

# TIMELINESS

## THE 45-DAY DEADLINE AND EXTENSIONS

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### I. INTRODUCTION.

- A. IDEA and its regulations require that a final decision be issued in an IDEA hearing not later than 45 days after the expiration of the 30 day resolution meeting (RM) period, or the period as adjusted for specified reasons.<sup>1</sup> Note that the start of the deadline is not keyed from the “commencement of the prehearing or hearing” within 14 days of appointment<sup>2</sup> and the end is tied to rendering of the decision, not the hearing. IDEA regulations also provide that a hearing officer may grant specific extensions of time beyond this 45-day deadline “at the request of either party.”<sup>3</sup> However, any request must be for “good cause”, the extension must be for a specific time, and to a date certain.<sup>4</sup>
- B. Monitors from the Office of Special Education Programs (OSEP) have been extremely critical of hearing officers not adhering to the above requirements

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<sup>1</sup> 34 C.F.R. § 300.515(a).

<sup>2</sup> Title 8 NYCRR § 200.5(j)(3)(iii) and 200.5(j)(5). To start the running of the 45-day deadline in this manner is inconsistent with the starting date for the deadline established under IDEA.

<sup>3</sup> 34 C.F.R. § 300.515(d).

<sup>4</sup> *Letter to Kerr*, 22 IDELR 364 (OSEP 1994). 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). An extension may be for no more than 30 days from the date the timeline for the impartial hearing ends and the final decision is due (i.e., compliance date). 8 NYCRR § 200.5(j)(5)(i); *Lake Washington Sch. Dist. No. 414 v. Washington State Office of Admin. Hearings*, 51 IDELR 278 (W.D. Wa. 2009) *aff’d* 56 IDELR 61 (upholding an ALJ “good cause” continuance of a due process hearing to accommodate the parents’ attorney who was preparing for two upcoming trials and scheduled for two vacations during the 45-day period).

regarding the 45-day deadline and documenting such adherence. OSEP has also been critical of NYSED in this regard and therefore greater steps are being taken to assure that hearing officers understand and meet these requirements relating to the 45-day deadline and extensions of it.

## II. SPECIFIC REQUIREMENTS, RE: EXTENSIONS.

A. While not all hearings can be heard and decided within the 45-day deadline, the “abbreviated” timeline establishes a clear federal policy that hearings are to be conducted expeditiously. Bottom line, the following legal requirements must be adhered to and the practices suggested will facilitate the hearing officer doing so:

1. 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.<sup>5</sup> An effective 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 in The PreHearing Conference outline.) 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.

Soon after determining that the timeline should be readjusted, the hearing officer should issue a Notice of Start of 45-day Timeline<sup>6</sup> (*see, e.g.*, Attachment B in The PreHearing Conference outline) and a Notice of Scheduled Pre-Hearing Conference setting forth the agenda for the call (*see, e.g.*, Attachment C in The PreHearing Conference outline).

The hearing officer must be available to conduct the pre-hearing conference or commence the hearing within the first 14 days after the date upon which the impartial hearing officer is appointed, when a school district files the due process complaint.<sup>7</sup> Similarly, the hearing officer must be available to conduct the pre-hearing conference or commence the hearing within the first 14 days after the end

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<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 8 NYCRR § 200.5(j)(3)(iii)(a).

of the resolution period, when the parent files the due process complaint.<sup>8</sup> It is, therefore, imperative that immediately upon appointment or the end of the resolution period, the hearing officer determine that his schedule will allow for the conduct of the prehearing conference or commencement of the hearing within the first 14 days from appointment or the end of the resolution period, as applicable. Should the hearing officer determine that her/his 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 immediately resign due to unavailability. As will be discussed further below, the scheduling problems of the hearing officer alone are not a "good cause" basis for the 45-day timeline to be extended.

Moreover, simply because the hearing officer is available for the conduct of the prehearing conference within the first 14 days from appointment or the end of the resolution period, as applicable, the hearing officer must also be reasonably available to complete the hearing<sup>9</sup> and issue the decision within the 45-day timeline.

2. While the 45-day deadline is mandatory, the hearing officer, at the request of either party, can extend it. The hearing officer cannot initiate nor encourage either or both parties to request an extension of the deadline, due to the needs of the hearing officer or otherwise.<sup>10</sup>

This does not prohibit the hearing officer from offering the parties options, e.g., "if you want to file briefs, they will need to be filed in two days given the current 45 day deadline or seven days if combined with a request for a extension of the 45 day deadline until \_\_\_\_\_ so I will have time to consider them and render a decision" or "since we have used all the time scheduled for hearing, either we conclude the hearing at this point or you can request additional time to present the rest of your case combined with a request to extend the 45-day deadline to accommodate the additional hearing date, any briefs, and time thereafter for me to render a decision." But, 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 NY regulations, as discussed below.

3. The 45-day deadline cannot just be "waived" by the parties (whether by agreement or otherwise) or hearing officer. One or both parties must request the

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<sup>8</sup> 8 NYCRR § 200.5(j)(3)(iii)(b).

<sup>9</sup> Each party up to one day to present its case unless the hearing officer determines that additional time is necessary for a full and fair disclosure of the facts required to arrive at a decision. Additional hearing days, if required, shall be scheduled on consecutive days wherever practicable.

<sup>10</sup> *Letter to Kerr, supra.*

extension for “good cause” and the hearing officer must find that such good cause exists before the extension can be granted.<sup>11</sup>

4. New York’s regulations set forth very detailed requirements, which a hearing officer must weigh when considering and ruling upon a request for an extension of the 45-day deadline. Specifically, the regulations provide:
  - Any extension must be for a specific length and no more than 30 days;
  - Not more than one extension can be granted at a time;
  - The reason for each extension must be documented in the record;<sup>12</sup>
  - A request for extension may be granted only after fully considering the cumulative impact of the following factors: 1) the impact on the child’s educational interest or well-being which might be occasioned by the delay; 2) the need of a party for additional time to prepare or present the party’s position at the hearing in accordance with the requirements of due process; 3) any financial or other detrimental consequences likely to be suffered by a party in the event of delay; and, 4) whether there has already been a delay in the proceeding through the actions of one of the parties;<sup>13</sup>
  - Absent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of: 1) school vacations; 2) a lack of availability resulting from the parties’ and/or representatives’ scheduling conflicts; 3) settlement discussion between the parties; or, 5) other similar reasons;
  - Agreement of the parties is not a sufficient reason for granting an extension;<sup>14</sup>
  - The hearing officer shall respond in writing to each request for an extension with the response becoming a part of the record. The hearing officer may render an oral response to an oral request for an extension, but shall subsequently provide that decision in writing and include it as part of the record;
  - For each extension granted, the hearing officer shall set a new date for rendering his or her decision, and notify the parties in writing of such date.<sup>15</sup>

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<sup>11</sup> In *Letter to Kerr, supra*, OSEP noted that an extension might be justified “where a full and fair hearing requires additional evidence and it cannot be immediately secured or the schedule of the parties or counsel requires a continuance.”

<sup>12</sup> 8 NYCRR § 200.5(j)(5)(i).

<sup>13</sup> 8 NYCRR § 200.5(j)(5)(ii).

<sup>14</sup> 8 NYCRR § 200.5(j)(5)(iii).

<sup>15</sup> 8 NYCRR § 200.5(j)(5)(iv).

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**IV. SPECIFIC REQUIREMENTS, RE: CLOSING THE RECORD AND RENDERING THE DECISION**

- A. The hearing officer shall determine when the record is closed and notify the parties of the date the record is closed.<sup>16</sup> Typically, the record is closed either when the hearing ends or the date briefs (or other materials) are submitted.
- B. The hearing officer shall render the decision and mail a copy of it (or at the option of the parents, an electronic decision) to the parents, the LEA and NYSED not later than 45 days after expiration of the 30 day resolution meeting period, or the period as adjusted for specified reasons.<sup>17</sup>

Where extensions of the 45-day deadline have been granted, the decision must be rendered and mailed no later than 14 days from the date the record is closed by the hearing officer. The date the record is closed must be indicated in the decision.<sup>18</sup>

**V. SPECIFIC REQUIREMENTS, RE: SETTING HEARING DATES AND BRIEFS**

- 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.<sup>19</sup>

These requirements are important since they were no doubt promulgated in furtherance of the policy underlying IDEA's 45-day deadline that time is of the essence given the subject of this process is a child's education. Therefore, it is very important that the hearing officer when initially scheduling hearing dates take care in assessing the time necessary and err on the high side of a range of dates thought necessary to hopefully avoid setting more dates later in the process which usually

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<sup>16</sup> 8 NYCRR § 200.5(j)(5)(v).

<sup>17</sup> 34 C.F.R. 300.515(a); 8 NYCRR § 200.5(j)(5). It is significant to note that the starting point for the 45-day deadline under IDEA, as discussed above, is the prevailing requirement notwithstanding the language in the New York regulations. The New York regulations at 8 NYCRR 200.5(j)(5) state that the decision must be rendered "not later than 45 days from the date required for the commencement of the impartial hearing in accordance with subparagraph (3)(iii)" which, contrary to IDEA's mandate, has the 45-day period start when the prehearing or hearing is scheduled within the first 14 after the hearing officer is appointed.

Exceptions to this requirement are the provisions of 8 NYCRR § 200.16(h)(9) (relating to tuition rates for approved programs educating students with disabilities ages 3 to 21 enrolled pursuant to articles 81 and 89 of the Education Law) and Title 8 NYCRR § 200.11 (relating to admission to public schools of students residing in facilities of OMH and OPWDD or child care institutions).

<sup>18</sup> *Id.*

<sup>19</sup> 8 NYCRR § 200.5(j)(3)(xiii).

entails greater delays due to the then scheduling problems of both parties and the hearing officer.

- 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.<sup>20</sup>

While parties may request the opportunity to file briefs, it is clearly within the discretion of the hearing officer as to when, how (reply briefs too) and what is to be addressed. It is most important that the hearing officer in each case weigh the need for briefs, the timing and what they need to address, against the strong policy of urgency underlying IDEA's 45-day deadline. Absent the most unusual of circumstances, given this underlying policy, parties should be given direction by the hearing officer as to what issues merit briefing. Additionally, absent unusual circumstances, parties should not be given more than 7 to 10 days to file a brief and the briefs should be filed concurrently.

If a party fails to submit a timely brief, good practice would dictate an inquiry as to the reason. It is then up to the hearing officer to decide whether to accept the tardy brief considering all the circumstances. Absent the most extraordinary of circumstances, problems regarding the submission of briefs should not impact the 45-day deadline.

#### **IV. PRACTICE SUGGESTIONS**

- A. At the pre-hearing conference, to the greatest extent possible under the circumstances, once you determined the start date for the 45-day deadline (and accordingly the decision date), work backwards from the 45-day deadline based on what the pre-hearing has reflected in terms of the events which need to be scheduled, e.g., obtaining clarifying information regarding the parties allegations/response, motions which need to be filed and addressed (including any mini-hearing regarding them), the five day deadline, hearing dates, the filing of briefs, the closing of the record date and time for the rendering of the decision.

If as a result of this planning process, it becomes clear that the 45-day deadline 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 (e.g., impact on the child resulting from any delay). In no event should the extension exceed 30 calendar days.

- B. If the response to an inquiry reflects a concern in exceeding the 45-day deadline (e.g., a potential and significant adverse educational impact on the child absent the stay put being adjusted) the hearing officer can consider whether to grant any extension on the

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<sup>20</sup> 8 NYCRR § 200(j)(5)(xii)(g).

- condition that the particular concern is addressed (e.g., the parties agreeing to a change in the stay put).
- C. During the course of the proceeding, some adjustments may need to be made in the scheduling of events, and accordingly, the 45-day deadline. But, again it must be emphasized that the hearing officer must closely consider the mandated factors discussed above.
  - D. Whether in the hearing officer's pre-hearing order or a subsequent written order, it is imperative that the hearing officer carefully document and place in the record the basis for the request, the opposing parties position, the factors the hearing officer considered in ruling on the request and how they were weighed/balanced to arrive at the ruling. The specific date on which the decision will now be rendered must also be noted.

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