Materials for Day 3

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A Program of the Seattle University School of Law
Education Law Programs
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I.  INTRODUCTION

A.  In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act.¹

B.  IDEA hearings have grown in complexity and, arguably, the parties have become more litigious. A competent and impartial hearing system, nonetheless, promotes either the early resolution of disputes — through mediation, the resolution meeting, or traditional settlement discussions — or, should a hearing be necessary, the fair and timely conduct of the hearing.

C.  Even in a well-defined impartial hearing system, however, there are common practice hurdles that can compromise the early resolution of disputes or the fair, orderly and timely conduct of hearings. Initially, it is critical that the hearing officer accept the responsibility to efficiently and effectively manage the entire hearing process. The primary purpose of this presentation is to focus on the key management tool a hearing officer has — the pre-hearing conference — and propose strategies that would advance efficient and effective practices in its use.

II.  HEARING OFFICERS ENJOY VAST DISCRETION AND AUTHORITY TO MANAGE THE HEARING PROCESS

A.  The IDEA and its implementing regulations delineate the specific rights accorded to any party to a due process hearing.² The hearing officer is

² See 34 C.F.R. § 300.512.
charged with the specific responsibility “to accord each party a meaningful opportunity to exercise these rights during the course of the hearing.”\(^3\) 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.\(^4\) In this regard, apart from the hearing rights set forth in 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.\(^5\)

B. The IDEA and its regulations do not comprehensively specify the available procedural rules, penalties, and sanctions to enable the hearing officer to effectively and efficiently manage the hearing process.\(^6\) However, a hearing officer has broad powers and discretion to manage the hearing process under the IDEA.\(^7\) This authority extends to various procedural and evidentiary matters,\(^8\) provided that any decision made by the hearing

\(^3\) Letter to Anonymous, 23 IDELR 1073 (OSEP 1995).
\(^4\) Id.
\(^5\) Id.

\(^6\) Unlike the specific rights accorded to any party to a due process hearing that are listed, primarily, at 34 C.F.R. § 300.512, the few remedies, penalties and sanctions specified in IDEA and its regulations are sprinkled throughout various provisions. For example, when the school district is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented, the school district can request that a hearing officer dismiss the parent’s due process complaint. 34 C.F.R. § 300.510 (b)(4).


\(^8\) In this regard, the Comments to the Regulations are informative. Specifically, the Comments say, in part –

We do not believe it is necessary to regulate further on the other pre-hearing issues and decisions mentioned by the commenters because we believe that States should have considerable latitude in determining appropriate procedural rules for due process hearings as long as they are not inconsistent with the basic elements of due process hearings and rights of the parties set out in the Act and these regulations. The specific application of those procedures to particular cases generally should be left to the discretion of hearing officers who have the knowledge and ability to conduct hearings in accordance with standard legal (footnote 8, continued) 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
officer is consistent with basic elements of due process hearings and the rights of the parties set out in the statute and the regulations. Generally, decisions on procedural and 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. Thus, the test for reversal is not whether the reviewing judge would rule the same way as the hearing

manner that is consistent with a parent’s or a public agency’s right to a timely due process hearing.


9 See, e.g., Davis v. Kanawha Cty. Bd. of Educ., 53 IDELR 225 (S.D.W.V. 2009) (finding that the hearing officer did not abuse his discretion in denying the parent’s requests for a continuance); 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).

10 See, e.g., Bougades v. Pine Plains Central Sch. Dist. 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., 44 IDELR 89 (2d Cir. 2005) citing Walczak v. Florida Union Free Sch. Dist., 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., 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, 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., 22 IDELR 1017 (3d Cir. 1995), amended, 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., 19 IDELR 712 (E.D. Va. 1992) (stating that the rulings of the hearing officers are entitled to more than the (footnote 11, continued) customary “due weight” and must be accorded review on a more deferential “abuse of discretion” standard).
C. Ultimately, the state educational agencies have the responsibility to ensure that hearing officers are given the authority required to grant whatever relief is necessary to effectively and efficiently resolve due process complaints. Nonetheless, 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. The due process hearing system established by a State must provide for such authority.

D. Al Capone Maxim. Al Capone is reported to have said, “You can get much farther with a kind word and a gun than you can with a kind word alone.” IDEA empowers hearing officers to do what is required for the child and, as such and when necessary, hearing officers should use the full breath of their authority and discretion to carry out the IDEA’s hefty objectives.

III. PRE-HEARING PROCEDURES – BEST PRACTICES

A. The Pre-Hearing Conference

1. Utility – Necessity – Authority. IDEA and its regulations do not require a pre-hearing conference. Although the pre-hearing conference is not mandated, “appropriate standard legal practice” under IDEA dictates that the hearing officer exercise discretion to hold a pre-hearing conference in every case regardless of whether it

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11 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.  
12 Letter to Armstrong, 28 IDELR 303 (OSEP 1997). Equally important, the state educational agencies are also charged 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. Id.  
13 See Sch. Comm. of Burlington v. Dept’ of Educ., 471 U.S. 359 (1985) (IDEA empowers courts [and hearing officers] to grant the relief that the court determines to be appropriate); Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 52 IDELR 151, n. 11 (2009); Cocores v. Portsmouth Sch. Dist., 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).  
14 Letter to Armstrong, 28 IDELR 303 (OSEP 1997).
initially appears to the hearing officer that the matter may ultimately settle. How the conference is structured and the tone set by the hearing officer leading up to the pre-hearing conference is pivotal to the hearing officer taking control of the hearing process and the management of its participants.

2. **Purpose.** The pre-hearing conference should be meaningful, and should accomplish various objectives, including –

a. simplifying or clarifying the issues;

b. establishing the date(s) for the completion of the hearing;

c. identifying evidence to be entered into the record;

d. identifying witnesses expected to provide testimony; and

d. addressing other administrative matters as the hearing officer and the parties deem necessary to complete a timely hearing, including –

i. any objections to the appointed hearing officer;

ii. evidentiary, procedural issues, like the date and time for the exchange of disclosure; how exhibits should be marked prior to the hearing; and confirming who bears the burden of persuasion and production;

iii. access to records issues and/or whether any party anticipates the need to compel the attendance of a witness;

iv. anticipated motions and/or requests;

v. identifying any prior decisions or settlement agreements between the parties that may affect the present matter; and

vi. ascertaining whether any hearing participant will require any special accommodation.

3. **Structure and Tone.** 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.\textsuperscript{15} An effective approach may be to issue an order requiring the parties to provide the hearing officer with information pertaining to the resolution process. (\textit{See, e.g.}, Order – Resolution Process, Attachment A.) 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.\textsuperscript{16}

Soon after determining that the timeline should be readjusted, the hearing officer should issue a Notice of Start of 45-Day Timeline\textsuperscript{17} (\textit{see, e.g.}, Attachment B) and a Notice of Scheduled Pre-Hearing Conference setting forth the agenda for the call (\textit{see, e.g.}, Attachment C). The pre-hearing conference should be held early on in the 45-day time period,\textsuperscript{18} and consideration should be given to the five-day rule,\textsuperscript{19} the ten-day attorneys’ fee rule,\textsuperscript{20} and the time the parties will need to prepare for the hearing.

\textsuperscript{15} 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 to waive the resolution meeting; (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.

\textsuperscript{16} The apparent formality of this approach does not necessarily have to be carried over to the actual pre-hearing conference. Individual hearing officers should adopt whatever style works best within their comfort and circumstances (\textit{e.g.}, where the parent is unrepresented and school personnel are representing the district), but avoid any appearance of bias, unfairness or prejudgment. \textit{See, e.g.}, \textit{Massachusetts Dept. of Educ.}, 18 IDELR 286 (OCR 1991) (where the parents filed a complaint with the Office of Civil Rights complaining that they were denied a fair hearing because the hearing officer, among other conduct, said in an off-the-record discussion that she had heard a particular witnesses “spiel” before).

\textsuperscript{17} 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.

\textsuperscript{18} Some hearing officers prefer to hold the pre-hearing conference prior to the resolution period. While there is no reason that this cannot be done, the hearing officer should be mindful that what he says during the pre-hearing conference might sway the discussion during the resolution meeting.

\textsuperscript{19} \textit{See} 34 C.F.R. § 300.512(a)(2) and (b)(1).

\textsuperscript{20} \textit{See} 34 C.F.R. § 300.517(c)(2)(i)(A).
4. **Unavailability of Party(ies).** All efforts should be made to hold a pre-hearing conference; any given party should not be allowed to delay it without good cause. When a party becomes “unavailable” for the initially scheduled pre-hearing conference, the hearing officer should consider –

a. adjourning the conference to another day. The hearing officer should document the reason for the adjournment and issue a Notice of Rescheduled Pre-Hearing Conference.

b. adjourning the conference to non-business hours or days (e.g., early morning, late evening, weekend).

c. issuing an order setting the pre-hearing conference for an adjourned date and time and requiring the party to appear. The order should advise that the failure to appear could result in a dismissal for failure to prosecute (where the non-attending party is the parent and/or his representative) or, for example, limiting affirmative defenses (where the non-attending party is the school district).

5. **Pre-Hearing Conference Summary and Order.** Upon completion of the pre-hearing conference, and within three business days, the hearing officer should issue a Pre-Hearing Conference Summary and Order that confirms the matters discussed during the pre-hearing conference.21 (See, e.g., Pre-Hearing Conference Summary and Order, Attachment D.) The parties should be held to the matters agreed upon, ordered, or otherwise set forth in the Order unless the hearing officer is advised immediately (e.g., three business days) of any corrections or objections. The Pre-Hearing Conference Summary and Order should be entered into the record.

**B. Identifying the Issues with Precision – Managing the Issues Presented**

1. **Authority.** Hearing Officers have expansive discretionary authority when handling pre-hearing procedural matters.22 Said authority

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21 Most pre-hearing conferences are not recorded, but consideration should be given to recording the conference when the parties are scheduled to discuss a significant motion, a party (the parties) is (are) difficult, or there is a need for limited testimony to decide a motion or an issue. Further, consideration should be given to the meaning of 34 C.F.R. § 300.512(a)(4) (any party has the right to obtain a written or verbatim record of the hearing.) But see School District of Sevastopol, 24 IDELR 482 (WI SEA 1996) (finding that a pre-hearing conference is an “optional” component of the hearing process and IDEA’s hearing rights were inapplicable). In any case, the hearing officer should take accurate and complete notes of the pre-hearing conference.

22 See Section II, supra.
extends to requiring specification of the issues raised in the due process complaint, even in the absence of a sufficiency challenge. OSEP, too, suggests that hearing officers have a role to play in managing the issues presented. Specifically, the Comments to the Regulations state:

To assist parents in filing a due process complaint, § 300.509 and section 615(b)(8) of the Act require each State to develop a model due process complaint form. While there is no requirement that States assist parents in completing the due process complaint form, resolution of a complaint is more likely when both parties to the complaint have a clear understanding of the nature of the complaint. Therefore, the Department encourages States, to the extent possible, to assist a parent in completing the due process complaint so that it meets the standards for sufficiency. However, consistent with section 615(c)(2)(D) of the Act, the final decision regarding the sufficiency of a due process complaint is left to the discretion of the hearing officer.

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With regard to parents who file a due process complaint without the assistance of an attorney or for minor deficiencies or omissions in complaints, we would expect that hearing officers would exercise appropriate discretion in considering requests for amendments.

2. Purpose. Managing the issues presented is critical to effective and efficient management of the hearing process. When the issues in the due process complaint are clear, the responding party is able to prepare for the hearing, the evidence presented at hearing is more focused, there is meaningful opportunity for resolving the complaint during the resolution meeting or thereafter, the decision

23 Ford v. Long Beach Unified Sch. Dist., 37 IDELR 1 (9th Cir. 2002) (holding that the parents due process rights were not violated when the hearing officer, in her written decision, formulated the issues presented in words different from the words in the due process complaint); J.W. v. Fresno Unified Sch. Dist., 52 IDELR 194 (E.D. Cal. 2009); Adam J. v. Keller Indep. Sch. Dist., 39 IDELR 1 (5th Cir. 2003) (impartiality challenge). Cf. K.E. v. Indep. Sch. Dist. No. 15, 54 IDELR ¶ 215 (D. Minn. 2010) (finding that the ALJ did not err in failing to clarify the issues stated in the amended due process complaint before the hearing).

will be sharper, and the hearing officer is able to better determine whether he has jurisdiction over the specific issues.25

3. **Notice to Parties and Preparation of Hearing Officer.** Generally, the pre-hearing conference affords the parties/counsel the first opportunity to really focus on a case. Therefore, to be fair to them the Notice of Scheduled Pre-hearing Conference (e.g., Attachment C) must not only advise the parties/counsel that clarification of the issues will be addressed but also that they are to be prepared to meaningfully participate. And, the hearing officer can reasonably anticipate that the parties/counsel will grumble a bit or more when forced to do so.

In addition, the hearing officer needs to prepare for the pre-hearing conference by reviewing the due process complaint and response. Questions to clarify the issue(s)/relief and a rough outline organizing them should be prepared. The hearing officer will then also be ready, if necessary, to generally identify for the parties the evidence needed to decide each issue and determine relief, if necessary, providing greater assurance of a record to do so (e.g., to fashion compensatory educational services relief, if necessary).

4. **Sufficient Notice.** IDEA requires the complaining party to provide sufficient notice to the other side. Failure to provide sufficient notice may result in the complaining party not having a hearing or in a reduction of attorneys’ fees if the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint.26 The content of the due process complaint must include –

a. the name of the child;

b. the address of the residence of the child27;

c. the child’s attending school;

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25 See Letter to Wilde (OSEP 1990) (unpublished) (“Determinations of whether particular issues are within the hearing officer’s jurisdiction ... are the exclusive province of the impartial due process hearing officer who must be appointed to conduct the hearing.”).

26 34 C.F.R. § 300.507(c); 34 C.F.R. § 300.517(c)(4)(iv).

27 Should the child be homeless, the complaining party must provide available contact information and the name of the school the child is attending. 34 C.F.R. § 300.508(b)(4).
d. a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and,

e. a proposed solution to the problem, to the extent known and available to the complaining party at the time.28

The complaining party, however, is not required to include in the due process complaint all the facts relating to the nature of the problem.29 Nor is the complaining party required to set forth in the due process complaint all applicable legal arguments in “painstaking detail”.30 IDEA’s due process requirements imposes “minimal pleading standards.”31

6. **Notice of Insufficiency.** The due process complaint must be deemed sufficient unless the party receiving the complaint notifies the hearing officer and the complaining party in writing, within 15 days of receipt of the complaint, that the receiving party believes the complaint does not include the requisite content.32 There is no requirement that the party who alleges that a notice is insufficient state in writing the basis for the belief.33

Within five days of receipt of the notification, the hearing officer must decide on the face of the complaint whether the complaint includes the requisite content.34 Should the hearing officer determine that the due process complaint is insufficient, the hearing officer may dismiss the complaint but not before granting

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28 34 C.F.R. § 300.508(b).
30 Id. See also Anello v. Indian River Sch. Dist., 47 IDELR 104 (Del. Fam. Ct. 2007) (finding that the alleged facts and requested relief contained in the parents’ due process complaint were consistent with a child find claim and that the school district was not denied ample notice to prepare for a child find claim because of the parents’ failure to explicitly cite the child find provisions of the IDEA). But see Lago Vista Independent Sch. Dist. V. S.F., 50 IDELR 104, (W.D. Tex. 2007) (finding that the hearing officer acted outside the scope of his authority by deciding the appropriateness of the 2006 – 2007 IEP despite the issue not being properly raised in the due process complaint).
32 34 C.F.R. § 300.508(d).
34 34 C.F.R. § 300.508(d)(2).
the complaining party an opportunity to amend the complaint.\textsuperscript{35}

If the hearing officer determines the complaint is not sufficient, the hearing officer’s decision must identify how the complaint is insufficient, so that the complainant can amend the complaint, if appropriate.\textsuperscript{36} Should the complainant not amend, the complaint may be dismissed.\textsuperscript{37}

An amended complaint resets the timelines for the resolution meeting and the resolution period.\textsuperscript{38}

7. **Sufficient Insufficiency.** Determining whether the complaint is sufficient can be problematic. Citing court decisions is not entirely helpful given that each due process complaint is to be judged on whether the requisite content is included in the complaint. Given that a primary objective of the due process complaint – and, specifically the requirement that the complaint includes a description of the nature of the problem – is to serve as the basis for the discussion at the resolution meeting, the following are illustrative examples of what the hearing officer can do to effectively manage the issues presented and assist the parties in identifying the issues with precision.

\textsuperscript{35}See Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 52 IDELR 266, Question C-4 (OSERS 2009). The party may amend the complaint if the other party consents in writing and is given the opportunity to resolve the complaint through a resolution meeting or the hearing officer grants permission not later than five days before the due process hearing begins. 34 C.F.R. § 300.508(d)(3)(i) and (ii).


\textsuperscript{37}Id.

\textsuperscript{38}34 C.F.R. § 300.508(d)(4). The resolution meeting, however, should not be postponed when the school district believes that a parent’s due process complaint is insufficient. OSEP advises that the resolution meeting should nonetheless go forward:

While the period to file a sufficiency claim is the same as the period for holding the resolution meeting, parties receiving due process complaint notices should raise their sufficiency claims as early as possible, so that the resolution period will provide a meaningful opportunity for the parties to resolve the dispute.

a. **Dismissal.** When the complaining party contends that all that is required is “bare notice pleading,” even after the hearing officer identified how the complaint is insufficient, the hearing officer should warn the party of possible dismissal. The party’s refusal to amend the complaint after a warning of possible dismissal could result in dismissal.

b. **Addressing the Issue at the Pre-Hearing Conference.** Whether the requirement that the hearing officer must determine the sufficiency of the due process complaint “on the face” of the complaint precludes the hearing officer from discussing the notice of insufficiency with the parties in a conference call is arguable. Given that OSEP has opined that parties should raise their sufficiency claims as early as possible to enable the parties to have a meaningful opportunity to resolve the dispute during the resolution meeting, it would seem that the hearing officer who elects to discuss the complaint with the parties in a conference call would be promoting the purpose of the resolution meeting, and such practice would be consistent with OSEP’s expressed opinion.

But, whether during a conference call in conjunction with a notice of insufficiency, or a normal pre-hearing conference, considering these reasons, the hearing officer should —

(i) Get specifics by reviewing the IEP in question (even if line-by-line), the allegation(s) that the IEP was not implemented and/or the alleged inappropriate evaluation and the parties’ relative position on each issue in dispute;

(ii) Ask clarifying questions (Why do you disagree with the classification? What classification do you believe would be appropriate? How would the student’s IEP be different if the classification was changed?)

(iii) Ask clarifying questions regarding the requested relief (What compensatory education is being sought? What amount of reimbursement is being sought and for what?)

(iv) Consider starting from the end, when the complaining party is a pro se parent who has difficulty identifying the issues. Ask the parent to identify the remedy.
(v) Consider issuing an order listing specific questions that would need to be answered by the complaining party when more time is needed to respond. A schedule should be set identifying by when the complaining party should submit the answers and by when the responding party should submit his relative position on each identified issue.

The statement and organization of the issues and relief sought in the Pre-hearing Conference Summary and Order should normally serve as the statement of such in the decision. These are the only issues the hearing officer can decide (and must decide), given the notice and fairness requirements inherent in due process.

8. **Be Flexible.** Other than the parents’ right to inspect and review any education records relating to their children prior to an IEP meeting, resolution meeting or hearing, or the right to a response to reasonable requests for explanations and interpretations of the records, IDEA does not provide for discovery. Naturally, some discovery takes place during the hearing process and hearing officers should encourage allowing new issues to be added during the hearing (or post the filing of the complaint) when it can be done fairly and without undue delay. The alternative might be a second hearing, resulting in the additional expenses of time and money.

9. **Document Issues Not in Dispute.** Identifying issues (and facts) not in dispute will focus settlement discussions and, should a hearing

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39 34 C.F.R. § 300.613(a) and (b)(1).
40 *Horen v. Bd. of Educ. of City of Toledo Pub. Sch. Dist.*, 53 IDELR 79 (N.D. Ohio 2009). See also *Hupp v. Switzerland of Ohio Local Sch. Dist.*, 51 IDELR 131 (S.D. Oh. 2008) (holding that the parent is not entitled to information about all students within the LEA’s borders who received special education services); *B.H. v. Joliet Sch. Dist.*, 54 IDELR 121 (N.D. Ill. 2010) (holding that IDEA hearings do not provide for the sort of extensive discovery that often occurs in litigation).
41 Be mindful of the language in 34 C.F.R. § 300.508(c), requiring notice before a hearing. Note, however, the use of the permissive word, “may.” Remember also that the complaining party may amend the complaint only if the non-complaining party consents or the hearing officer grants permission not later than five days before the hearing. 34 C.F.R. § 300.508(d)(3). (Should the complaint be amended, the applicable timeline(s) recommence with the filing of the amended complaint. 34 C.F.R. § 300.508(d)(4).)
42 Prohibiting the complaining party from raising new issues at the time of the hearing could result in additional complaints or protracted conflict and litigation. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46747 (August 14, 2006).
be necessary, the hearing. When at all possible, encourage (order) the parties to stipulate to facts.

10. **Eliminate Non-Hearable Issues.** Issues that are not the appropriate subject of an IDEA due process hearing, or that are no longer viable, should be disposed of early on to avoid unnecessary preparation for, and prolonging, the hearing.\(^43\) The hearing officer has authority to determine whether an issue is within his jurisdiction.\(^44\)

Consideration should also be given to whether the parents can properly exercise their right to an administrative due process hearing when parents do not first address their concerns (of which they are now complaining) with the IEP Team or school district.\(^45\) At the heart of IDEA, “is the cooperative process that it establishes between parents and schools.” *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005) *citing Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982).

Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, ... as it did upon the measurement of the resulting IEP against a substantive standard. *Rowley*, 458 U.S. at 205-06. “The central vehicle for this collaboration is the IEP process,” and parents play a significant role in this process. *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005).

Given this envisioned cooperative process, the hearing officer should weigh whether the issues in the due process complaint stem from the IEP Team or school district’s proposal and/or refusal to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free and appropriate public education to the child.\(^46\)

Should the hearing officer determine that the parents failed to raise an issue at an IEP Team meeting, the hearing officer may dismiss

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\(^43\) For example, matters that are beyond the two-year statute of limitations, absent an exception, or previously litigated and determined (i.e., *res judicata* and/or collateral estoppel) might warrant dismissing the issues (or the case) prior to the actual hearing.


\(^45\) A parent [or a school district] may file a due process complaint on matters relating to the identification, evaluation or educational placement of a child with a disability, or the provision of a free an appropriate public education to the child. 34 C.F.R. 300.507(a)(1).

\(^46\) See 34 C.F.R. § 300.503(a)(1) and (2).
the hearing without prejudice, provided there are no remaining hearable issues; remand the issue to the IEP Team but, if more than one issue is raised in the due process complaint, proceed to hearing on those that the hearing officer deems to have jurisdiction over; direct the parties to discuss settlement of the issue informally; or proceed to hearing if the hearing officer determines that further discussions might not be fruitful.47

47 But see Compton Unified Sch. Dist. v. Addison, 598 F.3d 1181, 54 IDELR 71 (9th Cir. 2010) (rejecting the school district’s argument that the prior written notice procedures limit the jurisdictional scope of the hearing to those issues that the school district included in the notice to the parent); Letter to Zimberlin, 34 IDELR 150 (OSEP 2000) (expressing the view that Connecticut’s statute barring any issue at a due process hearing that was not raised at a planning and placement team meeting, to be inconsistent with IDEA).
ATTACHMENT A: ORDER

NOTE: This is a sample Order that might be used. It would need to be modified if it were to be used in other situations e.g., in a case involving a pre-school student or an expedited hearing.

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STUDENT, a minor, by and through his/her Parent(s), ____________________________

ORDER

Petitioners,

- against -

Case No. _____________

__________________________________, ____________, Hearing Officer

Respondent.

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I have been appointed to hear the above-captioned matter. The dates and times for the conduct of a pre-hearing conference and due process hearing will be set under separate correspondence.

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 to waive the resolution meeting; (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.

Pursuant to 34 C.F.R. § 300.515(c), the undersigned may grant specific extensions of time beyond the periods set out in 34 C.F.R. § 300.515(a) at the request of either party.

IT IS HEREBY ORDERED that –

1. Should the parties schedule a resolution meeting pursuant to 34 C.F.R. § 300.510(a), the parties shall notify the undersigned of the date and time of the scheduled resolution meeting within two (2) business days of it being scheduled.
2. Should the parties participate in a resolution meeting pursuant 34 C.F.R. § 300.510(a), and the parties reach an agreement consistent with 34 C.F.R. § 300.510(d), the parties shall notify the undersigned within five (5) business days of the agreement’s execution that the matter has been resolved and that it can be dismissed (with or without prejudice).

3. Should any of the events under 34 C.F.R. § 300.510(c) occur, the parties shall notify the undersigned of the occurrence within two (2) business days. The 45-day timeline for the due process hearing will be started by the undersigned.

IT IS SO ORDERED.

DATED:

________________________________________
HEARING OFFICER
ATTACHMENT B: NOTICE OF START OF 45-DAY TIMELINE

[HEADING]

NOTE: This is a sample Order that might be used. It would need to be modified if it were to be used in other situations e.g., in a case involving a pre-school student or an expedited hearing.

DATE

NAME
ADDRESS

VIA FACSIMILE TRANSMISSION FOLLOWED BY ELECTRONIC MAIL
(Facsimile transmission nums.: ______________________)

Re: ________________________, Case No. _________

NOTICE OF START OF 45-DAY TIMELINE

Dear Interested Parties:

The 45-day timeline for the due process hearing in 34 C.F.R. § 300.515(a) starts the day after one of the events described in 34 C.F.R. § 300.510(c) has occurred.48 The parties have notified the undersigned that, although a resolution meeting took place on ____________, the parties did not reach an agreement and further agreed in writing on ____________ to proceed with the due process hearing.

Consistent with 34 C.F.R. § 300.510(c)(2), a final decision must be reached in this matter not later than 45 days after the expiration of the resolution period, absent the undersigned granting a specific extension of time. The 45-day timeline started to run on ____________. Accordingly, a decision in this matter must be reached and mailed to each of the parties on or before ____________.

48 Pursuant to 34 C.F.R. § 300.515(a), a decision in this matter 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 to waive the resolution meeting; (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 period, but later, the parent or public agency withdraws from the mediation process.
A Notice of Scheduled Pre-Hearing Conference will follow this correspondence setting the date and time within the required timeline for the conduct of a pre-hearing conference and advising you of the various matters that we will discuss during the pre-hearing conference.

Very truly yours,

HEARING OFFICER
ATTACHMENT C: NOTICE OF SCHEDULED PRE-HEARING CONFERENCE WITH AGENDA

DATE

NAME
ADDRESS

VIA FACSIMILE TRANSMISSION FOLLOWED BY ELECTRONIC MAIL
(Facsimile transmission nums.: ______________________)

Re: ________________________, Case No. __________

NOTICE OF SCHEDULED PRE-HEARING CONFERENCE

Dear Interested Parties:

You have been notified that I have been appointed as hearing officer to the above-referenced case. A pre-hearing conference in this matter has been scheduled for ______________________.

On the appointed date and time, I will initiate the telephone conference and call you at your office number. Should you anticipate not being in your office on the appointed date and time, please provide me with an alternative number where you can be reached.

Please be further advised that the purpose of this letter is two-fold. First, to advise you of the various matters that I will want to discuss with you during the pre-hearing conference. (See attached Pre-Hearing Conference Agenda.) Second, to provide you with the opportunity before the teleconference to confer with your client, and/or each other, and take such other steps as may be necessary in order to meaningfully respond to, or otherwise address, these matters.

Subsequent to the pre-hearing conference, I will prepare a detailed order of what has been agreed upon and determined during the conference. You will receive it within three (3) business days after the pre-hearing conference. Should you have any suggested corrections or additions to the order, you are to advise me of them immediately, in writing, and I will address them promptly. At the commencement of the hearing, the order and all subsequent correspondence relating to it will be placed on the record (as exhibits of this hearing officer).
It would be helpful if I were provided with a copy of the student’s IEP being appealed prior to the pre-hearing conference. I thank you in advance for your anticipated cooperation. I remain,

Very truly yours,

HEARING OFFICER
ATTACHMENT D: PRE-HEARING CONFERENCE SUMMARY AND ORDER

STUDENT, a minor, by and through his/her Parent(s), ________________,

Petitioners,

- against -

Case No. ____________

__________________________, ________________, Hearing Officer

Respondent.

Petitioner is the parent of ___________ ("Student"), a ______-year-old student [with a disability]. On ________, Petitioner filed a Due Process Compliant ("Complaint") against the ______________________________ pursuant to the Individuals with Disabilities Education Act ("IDEA"). This Hearing Officer was appointed to preside over this case on ________.

On ________________, 2010, a pre-hearing conference was held in the above matter. The conference was conducted by telephone from _______ p.m. to _______ p.m. Participating in the conference were: ____________________________, Hearing Officer; __________________ for Petitioners; and, __________________ for Respondent. The parties discussed the following matters:

1. **Objections to the Appointed Hearing Officer.** Neither party objected to the appointment of the undersigned as hearing officer.
2. **Mediation / Settlement / Attorneys.** Each side is represented by counsel. Neither side expressed an interest in engaging in mediation. [Both sides waived the mandatory resolution meeting.] [A resolution meeting was held on __________. The parties, however, did not reach an agreement.] The parties are free to enter into settlement discussions and an agreement at any time and nothing in this order should be interpreted as prohibiting any settlement discussions.

It was agreed that the 45-day timeline started to run on __________. The hearing decision is due on _____________.

3. **Hearing Dates / Arrangements.** The hearing will be conducted at __________________________, located at ____________________________, on ______________, _______________, 2010, at ____________ a.m. / p.m. to ___________ a.m. / p.m. [A second pre-hearing conference will be conducted on ______________________, 2010, at ____________ a.m. / p.m., at which time the parties should be prepared to discuss _________________________________.] Should any problem arise prior to the hearing that might adversely affect the hearing process, counsel is directed to notify the undersigned and request an immediate pre-hearing conference call.

Inasmuch as this is not a matter involving discipline so as to require an expedited hearing, it will be handled as a regular hearing.

a. **Evidence / Witness Disclosure.** Disclosure will occur on or before ______________, ________________, 2011 by 5 p.m., and a courtesy copy mailed overnight delivery on the same date (to arrive on the ________) or sent by facsimile transmission to the Hearing Officer. (See Hearing Officer contact...
information below.) Documents that are emailed or sent by facsimile transmission should be limited to no more than 75 pages.

At least three business days prior to the due process hearing, both parties shall exchange all objections to any portion of the opposing party’s five-day-disclosures in writing. At least two business days prior to the due process hearing, the parties shall jointly discuss all objections and attempt in good faith to resolve them. At least one day prior to the due process hearing, each party shall provide this Hearing Officer a joint list of objections that they were unable to resolve. Counsel for each party shall certify in a letter that s/he made good-faith efforts to resolve all objections.

A party’s failure to provide all objections in writing three days prior to the hearing may result in a waiver of the objection. A party’s failure to attempt to resolve an objection in advance of the due process hearing may result in the objection being sustained.

b. **Exhibit Format.** All exhibits must be marked prior to the hearing date and an exhibits list generated. Parents exhibits should be identified as “P” followed by the exhibit number. Each page of the exhibit should be numbered as well. For example, if the IEP is to be the parents’ first exhibit and it consists of seven pages, each page should me marked as follows: P 1-1, P 1-2, P 1-3, etc. The LEA exhibits should be identified as “R” followed by the exhibit number. Again, each page of the exhibit should be numbered as in the example above. Joint exhibits should be identified as “JE” followed by the exhibit number. Each page of the exhibit should also be numbered.

The parties are encouraged to prepare joint exhibits.

c. **Witness List / Witnesses.** The witness list must include the name and title of the witness and a brief, but informative, description of the nature of
the witness’ testimony. The Hearing Officer may exclude any irrelevant, immaterial, unreliable or unduly repetitious testimony during the hearing.

Witnesses participating through teleconference on the day of hearing are to be provided with courtesy copies of the proposed evidence packets (i.e., Petitioners and Respondent’s) prior to the hearing day. Failure to do so might result in the undersigned excluding the witness(es) from participation in the hearing.

The parties are expected to work cooperatively on scheduling witnesses and/or making witnesses available to one another. Should either party anticipate a problem in gaining a witness’ participation, counsel is directed to address it by contacting opposing counsel where appropriate, seeking a subpoena *ad testificandum*, or request an immediate pre-hearing conference call.

d. **Open / Closed Hearing.** Petitioners request that the hearing be closed to the public. The student who is the subject of this appeal will not [may be] be present during the hearing.

All witnesses will be sequestered.

e. **Special Accommodations.** The parties indicated that special accommodations or interpreter services are not necessary for any of the parties, representatives, and/or witnesses.

f. **Pre-Hearing Motions / Requests.** None are anticipated at this time. [Petitioners Respondent] will file a motion to [extend the 45 day time line] [dismiss] [for recusal] [consolidate multiple cases into one hearing]. The parties agreed to the following motion schedule: _________________________________.

The parties agreed that the student’s stay-put placement pending resolution of the dispute is ___________________________.

Seattle University School of Law
g. **Stipulated Facts.** The parties are encouraged to stipulate to as many facts as can be agreed upon in order to facilitate and expedite the taking of testimony on the day of the hearing. Each party shall provide the Hearing Officer a list of joint stipulations of fact and material admissions three days prior to the due process hearing. Each party shall stipulate and admit only those facts that are material, i.e., “significant to the issue or matter at hand.” Each party’s counsel must certify in a letter, submitted at least one day prior to the due process hearing, that s/he has attempted in good faith to stipulate to material facts that are not in dispute.

h. **Burden of Persuasion / Production.** Respondent will proceed first on the day of the hearing and carry the burden of persuasion.

i. **Presentation of Case.** Each party will be given the opportunity to make an opening and closing statement. The parties have agreed that written opening and closing statements are not required. However, the Hearing Officer at his discretion may order written memoranda of law at the close of the hearing on specific issues raised during the hearing.

4. **Issues / Relief Sought / Agreements of the Parties.** The issues are limited to those raised in the Complaint. The undersigned has determined that he has the authority to hear the issues listed below and grant the relief sought by Petitioners. Respondent has / has not filed a response to the Complaint [or sent prior written notice to the parent regarding the subject matter contained in the parent’s due process

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49 Material stipulations will streamline the presentation of evidence and testimony in the interest of a more efficient due process hearing.

50 Black’s Law Dictionary, 7th ed. Evidence is material if it has a logical connection to a fact of consequence to the outcome of the case.

51 If other issues are anticipated, Petitioners must seek to amend the complaint as set forth in the IDEA. See 34 C.F.R. § 300.508(d)(3).
complaint]. Accordingly, Respondent has been directed to file a response by 5 p.m. on ________________, _________________, 2011. Respondent did not challenge the sufficiency of the Complaint.

The issues and requested relief being presented for determination are as follows:

a. Issue One

b. Issue Two

5. **Decision.** Following the due process hearing, this Hearing Officer will mail a written findings of fact and decision to the parties. [Petitioner has elected an electronic findings of fact and decision. Following the due process hearing, this Hearing Officer will issue the findings of fact and decision to the parties via electronic mail.]

6. **Communication with Hearing Officer.** The parties understand that there are to be no *ex parte* communication with the Hearing Officer. Any written communications with the Hearing Officer, whether by mail, electronic mail, or facsimile transmission must be simultaneously copied / delivered to the other party. The Hearing Officer may be reached as follows:

The parties will be held to the matters agreed upon, ordered, or otherwise set forth above. If either party believes this Hearing Officer in this Order has overlooked or misstated any item, s/he is directed to advise this Hearing Officer of the same within ____________________________

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52 If the school district has not sent a prior written notice under 34 C.F.R. § 300.503 to the parent regarding the subject matter contained in the parent’s due process complaint, the school district must, within 10 days of receiving the due process complaint, send to the parent a response that includes (i) an explanation of why the agency proposed or refused to take the action raised in the due process complaint; (ii) a description of other options that the IEP Team considered and the reasons why those options were rejected; (iii) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (iv) a description of the other factors that are relevant to the agency’s proposed or refused action. 34 C.F.R. § 300.508(e).
three (3) business days of the date of this Order (with a copy to opposing counsel). The concern will be addressed immediately.

IT IS SO ORDERED.

DATED:

_________________________________
HEARING OFFICER
Pre-Hearing Procedures

Academy for IDEA Administrative Law Judges and Hearing Officers

Presented by: Deusdedia Merced and Lyn Beckman

introduction

questions and comments are welcomed*

*provided the point you wish to make is in agreement with what we have said
good practice

engaging in pre-hearing procedures helps with taking control of the hearing process and sets expectations for hearing participants

And why do we want to do this?

- It conveys the importance of the 45-day timeline to the parties, and sets expectations for the completion of the hearing, and issuance of the decision, within the 45-day timeline
- It sets the stage and tone for the PHC and the hearing process
- It allows the hearing officer to continue to promote settlement of disputes

And how do we do this?

- The PHC is the key management tool available to the hearing officer
- Effective PHC techniques can promote settlement and advance efficient and effective practices that help facilitate the fair and timely conduct of the hearing, when a hearing is necessary
good practice

although federal or state law does not mandate the PHC, a PHC should be held in each case

Accept responsibility early on

- Take control of the hearing process by managing the timeline soon after appointment
- Set expectations for the participants

good practice

provide notice to parties soon after appointment
When does the 45-day timeline begin?

- Ascertaining when the 45-day period begins is critical.
- The parties should be held responsible for communicating to the HO information pertaining to when the resolution period ended.
- An effective approach is to acquire resolution information through an order.

Why take this approach?

- It allows the parties to appreciate the importance of the 45-day timeline.
- It reinforces for the parties the HO’s expectations of what must occur within the 45-day timeline.
- It allows the HO to schedule the PHC early on in the 45-day period.
- It sets the stage and, more importantly, the tone for the PHC and the hearing process.

**good practice**

**confirm the 45-day timeline and schedule the PHC soon after the resolution period has ended.**
Resolution period ended. Now what?

- Confirm when the 45-day timeline started to run and when the decision in the matter must be reached and mailed to each of the parties
- Set tentative dates and times for the DPH
- Schedule the PHC

Good practice

A party should not be allowed to delay the PHC without good cause, and the HO should make reasonable attempts to hold the PHC and document those attempts when a party fails to appear.

No stonewalling allowed

- Upon issuing written notice of the PHC, the HO should confirm the availability of the parties on the proposed date and time
  - allow each party a reasonable opportunity to request new dates and times in the event of conflict
No stonewalling allowed

- Offer to adjourn the conference to non-business hours or days (e.g., early morning, late evening or weekend)
- Adjourn the conference to another day when a party’s failure to appear resulted from an unexpected event

No stonewalling allowed

- When the failure to appear is deliberate, issue an order setting the PHC for an adjourned date and time and require the non-appearing party to appear or face consequences for the repeat failure to appear

Good practice

- Make sure that you cover all of the items listed in the PHC agenda and any other matters that come up during the course of the PHC
Topics to cover during PHC

- Any objections to the appointed hearing officer
- Simplify and clarify the issues
  - Get specifics by reviewing the IEP in question when the complainant alleges a general denial of FAPE

Topics to cover during PHC

- Confirm that the requested relief relates to an issue raised in the DPC
- Start from the end, when the complaining party is a pro se parent

Topics to cover during PHC

- Issue an order with specific questions that must be answered, when more time is needed to respond
- “Certify” the issues for the hearing at the conclusion of your discussion with the parties
Topics to cover during PHC

- Confirm the date(s) for the completion of the hearing
- Identify evidence to be entered into the record
- Identify witnesses expected to provide testimony

Topics to cover during PHC

- Evidentiary, procedural issues, including -
  - the date and time for the exchange of disclosures
  - how exhibits should be marked prior to the hearing
  - who bears the burden of proof

Topics to cover during PHC

- Access to records issues and/or whether a party anticipates the need to compel the attendance of a witness
- Anticipated motions or requests
Topics to cover during PHC

- Identifying any prior decisions or SAs between the parties that may affect the present matter
- Ascertaining whether any hearing participant will require any special accommodation

Topics to cover during PHC

- Document issues and facts not in dispute
- Eliminate non-hearable issues

Good practice

A written summary of the PHC should be provided to the parties following the PHC.
The pre-hearing order

- The written summary should be in the form of an order
- Issue the PHO to the parties within a reasonable time after the PHC
- Hold the parties to the matters in the PHO

Good practice

allow new issues to be added post the filing of the DPC when it can be done fairly and without undue delay
I. INTRODUCTION

A. The prehearing conference (PHC) is without question the key tool to manage the entire hearing process. While the results of the PHC will significantly impact the length and quality of the hearing itself, how the administrative law judge/hearing officer manages the hearing phase itself will also be a critical factor in whether the purposes of the process will achieved.

B. What are the goals of IDEA’s hearing process? The presenter's believe the hearing process should be:

1. **Fair**, in keeping with due process – foremost to the student given it is about ensuring her/his rights under IDEA, and then the parties;
2. **Expeditious**, given the subject matter relates to the student’s ongoing education (as primarily evidenced by the longstanding 45 day requirement);
3. **Economical and efficient** in utilizing the resources of the SEA, parties and attorneys i.e., time and money;
4. **Effective**, for parties exercising their rights and justly deciding cases; and,
5. **Sensitive**, to the usual needed continuing relationship between the parties after the decision.

C. As we discuss conducting better hearings we must keep these goals clearly in mind. But, often it will be necessary to strike a balance in trying to achieve differing goals i.e., exercise judgment. And, as someone once said: “Good judgment comes from experience. Experience comes from bad judgment.”

II. OTHER PRE-HEARING ISSUES IMPACTING THE HEARING

A. **Amendments to Complaint Generally.** A party may amend its complaint only if the other party consents and is given the opportunity to return to a resolution meeting or the hearing officer
grants permission. But, such permission may only be granted not later than 5 days before the hearing.\footnote{34 C.F.R. § 300.508(d)(4).} In addition, the timelines begin again for both the resolution meeting and the 45 days. However, if a parent is not able to amend the complaint, a separate complaint may be filed on the issue.\footnote{34 C.F.R. § 300.513(c).}

For the sake of expediting resolution of the student’s educational situation and judicial economy (i.e. avoiding a separate hearing) hearing officers should consider encouraging school districts to agree to amendments after the 5-day deadline but prior to the hearing, and possibly further agreeing to waiving returning to a resolution meeting and the restarting of the timelines. If prejudice is alleged an attempt should be made to address it in order to encourage the agreement. (It might also be pointed out that any separate due process complaint filed later may be consolidated with the pending matter.)

B. Motions. As hearings have become more legalistic, parties are often filing more motions. While IDEA does not expressly provide for any type of motion practice, given the broad authority granted hearing officers to manage the process\footnote{See Notes 27 to 31, supra, and accompanying text.}, hearing officers have the authority to entertain and determine motions.\footnote{See Dist City 1 & Dist City 2 Pub. Sch., 24 IDELR 1081 (SEA MN 1996).}

Although both parties have a right to a fair hearing, the matters heard need to be arguably hearable, unnecessary delays avoided, any abuse of the process addressed, and judicial economy fostered.\footnote{Also consider that since there is typically no discovery (save the 5-day rule and access to records), in the IDEA hearing context sometimes “discovery” must take place during the hearing itself.} Motions, usually addressing these matters, provide the hearing officer the opportunity to fairly manage the hearing process.

In handling motions, hearing officers should prompt the parties to file all motions as soon as possible; schedule how and when they will be resolved at the prehearing conference (including, if factual disputes require determination, how the record to do so will be made); and, decide them promptly to give the parties direction early on in their preparation as to the issues which will be heard and how the hearing on them will be conducted.\footnote{Most}
importantly, since court rules do not apply to the IDEA hearings, neither should those pertaining to motion practice. But, analogies to certain court rules in some situations do provide appropriate guidance and might be drawn upon.

C. 5-Business Day Rule

1. **Generally.** The five-day rule has two purposes. First, is to prevent the non-moving party from having to defend against undisclosed evidence produced at the last minute in the hearing. Second, is to ensure the prompt resolution of disputes.\(^7\)

   The date should be set during the prehearing conference, but can be altered at any time by mutual agreement of the parties. In a multi-day hearing, OSEP has opined that additional submissions can be made at any time provided the disclosure is made five days before the next session and the introduction of the evidence is not the sole reason for the hearing delay.\(^8\) As a matter of fairness, this ruling is generally questionable.

2. **Witnesses.** The list of witnesses to be exchanged must reveal the “general thrust” of the witnesses’ testimony.\(^9\) The mere fact that a witness appears on the other party’s list does not necessarily entitle the non-disclosing party to call the witness to testify unless the parties reached an agreement to the contrary. The hearing officer should also watch for abuses (e.g., excessive witnesses just to cover everyone possible) and address any concerns during the prehearing conference.

3. **Non-disclosed Witness/Exhibits.** If a party seeks to admit a witness/exhibit not on the five-day list and the opposing party objects, the hearing officer should –

   a. ascertain why it was not on the five-day list;

   b. inquire as to how is the objecting party actually prejudiced, if at all; and

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\(^6\) The ruling must be based on, and should refer to, the record, including any findings of fact, set forth the legal standard for the ruling, note the competing factors the hearing officer considered/balanced and rule on the action requested.


\(^8\) *Letter to Steinke*, 18 IDELR 739 (OSEP 1992).

c. determine whether the prejudice can be cured (e.g., provide other party time to review, etc.).

If the exhibit/witness seems relevant and the hearing officer believes it should be part of the record, as a last resort, the hearing officer can use the Steinke opinion, if applicable.

D. **Hearing Days.** 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.\(^{10}\)

Consider also 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 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. It is not recommended that this latter approach be utilized if a party is unrepresented.

E. **Scheduling witnesses.** When there are a large number of witnesses, hopefully the parties can agree on a schedule to avoid witnesses wasting their time. The parties can also agree on taking witnesses out of order (i.e., the parent puts on a witness before the school district completes its case) or a set time for a witness might be necessary, interrupting another witness’ testimony. If the parties cannot agree upon such accommodations, the hearing officer has the authority to order such considering what is fair to both parties in terms of each presenting their case and not being prejudiced, while getting all of the relevant testimony on the record in an expeditious manner.

F. **Excessive Number of Witnesses.** While typically not known until witness lists are exchanged, if it appears that a school district is being asked to have available witnesses whose testimony would not be relevant, the school district may request relief. (A school district could also call several unnecessary witnesses to prolong the hearing and harass a parent.) The hearing officer would then have to inquire of the moving party as to the reason the witness is being

\(^{10}\) *Letter to Kerr, 23 IELR 364 (OSEP 1994).*
called and determine whether such is appropriate considering relevancy, the best person to testify as to the alleged fact/opinion, cumulative testimony, etc., considering fairness to both parties and the need to obtain relevant facts. This may take some time during a prehearing conference call, but it will take a lot less time than hearing all of the witnesses on irrelevant matters.

If excess witnesses, or even documentary testimony, are suspected, the hearing officer might choose to give warnings or directives.

G. **Telephonic Testimony**. Whether to allow testimony by telephone or video conferencing is within the discretion of the hearing officer, subject to appellate review. If permitted, the witness should be provided with copies of all relevant exhibits. The hearing officer must also confirm that the witness is alone, in a confidential area and is not reading from the exhibits (unless permission to look at a document is granted). If necessary, a court reporter may need to be with the witness.

H. **Observations**. Home and school visits by district staff, parents, or their experts often pose problems (e.g., union concerns regarding evaluation use, disruptions, talking to staff, etc.). However, in order to meaningfully utilize a right granted under IDEA (e.g., the right to present evidence from an expert witness or obtain an IEE) an observation of the student may be necessary. Additionally, resolution by the hearing officer that enables a party to see the student in the other party’s setting sometimes results in changed views/positions by the school district and/or parent. The hearing officer may have to establish conditions on the observation.

I. **THE HEARING**

A. **Hearings In-Absentia**. Hearing officers have the authority to move forward with the hearing in the absence of a party, provided that the absent party has been given notice of the hearing and ample opportunity to participate in the hearing. Before doing so good practice would dictate the hearing officer try to check with the party/counsel as to possible problems/misunderstandings and place the results of such efforts on the record together with the reasons for

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why the matter will be continued or proceed.

B. Who Sits at the Table. Sometimes the parent does not want more than one district staff person at the table with the district’s attorney. How many district staff and whether an expert (e.g., psychologist) can assist either party’s attorney is again in the discretion of the hearing officer. The hearing officer should consider the assistance the attorney needs in presenting the case, being fair to both parties if the witnesses are sequestered and considering alternatives, e.g., opportunities for the attorney to confer with their expert before cross examination, etc.

C. Rules of Evidence. Clearly, the rules of evidence used in courts are not applicable. Rather, most agencies and hearing officers use a standard similar to that set forth in the Uniform Administrative Procedures Act e.g., admit and give probative effect to evidence of the type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law.”

Irrelevant testimony without objection too often unduly prolongs a hearing. Testimony regarding the alleged bad faith of either party, lack of cooperation, prior violations, unnecessary historical matters, etc., should be cut off, preferably subtly. However, the hearing officer should be careful in that sometimes such testimony is relevant with respect to compensatory education, retroactive reimbursement, deference to an IEP or evaluation, etc.

Admission of hearsay is permissible and does not deprive the other party of the right to confront witnesses.13

Assuming the traditional approach is used, here are some common problems:

1. The complaint alleges claims going back two years and the petitioner seeks to introduce evidence beyond the two year deadline “as background.”
2. Only the proposed IEP is in dispute but a party seeks to introduce a prior IEP(s) for “explanatory purposes.”
3. The “snapshot” rule (i.e., consider only information available to the IEPT at the time the IEP was developed) is used in many circuits. Assume it is here. A party seeks to introduce the student’s later progress or lack thereof.
4. A party seeks to introduce research studies regarding the appropriateness of a methodology for students with needs allegedly similar to the student’s needs.

5. A party seeks to introduce voluminous exhibits without any explanation other than a general assertion of relevance.
6. A party in response to the hearing officer questioning the relevancy of certain testimony asserts the right “to build a record.”

Whenever a hearing officer needs to decide the admissibility of evidence, the relevance of which is tenuous, the probative value of the evidence must be weighed against the time delay and cost to all the parties, spent in hearing it. Under IDEA, these are valid factors to consider in managing the hearing process. See Letter to Anonymous, 23 IDELR 1073 (OSEP 1995) regarding these factors being considered relative to taking testimony by telephone. When initially confronted with a situation such as those noted above, the hearing officer should pause and give serious consideration to the above balance for once you start down the admissibility path, it is extremely difficult to stop or turn back.

D. Student Witness. The parent has the right to determine whether the child testifies.14 Either the parent or the school district might want the child to testify or have the hearing officer meet the child. Should it be decided by the parent that the student will testify, the hearing officer should nonetheless be concerned about cross examination, the environment of the hearing, etc. The hearing officer has the authority to explore other options (e.g., the hearing officer meeting or observing the child informally with all present, the hearing officer asking the child questions proposed by the parties). The hearing officer may have to raise this issue with the parties due to neither party considering any of these types of options.

E. Experts. The qualifications of an expert should be placed on the record.15 Having a party introduce the expert’s vita as an exhibit often expedites doing so. But having the witness declared/accepted as an expert is not necessary. Anyone who can offer testimony beyond the knowledge of the common layperson is an expert to some degree and their background, among other factors (e.g., contact with/knowledge of student) will determine the weight their testimony should be given.

The hearing officer must clarify if necessary the area of expertise (e.g., diagnosis versus programming). Additionally, consideration should be

14 See 34 C.F.R. 300.512(c)(1) (“Parents involved in hearings must be given the right to [h]ave the child who is the subject of the hearing present.”)
given to having conflicting experts discuss an issue with each other on the record. The consent of both parties is advisable.

F. Handling Objections. As a matter of fairness, the hearing officer should try to be consistent throughout the course of the hearing with regard to rulings on objections. Where the objection will arise again, the hearing officer can note a continuing objection on the record. When deciding a difficult objection, or its implications for the hearing uncertain, the hearing officer can take a recess to think before ruling on the objection.

When attorneys spend too much time stating, or responding to, an objection, the hearing officer should establish ground rules. For example, the hearing officer can just allow one or two words as the basis for an objection (e.g., "Objection. Relevancy."), and then ask for more information should clarification or a response be warranted.

G. Handling Witnesses

1. Only one person for each party can question a witness. The scope and duration of cross-examination rests largely within the discretion of the hearing officer but should only be restricted within reasonable bounds. The number of times of re-direct and re-cross is also within the discretion of the hearing officer. If the hearing officer determines a witness is hostile or adverse, the questioning can be leading.

2. Where a witness and attorney are just “jousting” or the witness is nervous to the point of not being able to understand, the hearing officer might restate the question fairly, i.e., to get to the point.

3. Testimony can also be taken by affidavit, provided that the witness giving such testimony shall be made available for cross-examination.”

4. In some circumstances, the opposing party may have the right to review any notes or file of a witness.  

5. A hearing officer has discretion to forbid a witness to discuss his/her testimony with others, including counsel, during a recess.

H. Sequestration. The parents’ decision on whether the hearing is open or closed does not control whether witnesses shall be sequestered. Such is

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in the discretion of the hearing officer. While sequestering is frequently granted, there may be circumstances where it is appropriate to allow potential witnesses in the hearing room, despite a sequestering request (e.g., to allow experts to hear the testimony of other witnesses).\textsuperscript{18} Counsel should also instruct the witnesses not to discuss their testimony with each other.

I. \textbf{Privileges}. Professional privileges are increasingly being asserted by parents to deny access by school districts to the student’s physicians, psychologists, social workers, etc., or their reports. But under the statutes, rules, and case law establishing such privileges, in most states, once the parent places in issue in an administrative proceeding the emotional or medical condition of the student, the parent either has the option of presenting no evidence of professionals regarding the issues or waiving the privilege with regard to all professionals who diagnosed or treated the student regarding the condition at issue.\textsuperscript{19} Hearing officer rulings on whether such privileges are waived and, if so, to what extent, often impact settlement discussions. (An outside professional might attempt to assert a privilege despite the parent’s waiver.)

The district really only has a right to educationally relevant portions of such records. Sometimes the parties can agree on a third party to review the records and make such determinations or the hearing officer will be allowed to make such determinations by reviewing the records “in camera.” Other times the records are provided to the district’s counsel who may make such determination with an agreement that the records will never become a part of the student’s educational record or will be sealed and kept separate from those records.

If a party refuses to disclose records after the hearing officer has ordered such, an issue or the entire appeal could be dismissed.\textsuperscript{20}

J. \textbf{Moving the Hearing Along}. In terms of starting and ending times, breaks, irrelevant or cumulative testimony, the reading of documents into the records, etc., all should be dealt with to move the hearing along as expeditiously as reasonably possible. On the other hand, sometimes giving attorneys time to think about the questions they want to ask on cross-examination and to confer with their party can actually save time.

K. \textbf{Hearing Officer Involvement - Questions}. The hearing officer has the authority (and perhaps the obligation) to question the witness after the

\textsuperscript{18} See Vandalia-Butler City Sch. Dist., 501 IDELR 348 (SEA Ohio 1979).
\textsuperscript{20} See, \textit{e.g.}, \textit{Bd. of Ed. of Oak Park Pub. Sch.}, 20 IDELR 414 (SEA Mich. 1993); \textit{Sch. Dist. of Sevastopol}, 24 IDELR 482 (SEA WI 1996).
parties were given an opportunity. The hearing officer should ask questions (subject to objection) on points the hearing officer believes might be necessary to have on the record in order to render an appropriate decision. Attorneys might object that such is an intrusion in the adversary process, but the entire process should result in a record upon which a decision in the best interest of the student can be based. Hearing officers, however, should be sensitive to strategies of counsel.

L. Hearing Officer Involvement – Witnesses and Documents. Hearing officers can call additional witnesses or request to review certain documents if the hearing officer has reasonable cause to believe such might be necessary as part of the record. But, before doing so, the hearing officer should ask if one of the parties is willing to do so, giving the party the opportunity to present evidence on such points as part of their case. The hearing officer can also seek an independent educational evaluation (“IEE”).21 But, doing so would usually create problems in meeting the 45-day deadline.22

M. Disciplinary Sanctions. Persuasive authority suggests that hearing officers can issue sanctions for misconduct against a party or the party’s representative.23 When misconduct is afoot, in addition to off-the-record conferences, the hearing officer can warn the party or the party’s representative to discontinue such conduct on the record. Should the party’s attorney-representative be engaging in misconduct, the hearing officer can: consider commenting on the conduct in the decision as an adverse factor which should be considered in any claim for attorney’s fees; seek the assistance of a court if litigation is pending; warn, restrict, award costs/sanctions; or actually remove an attorney from continuing to handle the matter.

N. Rebuttal Testimony. The hearing officer is given wide discretion on whether to allow rebuttal testimony by either party. Rebuttal

21 34 CFR § 300.502(d). The cost of the evaluation must be at public expense. Id.
22 The hearing officer cannot unilaterally extend the 45-day timeline or ask for a request to do so.
23 Letter to Armstrong, 28 IDELR 303 (OSEP 1997). See also Moubry v. Indep. Sch. Dist. No. 696, 32 IDELR 90 (D. Minn. 2000) (upholding hearing officer sanction against parent’s attorney); Stancourt v. Worthington City Sch. Dist., 44 IDELR 166 (Ohio Ct. App. 2005) (“Because a due process hearing is quasi-judicial in nature and consists of a hearing resembling a judicial trial, we conclude that a hearing officer in such a proceeding is vested with implied powers similar to those of a court.”); K.S. v. Fremont Unified Sch. Dist., 49 IDELR 182 (N.D. Cal.) (upholding a hearing officer’s sanctions against the parent’s attorney); Indiana Pub. Sch. No. 729-93, 21 IDELR 423 (SEA Ind. 1994); District City 1 and District City 2 Pub. Sch., 24 IDELR 1081 (SEA MN 1996).
testimony should not merely reiterate issues but respond, explain, or contradict new matters raised by the responding party. The five-day rule on witnesses likely would not apply, but fairness must still be considered.

O. Closing Arguments/Briefs. The hearing officer should discuss with the parties whether they would prefer to submit oral closing arguments or written briefs. Ultimately, the hearing officer decides after considering, for example, the timeline and the complexity of the issues raised during the hearing. The hearing officer should also consider providing the parties’ specific direction as to what issues should be addressed.

P. The Record. Making the record is the hearing officer’s most important responsibility. The hearing officer should be mindful of problems that will adversely affect the record being made, such as overlapping conversations, use of acronyms, proper spelling of names, questioners/witnesses referring to exhibits without citing to exhibit numbers, and the use of clarifying gestures. The record is extremely important if your decision is appealed.

The failure to provide a complete transcript or recording is not necessarily a denial of a free and appropriate public education unless the student’s substantive rights under the IDEA were affected.24

NOTE: REDISTRIBUTION OF THIS OUTLINE WITHOUT EXPRESSED, PRIOR WRITTEN PERMISSION FROM ITS AUTHORS IS PROHIBITED.

THIS OUTLINE IS INTENDED TO PROVIDE WORKSHOP PARTICIPANTS WITH A SUMMARY OF SELECTED STATUTORY PROVISIONS AND SELECTED JUDICIAL INTERPRETATIONS OF THE LAW. THE PRESENTERS ARE NOT, IN USING THIS OUTLINE, RENDERING LEGAL ADVICE TO THE PARTICIPANTS.

24 Kingsmore v. District of Columbia, 46 IDELR 152 (D.C. Cir. 2006). See also J.R. v. Sylvan Union Sch. Dist., 50 IDELR 130 (E.D. Ca. 2008) (holding that the ALJ had to rehear the last day of testimony because the missing testimony was so significant).
Writing from the Reader’s Perspective

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1. A because of the the this to to which expected its most necessary particular
   single clues English interpretation it language meaning order people readers
   sentence word convey does gives lacks not.

2. This sentence does not convey a single particular meaning to most people
   because it lacks the expected word order of the English language, which gives
   readers the necessary clues to its interpretation.

3a. What would be the faculty reception accorded the introduction of such a
    proposal?

3b. How would the faculty receive such a proposal?

3c. How would the faculty receive such a proposal if the Council introduced it at
    this time?
4. Andrus also concedes that surface coal mining operations will destroy wildlife. He contends that "while reduced populations will result from increased human activity in the areas and from the loss of habitat, no adverse long-term impact is anticipated."

5. The pie smashed John in the face.
   Mary smashed John in the face with the pie.
   Mary smashed the pie into John's face.
   John's face was smashed by the pie.
   John's face was smashed by Mary.
   John's face suffered under Mary's pie attack.
   John suffered severe injuries as a result of Mary's pie attack.

   Defendant maliciously and without provocation smashed the pie into the plaintiff's face.

   Plaintiff suffered severe and irreversible damages as a proximate result of defendant's malicious and unprovoked pie attack.
6a. The window was broken.

6b. Somebody broke the window.

7a. Ms. Grundy taught me grammar.

7b. I learned grammar from Ms. Grundy.

7c. Grammar I learned from Ms. Grundy.
8. The trial court's conclusion that the defendants made full disclosure of all relevant information bearing on the value of Knaebel's stock is clearly erroneous.

9. Any assertion that chemical "retesting" is a valid technique but because of a time lag has not been recognized by the scientific community is untenable.

10. Churches exhorting members to sever family and marital ties, rodent infestation, and employee discharge, and a refusal to make a retraction in a newspaper, were all considered outside the definition of "extreme and outrageous."
11. As used in the foundry industry, the term "turn-key" refers to responsibility for the satisfactory performance of a piece of equipment in addition to the design, manufacture, and installation of that equipment. P et al agree that this definition of turn-key is commonly understood in the foundry industry.

12. A disease that progresses with few or no symptoms to indicate its gravity is an "insidious" disease, under this definition. Asbestosis, neoplasia, mesothelioma, and bronchogenic carcinoma are all examples of insidious diseases. Asbestos insulation installers who have inhaled asbestos fibers over a period of many years regularly contract these diseases.

13. The utilization of dextropropoxyphene products has been increasing gradually since 1981. Sales of these products have risen significantly in 1983 as a result of several factors, including the withdrawal of Zomax from the market in March 1983 and the Tylenol scare in 1982. Total prescriptions for dextropropoxyphene products continue to show strong and consistent growth since the removal of Zomax.
14a. Much has happened since the Apollo program and the Mercury and Gemini missions that paved the way for it in the early 1960's. Numerous scientific and communications satellites have been launched into Earth orbit. Unmanned deep-space probes have been sent to the sun, the moon, and the planets, where they gathered a wealth of information about our solar system. Skylab demonstrated that American astronauts could live and work in space for months at a time. And a dramatically different launch vehicle entered service: the space shuttle. The winged reusable craft was supposed to make space flight routine and cheap.

14b. Numerous scientific and communications satellites have been launched into Earth orbit. Unmanned deep-space probes have been sent to the sun, the moon, and the planets, where they gathered a wealth of information about our solar system. Skylab demonstrated that American astronauts could live and work in space for months at a time. And a dramatically different launch vehicle entered service: the space shuttle. The winged reusable craft was supposed to make space flight routine and cheap. Much has happened since the Apollo program and the Mercury and Gemini missions that paved the way for it in the early 1960's.
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*American Scientist,* Nov.-Dec 1990. Available online by accessing  
[www.americanscientist.org](http://www.americanscientist.org) and searching there for “Gopen.”

Both of the above books are available at 10% off when ordered from the website of  
the Pearson Education Division of Longman Publishers. Access their website,  
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