TIMELINESS

IDEA HEARING OFFICER TRAINING
NEW YORK STATE EDUCATION DEPARTMENT
MONDAY, OCTOBER 16, 2017 (ALBANY AREA)
THURSDAY, OCTOBER 26, 2017 (NYC)

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I. INTRODUCTION

A. The Individuals with Disabilities Education Act (IDEA)[1] and its implementing regulations[2] require that a final decision be reached and mailed to each of the parties not later than 45 calendar days after the expiration of the 30-day resolution period, or the adjusted time periods described in 34 C.F.R. § 300.510(c).[3]

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[1] In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. *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] Implementing regulations followed the reauthorized IDEA in August 2006. *See* 34 C.F.R. Part 300 (August 14, 2006). In December 2008, the regulations were clarified and strengthened in the areas of parental consent for continued special education and related services and non-attorney representation in due process hearings. *See* 34 C.F.R. Part 300 (December 1, 2008). In June 2017, the regulations were further amended to conform to changes made to the IDEA by the Every Student Succeeds Act (ESSA).

[3] 34 C.F.R. § 300.515(a). This outline focuses on the 45-day timeline and extensions of it, and not on the disciplinary timelines, which are governed by a different set of rules. A parent of a child with a disability may challenge the placement decision resulting from a disciplinary removal or the manifestation determination. 34 C.F.R. § 300.532(a); 8 NYCRR §§ 201.11(a)(3) and (4). A local educational agency (LEA) that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may seek to have the child placed in an interim alternative educational setting (IAES). 34 C.F.R. § 300.532(a); 8 NYCRR §§ 201.11(a)(1) and (2). In matters such as these, the parent or LEA must be given an opportunity for

B. A hearing officer may grant specific extensions of time beyond the 45-day period at the request of either party.[4]

C. The granting of extensions continues to be an area of concern for the New York State Education Department (NYSED) and the U.S. Department of Education's Office of Special Education Programs (OSEP). NYSED is committed to ensuring that each extension granted by the hearing officer is consistent with the IDEA requirements and properly documented in the record. This document outlines key considerations affecting 45-day timeline and the granting of extensions.

II. SPECIFIC REQUIREMENTS

A. In New York, the timeline for the hearing officer to render a decision is consistent with the federal timeline.[5] Not all hearings can be heard and decided within the 45-day timeline. Specific extensions of time beyond the 45-day timeline are, therefore, permissible.[6] However, the granting of specific extensions should be done sparingly and, when granted, should be limited in duration. The IDEA's "abbreviated" timeline establishes a clear federal policy that hearings are to be conducted expeditiously.[7]

B. The hearing officer cannot extend the timeline on his or her own initiative or pressure a party to request an extension.[8]

C. An indefinite extension is impermissible; each extension is limited to not more than 30 calendar days and must be to a date certain.[9] Not more than

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an expedited due process hearing, which must occur within 20 school days of the date the complaint is filed. 34 C.F.R. § 300.532(c)(1) and (2); 8 NYCRR § 201.11(b)(3)(iii). A decision must be made and provided to the parties within 10 school days after the hearing. 34 C.F.R. § 300.532(c)(2); 8 NYCRR § 201.11(b)(3)(iv). A hearing officer has no authority to extend the timeline of an expedited hearing at the request of either party. 34 C.F.R. § 300.532(c); 8 NYCRR § 201.11(b)(4). *See also Letter to Snyder*, 67 IDELR 96 (OSEP 2015). The parties to an expedited hearing cannot mutually waive the expedited timelines. *Letter to Zirkel*, 68 IDELR 142 (OSEP 2016). Nor can the parties agree to treat the hearing as a regular hearing. *See Letter to Snyder*, 67 IDELR 96 (OSEP 2015).

[4] 34 C.F.R. § 300.515(c); 8 NYCRR § 200.5(j)(5)(i).

[5] 8 NYCRR § 200.5(j)(5).

[6] 34 C.F.R. § 300.515(c); 8 NYCRR § 200.5(j)(5)(i).

[7] *Engwiller v. Pine Plains Cent. Sch. Dist.*, 110 F. Supp. 2d 236, 33 IDELR 90 (S.D.N.Y. 2000) ("[T]he brevity of the 45-day requirement indicates Congress's intent that children not be left indefinitely in an administrative limbo while adults maneuver over the aspect of their lives that would, in large measure, dictate their ability to function in a complex world.").

[8] 34 C.F.R. § 300.515(c); 8 NYCRR § 200.5(j)(5)(i). *See also Letter to Kerr*, 22 IDELR 364 (OSEP 1994).

one extension at a time may be granted.[10]

D. When an extension of the 45-day timeline is granted, the decision must be rendered and mailed not later than 14 calendar days from the date the hearing officer closes the record or not later than the last date of the extended timeline, whichever date comes first.[11]

E. The reason for each extension must be documented in the record.[12]

F. In weighing whether to grant an extension to the decision timeline, the IHO must -

1. fully consider the *cumulative impact* of the factors outlined in section 200.5(j)(5)(ii). Specifically, section 200.5(j)(5)(ii) requires the hearing officer to consider:

   a. whether the delay in the hearing will positively contribute to, or adversely affect, the child's educational interest;

   b. whether a party has been afforded a fair opportunity to present its case at the hearing in accordance with the requirements of due process;

   c. any adverse financial or other detrimental consequences likely to be suffered by a party in the even of delay; and

   d. whether there has already been a delay in the proceeding through the actions of one of the parties.

2. if the request to extend the decision timeline is predicated on vacations, scheduling conflicts of the parties' or their representatives', avoidable witness scheduling, or other similar reasons, establish that there is a *compelling reason* or specific showing of *substantial hardship*.[13] In the absence of any particular definition to the terms "compelling reason" and "substantial hardship," the words should be accorded their presumed meaning. The meaning of "substantial hardship," therefore, would include, for example, a significant and demonstrable economic, legal, or

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[9] 8 NYCRR § 200.5(j)(5)(i). *See also J.D. v. Kanawha City Bd. of Educ.*, 53 IDELR 225 (S.D.W.V. 2009) (finding that the hearing officer did not abuse his discretion when the hearing officer denied the parent's request for an indefinite continuance).

[10] 8 NYCRR § 200.5(j)(5)(i).

[11] 8 NYCRR § 200.5(j)(5).

[12] 8 NYCRR § 200.5(j)(5)(i).

[13] 8 NYCRR § 200.5(j)(5)(ii).

other type of hardship to the affected person. A "compelling reason" would be one that is truly convincing, certain.

Whether a compelling reason or specific showing of substantial hardship exists depends on the particular circumstances presented.[14]

3. find *good cause* based on the likelihood that a settlement may be reached before granting the extension for settlement discussions between the parties.[15] The parties, therefore, must present the hearing officer with adequate or substantial grounds or reason to allow the extension of the decision timeline. Whether good cause exists is dependent upon the circumstances presented.[16] For example, good cause may exist if the parties have scheduled meetings to discuss settlement or have a date by which they are reasonably likely to finalize the settlement discussions.

   To ascertain whether good cause exists, the IHO should seek to understand why the parties, or their representatives, require more time than what was afforded during the resolution period. Should the IHO grant the extension, the IHO should –

   a. establish (or revise) the hearing date(s) to ensure a timely decision prior to the expiration of the decision timeline;

   b. schedule a status conference between the parties, or their representatives, prior to the start of the hearing or require of the parties specific written status reports in accordance with a predefined schedule; and

   c. consider conditioning the granting of the extension on the parties utilizing the previously scheduled hearing date(s) for completion of settlement discussions and/or the settlement process.

4. The hearing officer must respond in writing to a request for an extension without delay.[17] The order must include the facts relied

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[14] Should the hearing officer have some doubt as to the validity of the compelling reason or substantial hardship, it is within the discretion of the hearing officer to seek verification.

[15] 8 NYCRR § 200.5(j)(5)(iii).

[16] *See Proposed Amendment to Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education Relating [to] Special Education Impartial Hearings*, dated October 29, 2012, on file with the New York State Education Department.

[17] 8 NYCRR § 200.5(j)(5)(iv).

upon, an analysis of the factors considered, and a discussion of the applicable standard.[18] Should the hearing officer grant the request for an extension, the order should include the hearing dates (or any revisions to the hearing dates), as well as the new decision date.[19]

III. SETTING HEARING DATES AND MEMORANDA OF LAW

A. Each party shall have up to one day to present its case unless the hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision. Additional hearing days, if required, shall be scheduled on consecutive days wherever practicable.[20]

These requirements are consistent with the policy considerations underlying the IDEA's 45-day timeline. Moreover, IDEA 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.[21] It is, therefore, important that the hearing officer, when initially scheduling hearing dates, takes great care to appropriately assess the reasonable time necessary to address the matters in the complaint in a fair, efficient and effective manner, and err on the side of caution by scheduling reasonably more time to hopefully avoid setting more dates later in the process. Tabling to schedule additional dates typically results in greater delays due to the scheduling problems of both the parties and the hearing officer.

The hearing officer should also consider 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

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[18] *See id.*

[19] *Id.*

[20] 8 NYCRR § 200.5(j)(3)(xiii).

[21] *Letter to Kane*, 65 IDELR 20 (OSEP 2015); *Letter to Kerr*, 23 IDELR 364 (OSEP 1994). *See also B.S. v. Anoka Hennepin Pub. Sch.*, 799 F.3d 1217, 66 IDELR 61 (8th Cir. 2015) (upholding an ALJ's time limitation of nine hours to present IDEA claims); *B.G. v. City of Chicago Sch. Dist 299*, 69 IDELR 177 (N.D. Ill. 2017) (upholding the hearing officer's use of time limitations on witness testimony and denial of a sixth day of hearing); *L.S. v. Bd. of Educ. of Lansing Sch. Dist.*, 65 IDELR 225 (N.D. Ill. 2015) (noting that hearing officers, "like judges, have the inherent authority to manage hearings to avoid needless waste and delay…, including imposing reasonable time limits where appropriate"). *Cf. S.W. v. Florham Park Bd. of Educ.*, 70 IDELR 46 (D.N.J. 2017) (remanding case for a new due process hearing because ALJ improperly declined to consider the parents' evidence after the parents moved for judgment in their favor after the school district presented its case).

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.

B. The hearing officer may receive memoranda of law from the parties not to exceed 30 pages, minimum 12-point type, and not exceeding 6 ½ by 9 ½ on each page.[22]

Submission of post-hearing memoranda is not a matter of right. In each case, the hearing officer should weigh the need for the memoranda against the strong policy of urgency underlying the IDEA's 45-day timeline.

Should the hearing officer deem the submission of memoranda necessary, the hearing officer should keep the following in mind:

1. The hearing officer should reserve asking for the memoranda when, for example, addressing novel legal issues and/or when the factual disputes are particularly complex.

2. Though New York sets a 30-page maximum, the hearing officer may, within his/her discretion, further limit the page count, consistent with the matters to be addressed in the memoranda.

3. Preference for concurrent filing with a 7 to 10-day turn around should be considered. (Fewer days may be appropriate depending on the scope of the issues to be addressed in the memoranda.)

IV. RECORD CLOSE DATE

A. The hearing officer determines when the record will be closed. No further extensions of the decision timeline can be granted after the record close date.[23]

B. The hearing officer has the discretion to revise the record close date, provided good cause exists to do so. The revised record close date, however, cannot extend the date the decision is due.

C. Good cause may exist, for example, when the hearing officer determines that additional clarification is required after the parties have submitted their post-hearing briefs or when an unanticipated event has prevented a party from submitting their written submission within the agreed upon timeline.

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[22] 8 NYCRR § 200(j)(5)(xii)(g).
[23] 8 NYCRR § 200.5(j)(5)(iii).

D. The hearing officer should consider the following matters when setting the record close date:

1. The time required for a transcription of the hearing to be made available to the hearing officer and the parties, should the hearing officer determine that a transcript is necessary to allow the hearing officer to write his/her decision. Access to the hearing transcript is not an absolute necessity when writing the decision. The hearing officer may rely solely on his/her accurate notes.

   A transcript may be necessary when the hearing is factually complex and replete with technical, expert testimony.

2. Whether post-hearing written submissions are required to assist the hearing officer in understanding the legal arguments of the parties. It is within the discretion of the hearing officer whether to permit the parties to submit post-hearing memoranda of law.

3. The complexity of the matters to be addressed in the parties post-hearing submissions.

4. The schedule for the submission of post-hearing memoranda of law (i.e., simultaneous submissions; sur-replies).

V. PRACTICE POINTERS

A. The hearing officer should immediately decline any appointment in which s/he is not available within the 30/45-day timeline, or any reasonable adjustments thereto, to manage the hearing process in accordance with legal requirements. This is critical because, should the hearing officer decline the appointment, the succeeding hearing officer will inherit the original timeline. It is imperative, therefore, that, upon being notified of the appointment, the hearing officer check his/her calendar to determine his/her overall availability within the 30/45-day timeline.

1. Moreover, in New York, when a school district files a due process complaint notice, the hearing or prehearing conference must commence within the first 14 calendar days after the date upon which the initial hearing officer is appointed.[24] When a parent files a due process complaint notice, the hearing or a prehearing conference must commence within the first 14 calendar days after the occurrence of any of the events described in 34 C.F.R. §

[24] 8 NYCRR § 200.5(j)(3)(iii)(a). A resolution meeting is not required when the school district initiates the hearing. 34 C.F.R.§ 300.510(a).

300.510(c).[25]

2. It is imperative that, immediately upon appointment, the hearing officer also determines that his/her schedule allows for the conduct of the prehearing conference (or commencement of the hearing) within the first 14 calendar days from either appointment or the end of the resolution period, as applicable. Should the hearing officer determine that his/her schedule will not allow for the conduct of the prehearing conference (or the commencement of the hearing) within the first 14 days from appointment or the end of the resolution period, as applicable, the hearing officer should decline the appointment.[26] The scheduling conflicts of the hearing officer are not a "good cause" basis for extending the 45-day timeline.

B. Immediately after being appointed, and accepting the appointment, the hearing officer should establish a mechanism by which the parties are required to report back on whether any of the events described in 34 C.F.R. § 300.510(c) require the hearing officer to adjust the resolution period timeline.[27] An effective approach may be to issue an order requiring the parties to provide this information within a prescribed number of days from the occurrence of the event. Alternatively, albeit potentially less effective, would be for the hearing officer to simply "shoot" the parties an email asking to be kept inform.[28]

C. Upon notification that the resolution period has ended, the hearing officer should confirm in writing with the parties his/her understanding of when the 45-day timeline started to run and when the decision must be rendered and mailed to the parties.

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[25] *Id.*

[26] The 14-day timeline runs from the date the initial hearing officer is appointed and does not recommence each time a new hearing officer is appointed to the matter after the preceding hearing officer recuses him/herself.

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

[28] The more structured approach affords the hearing officer a means by which to exact sanctions for the failure to comply with the directive of the hearing officer.

D. The hearing officer should also immediately schedule the prehearing conference. Though New York leaves it up to the individual hearing officer to decide whether to hold the prehearing conference in lieu of the hearing within the first 14 calendar days of the 45-day timeline and, if the hearing officer elects to hold a prehearing conference, to hold it as late as the 14th day, best practice would be to hold a prehearing conference and to do so within five to seven days from the end of the resolution period (or, in the case of a school district filing, from the date of the due process complaint).

1. If the parties anticipate the need for an extension, the hearing officer should encouraged/require the parties to submit their request in writing, incorporating the relevant information, as appropriate, pertaining to the factors discussed above in paragraph II(f).

2. Though the hearing officer cannot initiate nor encourage either or both parties to request an extension of the 45-day timeline, due to his/her needs or otherwise, the hearing officer may offer options to the parties to accommodate the reasonable needs of the parties. For example, if the parties seek to file post-hearing memoranda but allowing so would not afford the hearing officer a reasonable time to render and mail his/her decision, the hearing officer may offer the parties the option to submit their post-hearing submissions within two days or seven days, the latter combined with a request for an extension. Under circumstances such as this, the length of the extension must be reasonable (and for no more than 30 calendar days for each extension) considering the circumstances, including the specific factors set forth in the New York regulations, as discussed above.

E. At the prehearing conference, to the greatest extent possible under the circumstances, once the start date of the 45-day timeline (and, accordingly, the decision date), has been reconfirmed, the hearing officer should work backwards from the 45th day to establish the hearing date(s) after taking into consideration the time needed to obtain/receive clarifying information regarding the parties allegations/response, motions that would need to be filed and addressed in advance of the hearing, the five-business day timeline, anticipated post-hearing memoranda (if any), and the time for the rendering of the decision.

If as a result of this planning process, it becomes clear that the 45-day timeline cannot be met, the process will need to be dramatically compressed. Alternatively, the hearing officer can explore with the parties whether either party (or both) desire(s) an extension of the 45-day timeline, provided that any of the mandated factors noted above do not outweigh the need for an extension. In no event can the extension exceed

30 calendar days.

F. If, during the prehearing conference (or at any point) it becomes clear to the hearing officer that the granting of an extension has the potential to have a significant adverse educational impact on the student absent the stay-put being adjusted, the hearing officer can condition the granting of any extension on the condition that the parties address the particular concern (e.g., the parties agreeing to a change in the stay put).