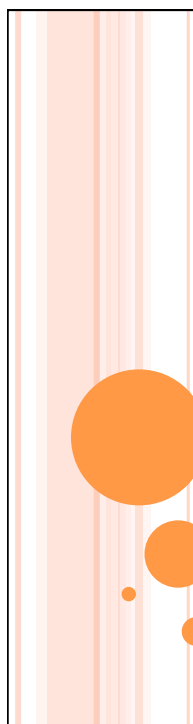
IF DEFAULT IS NOT APPROPRIATE, DOES THE HEARING OFFICER HAVE OTHER OPTIONS?

- There are other options available, including –
  - requiring through an order the LEA to submit an adequate response that complies with the IDEA;
  - excluding certain exhibits or testimony;
  - limiting testimony; and
  - precluding affirmative defenses
- Start small until desired outcome is achieved

DOES THE HEARING OFFICER HAVE THE AUTHORITY TO GRANT LEAVE TO AMEND THE DUE PROCESS COMPLAINT?

- Yes, but up to a point
- A party may amend if –
  - the other party consents; or
  - the hearing officer grants permission
- The HO can only grant permission no later than 5 calendar days before the hearing
- Should the complaining party have leave to amend (by consent of the other party or by permission of the HO), the timelines for both the resolution meeting and the decision begin anew upon the filing of the amended complaint





**IN THE ABSENCE OF AUTHORITY, CAN THE HEARING OFFICER ENCOURAGE THE SCHOOL DISTRICT TO AGREE TO AN AMENDMENT?**

*The answer is, yes.*



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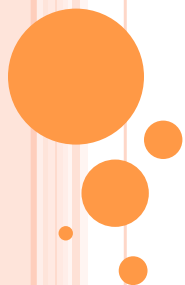
**DO HEARING OFFICERS HAVE THE AUTHORITY TO ENTERTAIN AND DETERMINE MOTIONS?**

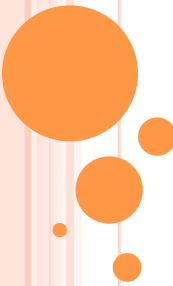
- The answer is, yes
- Motion practice provides the HO the opportunity to fairly manage the hearing process
- Court rules do not apply but can be relied upon by analogy
- Motions should be filed in advance of the hearing
- Use the PHC to inquire about motion practice and to set a scheduling order when motions are anticipated



**DOES THE HEARING OFFICER HAVE JURISDICTION TO HEAR MATTERS PERTAINING TO NON-ENROLLED, RESIDENT STUDENTS?**

The answer is, likely.




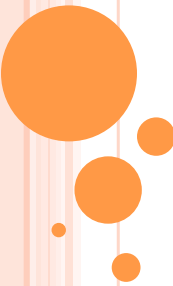


**DOES THE HEARING OFFICER HAVE THE AUTHORITY TO DETERMINE WHETHER A SUBSEQUENT DUE PROCESS COMPLAINT CONSTITUTES A NEW ISSUE WHEN IT IS COMPARED TO THE PARENT'S PREVIOUSLY ADJUDICATED REQUEST?**

The answer is, yes.

**CAN THE NON-COMPLAINING PARTY RAISE OTHER ISSUES AT THE HEARING THAT WERE NOT RAISED IN THE DUE PROCESS COMPLAINT?**

- The answer is, it depends on the particular facts and circumstances
  - The IDEA is silent on the issue but the comments specify that such matters should be left to the discretion of the HO
  - § 1415(f)(3)(B) prohibits the *complaining* party from raising new issues not included in the due process complaint
  - A district court in Hawaii, however, held that HOs do not have discretion
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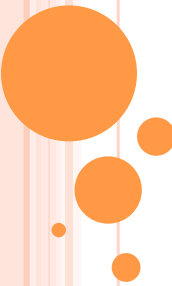
**CAN THE HEARING OFFICER HEAR ISSUES THAT WERE DECIDED BY THE IDEA'S STATE COMPLAINT PROCESS?**

*The answer is, yes.*

**DO NY HEARING OFFICERS HAVE JURISDICTION OVER SERVICES PLANS FOR PARENTALLY PLACED PRIVATE SCHOOL CHILDREN?**

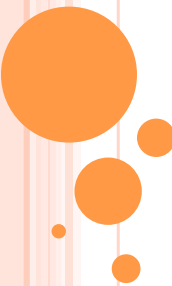
- Under IDEA, HOs do not have jurisdiction over FAPE issues for students enrolled in private schools with the exception of child find
- Children with disabilities attending private schools are entitled to equitable participation
- A services plan must be developed and implemented for each eligible parentally placed child with a disability
- Under IDEA, parents cannot file a due process complaint to challenge the services plan
- In New York, however, § 3602 – c allows the parent to challenge the services plan





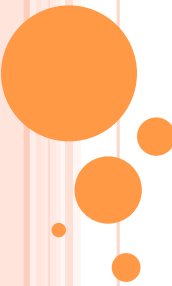
**DO HEARING OFFICERS HAVE JURISDICTION FOR PARENTAL CHALLENGES TO AN IEP THAT WAS INITIALLY AGREED TO OR IS NOT THE MOST RECENT IEP FOR THE CHILD?**

*The answer is, yes.*



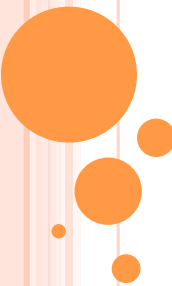
**DO HEARING OFFICERS HAVE JURISDICTION TO HEAR SECTION 504 CLAIMS?**

*The answer is, each LEA decides.*



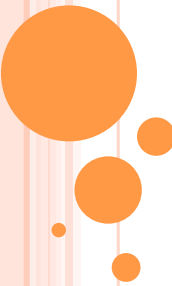
**DO HEARING OFFICERS HAVE JURISDICTION TO OVERRIDE A PARENT'S REFUSAL TO CONSENT TO INITIAL SERVICES OR A PARENT'S SUBSEQUENT REVOCATION OF CONSENT FOR CONTINUED SERVICES?**

*The answer is, no.*



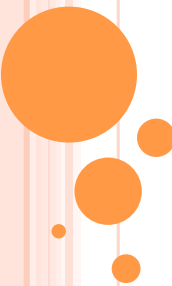
**DO HEARING OFFICERS HAVE JURISDICTION TO HEAR DISPUTES BETWEEN TWO PARENTS WHO SHARE LEGAL AUTHORITY TO MAKE EDUCATIONAL DECISIONS BUT WHO DISAGREE ON CONSENTING TO AN INITIAL EVALUATION?**

*The answer is, no.*



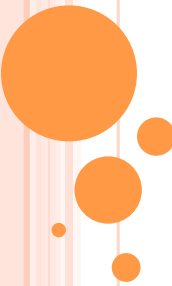
**CAN AN IDEA HEARING OFFICER  
DETERMINE ISSUES CONCERNING THE  
EDUCATIONAL RECORDS OF A CHILD WITH  
A DISABILITY?**

*The answer depends on the issues being raised.*



**ARE HEARING OFFICERS DIVESTED OF  
SUBJECT MATTER JURISDICTION WHEN  
THE SCHOOL DISTRICT OFFERED ALL OF  
THE RELIEF REQUESTED BUT THE  
PARENT REFUSED THE SETTLEMENT  
OFFER?**

*No, according to the Fifth Circuit.*



**DO HEARING OFFICERS HAVE THE  
AUTHORITY TO REVIEW AND/OR ENFORCE  
SETTLEMENT AGREEMENTS?**

*The courts are split on this issue but the Second  
Circuit has said no in an unpublished decision.*



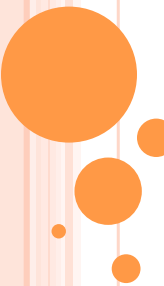
**DO HEARING OFFICERS HAVE  
JURISDICTION TO ENFORCE PRIOR  
HEARING OFFICER DECISIONS?**

*The answer is, no.*



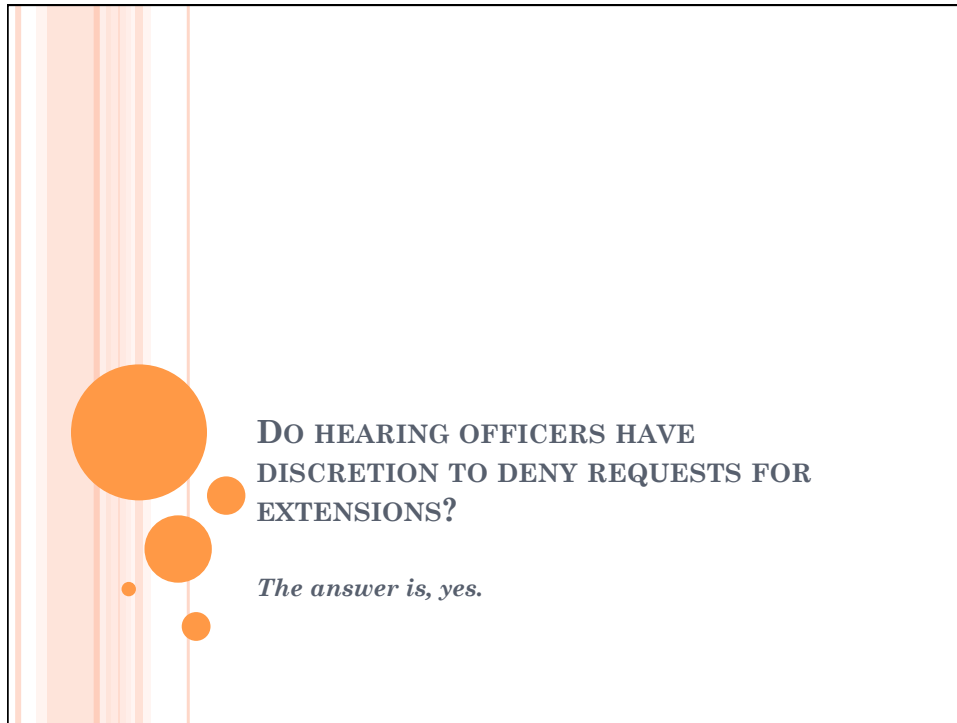


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**DO HEARING OFFICERS HAVE THE  
AUTHORITY TO DETERMINE A CHILD'S  
STAY PUT PLACEMENT EVEN IN THE  
ABSENCE OF A REQUEST BY EITHER  
PARTY?**

*The answer is, yes.*




**DO HEARING OFFICERS HAVE DISCRETION TO DENY REQUESTS FOR EXTENSIONS?**

*The answer is, yes.*

**DO HEARING OFFICERS HAVE ANY DISCRETION IN ADMITTING EVIDENCE PRESENTED AFTER THE 5-BUSINESS DAY DEADLINE?**

- The answer depends on the type of evidence
- IDEA has two 5-day rules
- The first is under § 300.512(a)(3), which applies to any evidence other than evaluations
- The right under § 300.512(a)(3) belongs to the objecting party
- The second 5-day rule can be found under § 300.512(b)(2), which applies to evaluations
- § 300.512(b)(2) expressly provides the hearing officer with discretion to admit the relevant evaluation over the objection of the non-moving party





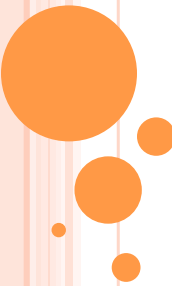
**MUST THE PARTIES DISCLOSE THEIR WITNESS LISTS IN THE 5-DAY DISCLOSURES?**

*The answer is, yes.*



**IS THE NON-DISCLOSING PARTY ENTITLED TO CALL WITNESSES WHO ARE DISCLOSED IN THE OPPOSING PARTY'S FIVE-DAY STATEMENT?**

*The answer is, no.*




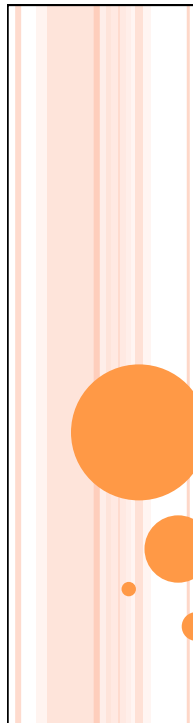
**DOES THE HEARING OFFICER HAVE THE AUTHORITY TO SHORTEN THE 5-DAY TIMELINE IN DISCIPLINE CASES?**

*The answer is, no.*

**IS DISCOVERY AN OPTION IN IDEA HEARINGS?**

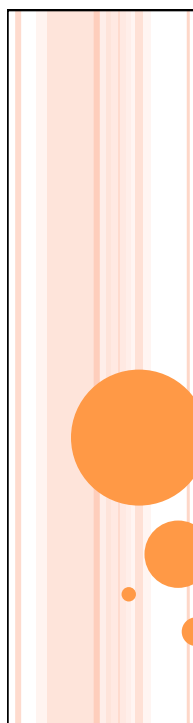
- It is within the discretion of the HO to decide
- IDEA does not provide for pre-hearing discovery, neither does it prohibit it
- Discovery can be permitted when it is necessary for the proper presentation of a party's case
- The hearing timeline is a significant factor to consider





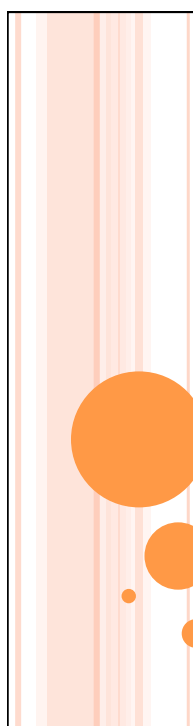
**DO HEARING OFFICERS HAVE THE  
AUTHORITY TO LIMIT THE NUMBER OF  
DAYS FOR THE HEARING?**

*The answer is, yes.*



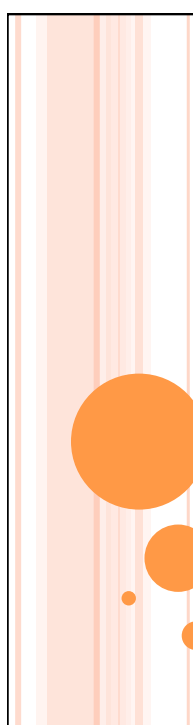
**DO HEARING OFFICERS HAVE THE  
AUTHORITY TO ORDER WITNESSES TAKEN  
OUT OF TURN AND TO LIMIT EXCESSIVE  
NUMBER OF WITNESSES?**

*The answer is, generally, yes.*



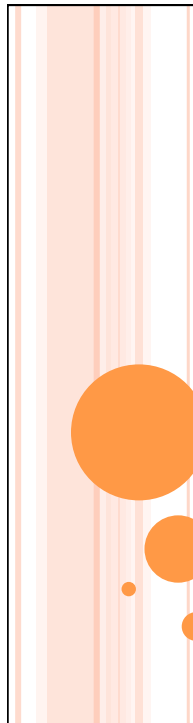
**IS IT WITHIN THE DISCRETION OF THE HEARING OFFICER TO ALLOW TELEPHONIC TESTIMONY?**

*The answer is, yes.*



**DO HEARING OFFICERS HAVE THE AUTHORITY TO COMPEL THE APPEARANCE OF WITNESSES AND THE PRODUCTION OF DOCUMENTS?**

*The answer is, yes.*



**DO HEARING OFFICERS HAVE THE DISCRETION TO AUTHORIZE HOME AND SCHOOL VISITS BY DISTRICT STAFF, PARENTS, OR THEIR EXPERTS?**

*The answer is dependent on the circumstances.*