DEVELOPING THE HEARING RECORD: WHEN AND HOW

IDEA HEARING OFFICER TRAINING – NEW YORK STATE

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I. INTRODUCTION

A. A challenge most IDEA administrative law judges (ALJ) / hearing officers (HO) face in fulfilling the role and responsibilities as an ALJ/HO is ensuring a complete record from which the ALJ/HO can make an informed decision regarding the presented issue(s). The ALJ/HO is tasked with ultimately deciding the presented issue(s) based on the evidence in the hearing record. But, what if the parties are not presenting sufficient evidence in the hearing record upon which to base a ruling?

Is there an obligation or responsibility on the part of an ALJ/HO to develop at least the minimal record necessary to determine the presented issue(s) regardless of whether either party is represented by an attorney? Or, is an ALJ/HO's function to solely take what is presented and let the knowledge and skill of the parties and their attorneys / advocates, if any, be determinative of the outcome?

Views among ALJs/HOs vary in this regard.

B. Let's be very clear. Where competent attorneys (or educational advocates, where permitted) with special education experience are representing the parties, these questions should not present themselves often. But not all attorneys (or educational advocates) are created equal and, more importantly, not all parties are represented.

C. A discussion on the extent and manner in which an ALJ/HO may or must assist in an adversarial proceeding is, therefore, appropriate.[1]

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[1] Generally, there seems to be more appeal to an ALJ/HO offering assistance to a *pro se* parent. *See* Memorandum to Erlichman, et. al from

II. NATURE AND PURPOSE OF IDEA HEARINGS

A. If the primary goal of the IDEA hearing process is to ensure that the educational rights of a child with a disability are upheld,[2] then to what extent, if any, does an ALJ/HO have a responsibility to take some steps to mitigate the potential adverse effect the lack of a complete record may have on the process while also achieving the IDEA's primary goal? And, if the ALJ/HO has a responsibility to ensure that the educational rights of a child with a disability are upheld, is an affirmative duty to develop /complete the record created?[3] Or, is the role of an ALJ/HO just to sit back and act as an umpire calling balls and strikes but not overly intruding into the process of developing / completing the record?[4]

B. If an ALJ/HO agrees that the very nature of the IDEA hearing process places upon him or her the responsibility to take some steps, the concern often then is how to balance maintaining impartiality while participating in the development / completion of the hearing record. But, the two dimensions are not mutually exclusive. Rather, ALJs/HOs must strike a balance between them by determining the extent, if any, each step will assist in making a factual record for the ALJ/HO to render an informed decision on the presented issue(s). The reality is that most decisions under the IDEA are fact determinative.

Wamsley, *Judges, Administrative Law Judges, and Hearing Officers Ability, Extent, and Duty to Question Witnesses to Develop the Record with Pro Se Litigants* (July 23, 2012) (on file with The Massachusetts Bureau of Special Education Appeals) at 1; Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant,* 27 J. Nat'l Ass'n Admin. L. Judiciary 447 (2007). However, the nature and purpose of an IDEA hearing may necessitate an ALJ's/HO's involvement in developing / completing the record even when the parties are represented.

[2] 34 C.F.R. § 300.1.

[3] At least one court has found than an IHO has an affirmative duty to develop the record if mandated by enabling law. *See Lizotte v. Johnson,* 777 N.Y.S.2d 580 (2004). In *Lizotte*, the court held that a New York City Administration for Children's Services ("ACS") hearing officer "should have inquired into the relevant facts to provide a more complete record, especially considering the petitioner's *pro se* appearance and her inability to speak English." The ACS regulations require hearing officers to develop a full record.

[4] *But see Logue v. Dore,* 103 F.3d 1040, 1045 (1st Cir. 1997) (stating it is "well-established that a judge is not a mere umpire"). *See also Quercia v. U.S.,* 289 U.S. 466, 469 (1933).

C. Clearly, ALJs/HOs cannot give legal advice to either party, including parties that are unrepresented.[5] There are, however, additional measures an ALJ/HO can take to develop / complete the hearing record. This outline offers a variety of suggestions in both of these regards to help ensure that the process achieves its primary goal of upholding the educational rights of the child. Whether an ALJ/HO chooses to implement any of them will depend on how the ALJ/HO perceives his/her role and responsibilities as an ALJ/HO and assesses the particular circumstances in each case.[6]

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[5] Generally, however, it is well settled that more leniency is afforded to decision makers working with unrepresented parties when handling procedural matters. *See Haines v. Kerner,* 404 U.S. 519, 520-21 (1972); *Merritt v. Faulkner*, 697 F.2d 761, 769 (7th Cir. 1983). *See also Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents with Children with Disabilities*, 52 IDELR 266 (OSERS 2009) (although the comments to the regulations permit a state agency to dismiss complaints that are unsigned or do not contain the parent's contact information, OSERS notes that the better practice might be to notify the parents of the defects in their complaints and allow the parent to remedy the deficiencies); *In re Student with Disabilities*, 112 LRP 36509 (SEA NY 2010) (stating that the HO "should deal flexibly with, liberally to, and with understanding towards a *pro se* parent with respect to matters relating to procedures"). And, in the case of a *pro se* parent, there are a host of accommodations and assistance that an ALJ/HO can provide the *pro se* parent. Providing a reasonable accommodation to a *pro* se parent is not necessarily an ethical violation. *See*, *e.g.*, *ABA Model Code of Judicial Conduct R.* 2.2 (Jan. 17, 2014), Comment 4 (stating that a judge can make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard).

[6] Since the IDEA was enacted in 1975, the fundamental purpose of the due process hearing (i.e., to uphold the child's educational rights) has not changed. Further, the IDEA's basic provisions governing the structure of the hearing process have not changed. What has dramatically changed in the intervening four decades is who is sitting at the hearing table. Initially, HOs were routinely educators, often college professors, and rarely attorneys. This may explain the basis for the reference in *Rowley* to the "educational expertise" of HOs. Similarly, back then attorneys typically did not represent parties in the hearings. The hearings could best be described as conferences – a bit more formal than an IEP meeting and rarely overtly adversarial, with the discussion on the record being led by the presiding HO. As society became more litigious in the intervening decades, so did IDEA hearings. Parties being represented by attorneys, particularly school districts, became far more commonplace. And, states began seeking attorneys to serve as HOs. With attorneys now often serving in various capacities in IDEA hearings, it is understandable why most attorney participants would view the process as being comparable to the process they are most familiar with – court litigation. But, an IDEA hearing is <u>not</u> like a court

III. LEGAL AUTHORITY

A. Neither the IDEA nor its implementing regulations directly address whether an ALJ/HO has the authority to develop / complete the hearing record. Arguably, however, the IDEA implicitly requires an ALJ/HO to develop / complete the record. First, an ALJ's/HO's "determination of whether a child received a FAPE must be made on substantive grounds."[7] Further, an IHO is given the authority to request an independent educational evaluation.[8] And, last, in a two-tier system, the reviewing officer must "[s]eek additional evidence if necessary."[9]

B. Whether an ALJ/HO under IDEA has the authority to engage more fully in the hearing process appears clear to OSEP. The IDEA sets forth the specific rights accorded to any party in a due process hearing.[10] According to OSEP, a HO is charged with the specific responsibility "to accord each party a meaningful opportunity to exercise these rights during the course of the hearing." It is further expected that the HO "ensure that the due process hearing serves as an effective mechanism for resolving disputes between parents" and the school district. In this regard, apart from the hearing rights set forth in IDEA, "decisions regarding the conduct of due process hearings are left to the discretion of the hearing officer," subject to appellate review.[11] And, the generally applicable standard of review is abuse of discretion, which typically favors the ALJ/HO.[12]

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proceeding – not in 1975 and not today. The purpose is singular. Court rules do not apply. The rules of evidence, generally, do not apply. And, given its purpose, as in 1975, the hearing record upon which issues will be decided cannot rest solely in the hands of the parties and their attorneys / advocates, if any.

[7] *See* 34 C.F.R. § 300.513(a).

[8] *See* 34 C.F.R. § 300.502(d).

[9] 34 C.F.R. § 300.514(b)(2)(iii).

[10] *See*, *e.g.*, 34 C.F.R. § 300.512.

[11] *Letter to Anonymous,* 23 IDELR 1073 (OSEP 1995). *See also Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, pages 46704-46706 (stating, in pertinent part, "the specific application of those procedures [regarding prehearing and decisions] to particular cases generally should be left to the discretion of hearing officers who have 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.").

[12] *See*, *e.g.*, *O'Toole v. Olathe Unified Sch. Dist. No. 233*, 144 F.3d 692,709 (10th Cir. 1998); *D.Z. v. Bethlehem Area Sch. Dist.*, 2 A.3d 712 (Pa. Commw. Ct.

IV. IF SO, WHEN AND HOW?

A. To preserve both the appearance and actual impartiality while developing / completing the hearing record, keep the following practices in mind.

B. It cannot be over emphasized that for many reasons the prehearing conference (PHC) is usually the most important strategy an ALJ/HO can use to help the parties and their representatives, if any, understand and navigate the hearing process. So, hold one. It is at the PHC that an ALJ/HO begins to set expectations on what evidence s/he will need to decide the presented issue(s). For unrepresented parents, a PHC is arguably "essential to accord [them] a meaningful opportunity to exercise [their] rights during the course of the hearing."[13]

C. Prior to the prehearing conference, the ALJ/HO should become familiar with the applicable standard(s) regarding the issue(s) to be decided.[14] Having this familiarity will help the ALJ/HO to have an understanding of the evidence s/he should expect to receive during the hearing. At the prehearing conference itself, when reviewing the issue(s) to be decided, the ALJ/HO should engage the parties in a discussion on what evidence is needed for the ALJ/HO to decide the issue(s). This practice serves various purposes. First, it confirms for the ALJ/HO the applicable standard(s) or, in the event of disagreement, it affords the ALJ/HO an early opportunity to rule on the applicable standard(s), which would allow the parties adequate time to prepare for the hearing. Second, this simple exercise would require the parties –especially when the ALJ/HO

2010). *Cf. J.W. v. Fresno Unified Sch. Dist.,* 611 F. Supp. 2d 1097, 1109 (E.D. Cal. 2009) *aff'd* 626 F.3d 431 (9th Cir. 2010) (court gave "due weight to ALJ's decision" after "ALJ questioned many witnesses, both to clarify responses as well as to elicit follow up responses"); *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942 (9th Cir. 2007) (court treated "hearing officers findings as 'thorough and careful' when the hearing officer participate[d] in the questioning of witnesses"); *M.M. v. Lafayette Sch. Dist.*, No. CV 09-4624, 2012 WL 398773 (N.D. Cal. Feb. 7, 2012) (court in deferring to ALJ's fact findings noted the ALJ was "thoroughly engaged … asking numerous follow-up and clarifying questions of the witnesses through out"); *S.A. v. Exeter Union Sch. Dist.*, No. CV F 10-347 LJO SMS, 2010 WL 4942539 (E.D. Cal. Nov. 24, 2010) (court finding that "although the ALJ actively questioned [the superintendent] for a lengthy period of time, there [was] no evidence that the ALJ inappropriately credited her responses").

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

[14] It may be of help to the ALJ/HO to obtain a copy of the contested IEP from the parties prior to the PHC.

provides advance notice of what is to be accomplished during the PHC – to get a jumpstart on thinking about the documentary evidence and witnesses each would have to present to prosecute or defend against the claim(s). Third, it would provide a basis – as more fully discussed below – for the ALJ/HO to highlight and address any perceived deficiencies in the hearing record during the course of the hearing and prior to the record being closed.

D. The typical due process complaint includes a myriad of concerns the parent has regarding his/her child's education. Presenting these concerns in an understandable and logical sequence can be difficult for any individual, including seasoned attorneys.

Nonetheless, the importance of an ALJ/HO having a comprehensive understanding of the precise question(s) that s/he must answer after the hearing record has been closed cannot be overstated. When the ALJ/HO understands what it is that is being asked of him/her, the ALJ/HO is in a better position to extract the necessary evidence that will enable him/her to decide an issue/defense and to craft an appropriate remedy, when necessary. The PHC affords the ALJ/HO an early opportunity to confirm his/her understanding of the presented issue(s) to be decided (i.e., the precise question(s) to be answered) and the proposed remedies being requested.

The discussion regarding clarification of the issues has other benefits as well. It allows, as stated above, the ALJ/HO to lead a discussion on what should be shown/presented for the ALJ/HO to be able to determine the presented issue(s). This discussion is extremely important in helping to ensure a complete record and can be of assistance to the parties in properly preparing for the hearing.

When clarification is necessary, obtaining it must be done with great care, and the ALJ/HO should first explain to both the school district and the parent how the requested information will help the ALJ/HO with understanding what s/he is being asked to do. It may be necessary for the ALJ/HO to remind the parties that the PHC is not the time for the presentation of evidence.

E. While in no way asking the parties to present their case, some general discussion regarding who the parties might call as witnesses and what documents they might submit offers the ALJ/HO the opportunity to help shape the quality of the presentations.

F. An ALJ/HO should spend time explaining the many details of the process during the PHC. Many of these process matters have a direct impact on the quality of the hearing record that is ultimately

created, e.g., the five-business day rule[15] (i.e., affects what evidence a party may seek to introduce into the hearing record), the possible option of telephone testimony (i.e., allows a party the option to present a critical witness who would otherwise not be available for in-person testimony), the right to subpoena witnesses[16] and how and when to do it (i.e., ensures that critical witnesses are available to provide testimony on the dates set for hearing), motion practice (i.e., helps, for example, to determine the scope of the hearing, admissibility of contested evidence, etc.), the format of the hearing (i.e., provides structure to the parties and helps them to plan their presentations), the burden of proof (i.e., defines the duty place upon a party to prove or disprove a disputed fact and the quantum of proof the party with the burden must establish to prevail), and the need for the parties to let you know before the hearing if problems arise (i.e., staves off problems that might directly impact the creation of an adequate hearing record).

G. Prior to the hearing, the ALJ/HO should review the results of the PHC (and 5-business day disclosures, if requested ahead of the hearing) in order to be prepared and engaged in the questioning of witnesses. Whether, and to what extent, an IDEA ALJ/HO has the duty or obligation to develop an incomplete hearing record was discussed above. How the ALJ/HO does it, is just as important as if the ALJ/HO does do it. Care should be taken that the questions are unbiased and presented in a manner that does not reveal the ALJ's/HO's concerns for a particular witness' credibility or the merits of the case. Here are some strategies to consider when the need to clarify / complete the hearing record arises:

1. During the course of the hearing, the ALJ/HO should be sensitive to offering the parent / district representative / attorney breaks to collect his/her thoughts and get organized. It can sometimes actually speed things up, and lead to a complete hearing record.

2. When a witness is called to the stand (for either party), ask of the parent / district representative / attorney what things/points s/he intends to question the witness about. This gives the ALJ/HO the chance to rule on irrelevant areas and subtly inquire if other areas that should be addressed are going to be addressed. In short, this approach assists in the party presenting relevant testimony and increasing the chances that a complete hearing record is made.

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[15] 34 C.F.R. §§ 300.512(a)(3), (b).
[16] 34 C.F.R. § 300.512(a)(2).

3. The ALJ/HO may have the responsibility to question a witness when the parent / district representative / attorney is struggling to conduct a meaningful examination of the witness. If the parent / district representative / attorney is struggling, the ALJ/HO may ask him or her what information s/he thinks the witness can provide (maybe dismissing the witness from the hearing room during the discussion) and suggest the form of the question(s). Alternatively, the ALJ/HO may want to consider asking the parties if s/he (the ALJ/HO) might ask the question(s).[17] Often there will be no objection. In any event, the ALJ's/HO's assistance should be directed towards accomplishing the party's own strategy, not in suggesting a different or better strategy.

4. When the ALJ/HO is considering asking a question / line of questions,[18] requesting to review certain documents or even calling a witness,[19] the ALJ/HO should explain why s/he thinks such is necessary / relevant and should get the party's reaction. A party will often agree to the ALJ's/HO's request once it understands the ALJ's/HO's concern(s) and offer to take action to try to satisfy it. An ALJ/HO should allow the party to take the lead because it significantly reduces the ALJ's/HO's risk of real or perceived partiality. If the party still does not fill in the evidentiary void, the ALJ/HO can

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[17] *See Oko v. Rogers*, 466 N.E.2d 658 (Ill. App. 3d 1984). In *Oko*, the appellate court upheld a trial judge who stopped a *pro se* defendant's narrative testimony and directly questioned the *pro se* defendant and directed the defendant on how to properly form a question on cross examination. After the plaintiff objected several times to the *pro se* litigant's questions, the *pro se* litigant asked, "Is there any way I can accomplish that?" The trial judge advised the pro se litigant, "Ask him what is customary." The appellate court, in upholding the trial judge's actions, stated, "As any judge or lawyer knows, the conduct of a jury trial with a *pro se* litigant who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge.... Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides." *Id.* at 661. The dissent, while sympathetic, nonetheless disagreed, stating, in part: "To condone such actions of the trial court here is to invite *pro se* representation in difficult trials which would make a mockery of the judicial process, even though to fully inform a jury is a commendable purpose." *Id.* at 662.

[18] *See* Fed. R. Evid. 614(b) (allowing a judge to examine "a witness regardless of who calls the witness"). Reference to the Federal Rules of Evidence is by way of analogy.

[19] *Id.* (also permitting a judge to call a witness).

then ask clarifying questions. Should the party not agree and objects, the ALJ/HO may proceed but should explain that s/he is doing so in order to complete the hearing record to determine an issue and not to reflect an opinion or be an advocate for a party. The ALJ/HO should also advise that the parties can object to any question and allow each party the opportunity to respond to what the ALJ/HO has done by way of cross or additional testimony.

5. Another possible option to complete the record in some situations is for the ALJ/HO to order an independent educational evaluation ("IEE").[20] But, usually, doing so presents problems in meeting the 45-day timeline even if previously extended because an ALJ/HO cannot initiate his/her own additional extension.[21]

[20] 34 C.F.R. § 300.502(d).

[21] *See* 34 C.F.R. § 300.515(c) ("A hearing … officer may grant specific extensions of time … at the *request of either party*.") (emphasis added).