Prehearing Procedures for an Effective Hearing

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I. INTRODUCTION.

A. Neither IDEA nor its regulations require a prehearing conference. However, many state statutes, regulations, or procedures do require one, and in other states, it is left to the discretion of the hearing officer. Check in your state and if there is such a requirement, note any specific items that must be addressed, documented, and how.

B. Remember under IDEA we have basically four types of hearings: (1) the "regular" hearing that would involve a district proposing/refusing to initiate/change the identification, evaluation, placement, or FAPE of a student, typically requested by a parent; (2) a hearing requested by a district to show its evaluations are "appropriate" in response to a parent's request that an independent educational evaluation (IEE) be publicly funded; (3) a hearing requested by a district to override a parent's refusal to consent to an evaluation or placement; and (4) any other matter that a state might allow be taken to a hearing.

C. In those states with a two-tiered administrative hearing process under IDEA, the state review officer (SRO) may choose to conduct a conference call immediately after the appeal has been filed whether one is required by state law or not. Items that might be addressed would include whether either party has any objection to the SRO serving in the matter, desires to submit additional evidence, desires to submit oral or written argument, and depending upon the answers to these matters, desires to request an extension of the 30-day limit.

II. GENERAL CONSIDERATIONS.

A. Necessity/Authority. Hold a prehearing conference, typically over the telephone (even if it means at an odd hour). You have the authority to do so as a matter of due process, by analogy to pretrial conferences under court rules and possible state laws or special education rules. Consider the need for an interpreter or accommodations for the hearing impaired when necessary. Typically, a record is not necessary unless you can anticipate unusual circumstances (e.g., important motion/argument, a need for testimony, a very difficult attorney, etc.). You (or one of the parties if they want) could always tape record. Most long distance companies will do so on a conference call they set up (and some transcribe it). Consider also now the option of the parent for a written or taped record. (34 CFR 300.509(a)(4)). In any event take copious notes. *See* Sch Dist of Sevastopol, 24

IDELR 482 (SEA WI 1996), to the effect that IDEA procedural safeguards do not apply to prehearing, therefore, there is no right to any record.

As to whether the parties are on the line, leave this decision to the advocates (unless you want them on line for some reason). If the hearing is open, other parties, such as news reporters, may also be on the line, but such would be in your discretion (e.g., with guidelines as if at board meetings). If either party requests an in-person conference, ask why. It is usually for a good reason and I will do it, particularly where the parties want you to be more involved in a possible settlement.

B. Structure and tone. **This conference call is a KEY to your taking control of the hearing process and the participants.** If possible, have a secretary set up the call to avoid having to converse with the parties. Often, it is helpful to request of one of the parties to fax or mail only a copy of the IEP being appealed (including goals and objectives). Consider also requesting of the parents a copy of any notice of the reasons they gave to the district (and proposed resolutions) pursuant to 34 CFR 300.507(c) but note it is "confidential."

Fax or mail to the parties/advocates a letter setting forth the agenda for the call (*see* Attachment A). It starts to set the tone for the process.

Generally, the sooner the prehearing conference is held, the better, even if it has to be adjourned because "the attorney doesn't know anything about the case yet." Don't let the parties, particularly attorneys, delay it for no good reason. Suggesting it be held at 7 a.m. or over the weekend often opens up schedules! The timing of the prehearing conference relative to the commencement of the hearing must consider not only the five-day rule, but the ten-day rule for the district to offer a possible settlement, as well as being fair to the parties in terms of preparation, etc.

It has been my experience that an informal, but structured conference works best. I have everyone call each other by their first name including me. (It's less intimidating for parents, district staff, and non-lawyers, and usually causes lawyers to be less "lawyer-like.") But sometimes more formality helps keep control. Use the "style" that you're most comfortable with. Consider asking the parties. When a party gets into history, facts, or argument I gently cut them off. Explain that whatever is said cannot serve as the basis for your decision, but only evidence entered at the time of the hearing. If you let one party get into their story or argument, to be fair you have to let the other party respond and it's just not necessary or constructive during a prehearing conference (unless you later want to try and resolve an issue).

Where a party has no advocate and either inadvertently or deliberately attempts to draw you into an advising or advocacy position, discuss the problem and the limitations on your role. Check to see whether the district has provided

information regarding free to low-cost legal services. With permission of the district you might suggest advocates or attorneys in the area. Direct the party to advise you and the opposing party immediately if they retain an advocate.

III. FUNDAMENTAL MATTERS TO BE ADDRESSED.

A. Potential conflicts. Disclose any contacts with either party or their advocates, even those that might give the appearance of partiality whether appointed or mutually selected. You are presumed to be impartial. The presumption can be overcome by actual personal prejudice or bias or where the probability of actual bias is too high to be constitutionally tolerable (e.g., when the hearing officer has a pecuniary interest in the outcome, has been the target of abuse/criticism from a party or their advocate, is enmeshed in other matters involving a party or their advocate, or might have prejudged the case). *See* West Bend Sch Dist, 24 IDELR 1125 (SEA WI 1996), and *Brimmer v Traverse City Area Pub Sch*, 22 IDELR 5 (USDC MI 1994), where hearing officers had represented parents/districts. Prior rulings or opinions that are merely unsatisfactory to a party do not give rise to a finding of prejudice/bias. *Palmer v U.S.*, 249 F2d 8 (10th Cir 1957).

I allow the parties or their advocates to ask questions of me if they have any concerns and confirm that neither has any objections to my serving. *See,* regarding a record to challenge impartiality, Minisink Cent Sch Dist, 16 EHLR 331 (SEA NY 1989), and *Falmouth Sch Comm v Mr. & Mrs. B.*, 32 IDELR ¶256 (USDC ME 2000).

A record should be made when a claim of conflict of interest/bias is raised. Options are to have it done by an exchange of letters, tape record/transcribe the conference call (or another call for that purpose), or do it at the outset of the hearing. You should rule on any request to reuse/disqualify as soon as possible. The issue must be timely raised. For an excellent discussion on how to analyze disqualification under IDEA see Marblehead Pub Sch, 36 IDELR 170 (SEA MA 2002).

B. Mediation. Check right at the outset as to whether the parties are aware of mediation, have considered it, if not why not, and if they are going to pursue it, how they choose to proceed with the telephone conference call and the hearing in general. Should the parties choose to pursue mediation, at a minimum, set the time for another telephone conference call a few days after the mediation will take place to keep control of the situation. Advise the parties that if the matter is resolved and if you receive written confirmation from the parties that it can be dismissed, the call will be automatically cancelled.

C. Additional parties. Consider if there any additional parties who should be participating in the conference call. Check the IEP to see if it identifies any other districts or agency providers with a possible interest in any issue in dispute. Should any party try to intervene (or even file an amicus brief), consider drawing

an analogy to the court rules on intervention and the grounds when such is allowed, the extent of participation, conditions, etc. *See* Needham & Newton Pub Sch, 35 IDELR 44 (SEA MA 2002). Whether a hearing officer has jurisdiction over another agency will be dependent on how a state under its plan and law implements IDEA. *See*, e.g., *L.P. v Edison Bd of Ed*, 20 IDELR 6 (NJ Sup Ct 1993).

D. Identifying the issues. Taking a strong stand on each party identifying all issues in dispute and their positions regarding each issue is important for several reasons. First, the party responding needs to know the disputed issues in order to prepare for the hearing, just as a matter of fairness. (This is particularly significant where the parent appeals but the district must proceed first!) *See Bd of Ed of the Green Local Sch Dist*, 18 IDELR 1092, at 1098 (USDC OH 1992), and In re: Contra Costa County Sch Dist, EHLR 502:151, at 157 (SEA CA 1980). Second, when parties don't know what they're fighting about, the process is less focused and takes more time. Third, some issues may not be hearable (and if the parties do not raise an objection, you should at some point where jurisdiction is lacking). Fourth, it offers the hearing officer a subtle opportunity to assess and explore settlement. Fifth, under IDEA-R unless the parent provides notice of the reasons for requesting a hearing (and proposed resolutions) should the parent prevail he/she could be denied attorney fees. This provision clearly evidences a policy under disclosure of issues. This notice is to be "confidential" but from whom is not clear. Hopefully it should be made available to the hearing officer (34 CFR 300.507(c)).

On rare occasion, an appealing party will contend it need not identify the issues. In my view, due process and common sense dictates it must. Further, analogies to a judge's authority to do likewise in a pretrial conference under court rules is appropriate. A party's refusal to identify issues, after a warning of possible dismissal, could result in dismissal (with you retaining jurisdiction to allow the party to reopen the hearing upon condition the directive to identify issues is obeyed).

If they can't do so (because they need an attorney or otherwise) give them time to possibly add additional issues, set a deadline for them to do so to you in writing with a copy to the opposing party. The opposing party must also be given a set time to respond to you regarding objections to the additional issues, if necessary. Today, too often, an advocate's failure to be able to identify the issues in dispute is due to a lack of opportunity to meet with the client or appropriate preparation (believing they can get to it on the eve of the hearing).

Get specifics (i.e., go through the program, services, etc.) of the IEP on appeal, exactly what is disputed and the relative position of each party on each issue in dispute--don't accept "refusal to provide FAPE," etc. I usually ask clarifying questions before allowing the other party to do so, state defenses, or add issues. If the party (often the parent) has difficulty identifying "issues," ask what they want,

e.g., What relief do you desire?; What would you like me to order assuming you are right?; If you could write my decision as of right now, what would it say regarding this issue? When the parent says: "I am not the expert--the district is" advise the parent at some point before the hearing he/she still has to have a position.

Be sure that issues not in dispute are also documented.

With regard to exploring settlement at this point, sometimes I note my "understanding of the law," subject to the parties showing me otherwise, and this cuts through unreasonable positions or advises ignorant parties of what the law is—both of which often prompt disposition/agreement of the issue. Additionally, if a party claims insufficient notice, records withheld, etc., ask them gently "so what," "how can we rectify the situation so you can proceed to a hearing?" or "what relief or action are you asking of me because of this" in an attempt to resolve the problem and dispose of the issue.

Don't overlook or assume other critical fundamental issues that might be present. For example, does the person requesting the hearing have the right to exercise that request? If divorced, does the requesting parent have legal custody? Is the student over 18 and of questionable competence? (consider the regs regarding transfer of parental rights at age of majority. 34 CFR 300.517. Is a non-parent acting on behalf of the student? Does the student/parent reside in the district? If you believe an issue not raised by either party must/should be addressed alert the parties as soon as possible as a matter of fairness.

If the district has requested a hearing in response to a parent request for an IEE, find out which "evaluation" the parent contends is inappropriate and why. (*Note*: Several OSEP rulings and now the regs (34 CFR 300.502(b)(4)) opine that the parent need not identify the reason for disagreement when making their request for an IEE.) Again, the answers to these questions can result in the hearing being much more focused. Consider asking the parties: what constitutes an "evaluation" for these purposes, e.g., does assessment of whether the inclusion option is appropriate for a student? What do they contend is the "test" for the appropriateness of an evaluation? Can two evaluations be appropriate, yet reach opposite conclusions?

E. Other Processes. Depending upon the circumstances, non-IDEA issues regarding related disputes might be requested/pursued (e.g., 504 claims, IDEA complaints, FERPA, etc.). With your assistance these might be resolved. If the parties agree, you can decide any of these issues (but clarify possible implications in terms of their right to appeal your decision). Consideration should be given with regard to some issues whether even by stipulation jurisdiction can be conferred upon you (and if not, later what risks/problems might result). If not resolvable, the interface between these various potential or pending proceedings and the IDEA hearing should be addressed if necessary.

Regarding any pending complaints (i.e., alleged violations of IDEA or the IEP), explain how the identity of issues in the hearing, if any, must be determined (and do so at some point). Under the regs the investigation by the SEA of complaint issues also raised in a hearing will be held in abeyance pending the hearing decision. 34 CFR 300.661(c). *See* Letter to Chief State School Officers, 34 IDELR 264 (OSEP 2000), regarding the interface between IDEA's hearing and complaint processes.

If 504 issues are present, should the hearings be combined (although possibly separate decisions rendered)? If a party objects, you might ask why to see if the problem can be addressed.

In addition, the interrelationship between a contested IEP hearing and a district requested IEE hearing should be addressed if present (i.e., should the hearing on the IEE be done first or doesn't it matter?).

Finally, where juveniles/probate court proceedings are pending, some coordination in the proceedings should often be sought (possibly by getting the permission of the parties to contact the juvenile/probate court judge). *See* In re Child with Disabilities, 20 IDELR 61 (SEA TN 1993), *aff'd* 21 IDELR 783 (USDC TN 1994), and 25 IDELR 227 (6th Cir 1997), where a hearing officer ordered a district to seek dismissal of a juvenile court petition where it had violated IDEA. *See also* Easton Area Sch Dist, 24 IDELR 1077 (SEA PA 1996), where juvenile court order did not deprive hearing officer of jurisdiction. IDEA does not limit a juvenile court's ability to hear cases involving IDEA students--state law does. Letter to Hayden, 24 IDELR 387 (OSEP 1995). IDEA's provisions clarify districts can refer criminal matters to juvenile courts (20 USC 1415(k)(9)). *See* 34 CFR 300.529.

Bottom line, typically the more aspects of the dispute you can resolve, the better. At a minimum, at least try to establish some sense of coordination between the various proceedings.

F. Non-hearable issues. The parties may contend (or you may offer) that a particular issue is not hearable, e.g., FERPA issue, issue previously litigated and determined, a specific teacher is desired, alleged retaliation by district, district pursues truancy, the qualifications of a service provider, a particular technique or methodology, student no longer a district resident, etc. If you and the parties are comfortable doing so, resolve it during the conference call. If you are not comfortable with an on-the-spot decision, ask for help by requesting letters by telephonic mail (fax) from the advocates in a couple of days and make the decision by letter pronto. By tackling non-hearable issues head-on, you and the parties can avoid unnecessary preparation and hearing time. If you lack jurisdiction consider identifying a possible avenue/process for the parent to seek relief (e.g., who they contact, their phone number, what are the procedures, etc.).

G. Failure to raise issue at IEP meeting. If the parents fail to participate in the IEP meeting, or participate but fail to raise an issue, a district might contend that it is not hearable. A primary basis would be that the parent is attempting to avoid the critical IEP process deemed essential in Rowley both in terms of giving the district a chance at the IEP to develop an appropriate program and providing an IEP which is supposed to be a primary consideration in any hearing/review. *See* Doe v Sumner County Sch System, 16 EHLR 134, at 137 (SEA TN 1987), *rev'd on the facts*, *not the principle,* at EHLR 559:391, at 398-399 (USDC TN 1988), and EHLR 441:544, at 546 (USDC TN 1989). *See also Cordrey v Euckert*, 17 EHLR 104, at 106, and *Doe v Defendant I*, 16 EHLR 930, at 932 (6th Cir 1990). *See, to the contrary*, *Pastel v District of Columbia Bd of Ed*, EHLR 553:112 (USDC DC 1981), Sch Administration Dist #56, 18 IDELR 548 (SEA ME 1991), and Letter to Zimberlin, 34 IDELR 150 (OSEP 2000). Consideration might now also be given to whether the parent gave the notice of reasons for going to hearing and, if so, the district's response. Also important is to ascertain whether the parent tried to raise the issue (e.g., requested an IEPT meeting) but the district ignored or unduly delayed responding. If so, such must also be considered in how to proceed.

Relief granted may vary from dismissing the hearing, remanding to an IEPT meeting, proceeding to hearing with some issues (with others not being hearable) or letting parents raise the issues at hearing because further discussions in addition to those which might have occurred after the IEPT meeting would not be fruitful. If remanded to an IEPT meeting possibly noting whether there should be no attorney's fees implications is an option. *See Payne v Bd of Ed, Cleveland City Sch*, 21 IDELR 923 (USDC 1993) and Caledonia Pub Sch, 1 ECLPR 850, at 854 (SEA MI 1993).

If the parties only partially completed the IEP prior to hearing, consideration should be given to requiring them to complete it as opposed to completing it as a part of the expensive hearing process. Whenever remanded to an IEPT meeting, specific timelines and directives should be given to the parties if completion of the IEP is ordered. *See* Northville, 16 EHLR 847, at 857 (SEA MI 1990).

IV. POTENTIAL PROCEDURAL PROBLEMS.

A. Various possible problems. You should not only request the parties to raise any such problems, but be sensitive as the discussion proceeds in terms of potential problems that you envision given the nature of the issue, the lack of cooperation between the parties, out-of-state witnesses, a large number of witnesses, records problems, etc. If you sense a possible problem, delicately inquire. The following are just examples of the types of problems which can arise and factors to consider in resolving them.

1. Advocate conduct hearing via phone. Requested by parent advocates some distance from the hearing, this practically seems next to impossible. But, it has been done. I would strongly recommend avoiding it.

2. Open hearing versus sequestration of witnesses. The parent's decision on whether the hearing is open or closed does not control whether witnesses shall be sequestered. Such is 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). In re: VanDalia-Butler City Sch Dist, EHLR 501:348, at 351 (SEA OH 1979). The witnesses should also be instructed, if possible, not to discuss their testimony with each other.

3. 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 alternatives, e.g., opportunities for the attorney to confer with their expert before cross examination, etc.

4. Access to records. Clearly a parent has access to "educational records." 34 CFR 300.562. Under the regs the parent has the right to examine "all records" (34 CFR 300.501(a)). But what about a district staff's notes which are not a part of "educational records" under FERPA? Unless the professional desires to assert a privilege on behalf of the student claiming release might harm the student (although typically the parent could waive the privilege on behalf of the student) the parent will argue the right to access the records as a matter of due process. If this issue arises you must decide it (probably after reviewing the records "in camera"). *See* Analysis at p. 12641.

5. Privileges. Professional privileges are increasingly being asserted by parents to deny access by 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 an 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. *See,* generally, *I.D. v Westmoreland*, 17 EHLR 417 and 684 (USDC NH 1991), the IDEA giving both parties the right to a copy of all "completed evaluations" five business days prior to the hearing. Hearing officer rulings on whether such

privileges are waived, and, if so, to what extent, often impact settlement discussions. (Again, an outside professional might assert a privilege despite the parents' waiver but their standing to do so appears very questionable.)

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 you have ordered such, the appeal could be dismissed with you retaining jurisdiction to allow the hearing to be reopened upon the party agreeing to obey the order. *See*, e.g., Bd of Ed of Oak Park Pub Sch, 20 IDELR 414 (SEA MI 1993), and Sch Dist of Sevastopol, 24 IDELR 482 (SEA WI 1996).

Lay advocates probably have a privilege regarding communications with their client and work product doctrine protection. *See Woods v N.J. Dept of Ed*, 19 IDELR 1092 (USDC NJ 1993).

6. Visitations. Home and school visits by district staff, parents, or their experts often pose problems (union concerns regarding evaluation use, disruptions, talking to staff, etc.). Resolution by the hearing officer which enables a party to see the student in the other party's setting sometimes results in changed views/positions by the district and/or parent. The hearing officer may have to establish conditions on the visitation. *Note:* A hearing officer may not make an observation without the consent of the parties or pursuant to a ruling on a request that he/she do so.

7. Discovery. There is no express right to discovery in a special education due process hearing (except the right to examine educational records) unless otherwise provided under state law (e.g., if a state Administrative Procedures Act applies). Thus, the hearing officer must employ fundamental fairness and common sense in exercising discretion as to its use. *See* No. 90-51, Hudson Sch Dist, 16 EHLR 1340 and 1392 (SEA NH 1990), and Letter to Stadler, 24 IDELR 973 (OSEP 1996). Allow discovery only when necessary for proper presentation or preparation of a party's case subject to limitations in the event of privileges or harassment. *See* Analysis at p. 12612 to effect that information disclosed during mediation still subject to discovery if it was otherwise.

8. Conducting further evaluations. A district may request the opportunity to conduct further evaluations of the student. In addition to the factors relating to allowing discovery generally, as noted immediately above, the hearing officer must consider, among other things, what evaluations the district has done already, why it claims to need another, and the parent's reason for objecting (e.g., harm to the student, possible delay of the hearing, etc.).

9. Scheduling witnesses. If there are a large number of witnesses hopefully the parties would agree on a schedule to avoid witnesses wasting their time. The parties can also agree on taking witnesses out of order (i.e., the district puts on a witness before the parent completes their case) or a set time for a witness might be necessary, interrupting another witnesses' testimony. If the parties cannot agree upon such accommodations, the hearing officer can order such considering what's 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.

10. Interpreters. Consider the level of qualification necessary and need to have two interpreters in order for them to alternate. Remember, they must be sworn in. *(Note: Interpreters called as witnesses have a privilege against testifying regarding communications interpreted unless waived.)* Consider the new option of a court reporter with a computer screen.

11. Burden of proof. Typically either the district or the party appealing carries the burden, but check in your jurisdiction. It might be changed under particular circumstances in some jurisdictions by agreement of the parties, where the parent has no advocate, if one party is proposing a much more restrictive environment, where procedural errors have resulted in an appealing parent not fully participating in the development of the contested IEP, etc. Who has the burden should be raised during the pre-hearing conference call to avoid any misunderstanding.

    Where who has the burden may depend on whether the parents' allegations that the IEP is procedurally defective are correct, suggest the parties agree (or you assign) who goes first. Plus, neither party waives anything and you decide who has the burden in your final decision.

12. Testimony by telephone. Although testimony in person is best, testimony by telephone is allowable within discretion of hearing officer to expedite the proceedings. *See*, Letter to Anonymous, 23 IDELR 1073 (OSEP 1995), *Hampton Sch Dist v Dobrowolski*, 17 EHLR 518 (USDC NH 1991), and Las Virgenes Unified Sch Dist, 17 EHLR 373 (SEA CA 1991). To the contrary, *see Walled Lake Consolidated Sch v Jones*, 24 IDELR 738 (DC MI 1996). Consider using a court reporter at the location of the telephone witness to protect against the witness utilizing documents, or

instruct the witness to advise if utilizing documents. Be sure to provide the telephone witness with copies of exhibits which may be utilized and have a speakerphone set up—and tested.

13. Rules of evidence. Clearly, the rules of evidence used in courts are not applicable. A possible standard is that set forth in a state's Administrative Procedures Act (e.g., a hearing officer may 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. Typically under this standard hearsay is permissible, but would be given less weight.

14. Subpoenas. The parties have the right to "compel" witnesses. Typically, this has been interpreted to mean that school districts will make their current employees available, i.e., not employees on leave, retired, employed by other districts, no longer with the district, etc. As to other witnesses, state law procedures govern whether the hearing officer or another agency issues the subpoena (and typically the requesting party will be required to enforce it). The hearing officer may also be requested to quash or restrict a subpoena, e.g., immateriality. If subpoenas are issued by another agency the party obtaining it is to provide you with a copy so you can keep track of what's going on.

15. Student testifying. By law the parent has the right to determine whether the child testifies. Either the parent or district might want the child to testify or have the hearing officer meet the child, but be concerned about cross examination, the environment of the hearing, etc. Other options can be explored such as the hearing officer meeting the child informally, observing the child, asking the child questions proposed by the parties, etc. You may have to raise this point due to neither party considering any of these types of options.

16. Stay put. Hearing officer's jurisdiction over the "stay put" placement is sometimes contested. But, action by a hearing officer is dictated almost by necessity (e.g., new district resident, grade change, leaving private school, prior school closes, program moved, etc.). *See generally* Letter to Chassy, 30 IDELR 51 (OSEP 1997). In Heldman, 20 IDELR 621 (OSEP 1993), it opined that a dispute as to a student's "current placement" under the stay should be determined by a hearing officer or a court. Decisions on the "stay put" can impact settlement. Parties can always stipulate that the hearing officer should decide stay put.

    How to decide it (i.e., process) is a problem given time constraints. Consider using (by agreement of the parties if possible) a more expeditious, less formal proceeding, e.g., swearing in persons over the

telephone in a transcribed conference call, with later adjustments in your ruling possible upon either party's request. Under Part H, portions of the IFSP not contested are to be implemented.

Under the regs a hearing officer has the authority to consider granting "Honig-type" injunctions as well as review interim alternative placements (and manifestation determinations) on an "expedited basis" (34 CFR 300.521 and 525).

17. How the hearing will be run. Unless both parties are represented by attorneys familiar with the process, the hearing format should be reviewed. Further, where one of the parties is not represented by an advocate/attorney or the parties are particularly contentious more discussion would be appropriate with regard to the formality, or lack thereof, which will be expected. A sample format is best. Consider suggesting where appropriate less formal procedures.

18. Parent testifying without advocate/attorney (or is attorney). In order to provide some structure to the parent's testimony, the parent should be advised of two options: either ask himself/herself a question and answer it or have some other person, possible the hearing officer, ask prepared questions. Absent agreement from the district, the parent should not be allowed to just give a narrative.

    Parent who is attorney should not be disqualified to represent self because parent will testify (as might happen under some court rules).

19. An extreme number of witnesses. While typically not known until witness lists are exchanged, if it appears a district is being asked to have available witnesses whose testimony would not be relevant, the district may request relief. (A 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 party as to the reason the witness is being 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 the prehearing conference call, but it will take a lot less time than hearing all of the witnesses on irrelevant matters! Refusal to do so may result in dismissal with jurisdiction retained to allow party to reopen. *See* Bd of Ed of Oak Park Sch Dist, 20 IDELR 414 (SEA MI 1993). (*Note:* Ask the parties to give you a copy of their witness list. *See* paragraph C immediately below regarding five-day rule.)

    If excess witnesses, or even documentary testimony, is suspected, the hearing officer might choose to give warnings or directives (e.g., don't put in the student's entire educational record).

V. OTHER LOGISTICAL MATTERS.

A. Setting hearing date(s). The law requires the decision to be rendered within 45 days of the hearing request, but extensions can be granted by the hearing officer for good cause upon the request of either party. Under the regs certain hearings (e.g., in discipline situations) must be held on an "expedited basis" (34 CFR 300.521 and 525). Further, once the hearing officer is selected, it is within his/her discretion to grant adjournments. Steinke, 18 IDELR 739 (OSEP 1991). In some situations, to alleviate unfairness, costs might be a condition for granting an adjournment. In other situations, given the unfairness of the "stay put," options might be given a party, e.g., proceed now without counsel or wait and proceed with counsel but reach agreement on an interim placement. Supt of Public Instruction (WA), 19 IDELR 82 (OCR 1992). While the time and place must be "reasonably convenient" to the parent, the fairness to the parties in presenting their case vis-a-vis conflicts, availability of witnesses and 45-day time line must all be considered. Usually, greater deference can be given to delay if the party seeking the hearing is making the request (unless the delay is solely to prolong the stay put). Summer or other vacation breaks in and of themselves should not be cause for delay unless witnesses are unavailable by telephone, etc. *Note*: Federal monitors in most states are now requiring that state departments of education assure adjournments be to some date certain with that date and the reason for the adjournment being documented. The extension of the 45-day deadline must be requested by a party and not encouraged or initiated by the hearing officer. Letter to Kerr, 22 IDELR 364 (OSEP 1994). Denial of a parental request that hearings only be held after school and during the evening has been upheld. *See* In a Matter of a Child with Disabilities, 17 EHLR 80 (SEA MI 1990). *See also* Anonymous, 18 IDELR 1303 (OSEP 1992), in that district can consider own needs. Again, when dates can't be found, suggesting Saturdays, Sundays, and holidays usually opens up calendars! Alleged problems caused by union contracts typically can be overcome, if necessary by a subpoena.

In determining the place for the hearing, considerations would include proximity to the witnesses, number of anticipated participants, accessibility, privacy, potential for disruption, and occasionally the need for "neutrality." If necessary, the hearing officer must decide the place.

B. Verbatim record. Given the right to an appeal, a record is an essential part of the due process hearing. Under the regs the parent now has the option of a written or electronic record (34 CFR 300.509(a)(4)). If the record is “electronic,” inquire what the party believes this means. Then take appropriate measures to either properly tape record the hearing or have it on disk. *See* Houston Ind Sch Dist, 25 IDELR 163 (OCR 1996), to the effect that in 504 hearing there is no right to court reporter just tape recording. If a court reporter is to be utilized, make sure whoever retains the reporter gains assurance that the transcription will be available soon after the hearing. If a long hearing is anticipated, make sure both

parties have access to the transcript at the same time during the hearing. Requiring that the pages of the record be numbered consecutively over many sessions is often easiest.

Some contend American Sign Language (ASL) is a visual language and therefore requires videotaping of the hearing in order to have a verbatim record. Since most hearing officers and judges do not understand ASL and any video would thus require reinterpretation, to require videotaping would seem of questionable utility.

C. The Five Business Day Rule. This used to be calendar days but is now business days under the regs. The date should be set, but can be altered at any time by mutual agreement of the parties. In a multi-day hearing, OSEP has ruled that additional submission can be made at any time provided disclosure is made five days before the next session. Steinke, 18 IDELR 739 (OSEP 1991). As a matter of fairness, this ruling is questionable.

If a party seeks to admit an exhibit not on the five-day list and the opposing party objects: 1) ask why it was not on the five-day list; 2) how is the objecting party actually prejudiced if at all ; 3) can the prejudice be cured (e.g., give other party time to review, etc.). If it seems relevant and you believe it should be part of the record, as a last resort you can use the Steinke ruling if applicable or threaten to reconvene the hearing regarding just this exhibit in five days. *Note:* Under the regs each party also has the right to a copy of all "completed evaluations" at least five business days prior to the hearing (34 CFR 300.509(b)).

Generally, the list of witnesses to be exchanged must reveal the "general thrust" of the witnesses' testimony. Bell, EHLR 211:166 (BEH 1979). Require the parties to provide you with a copy of the list of witnesses to be sure it was exchanged and to gain some feel for the number (although they need not all be called). Make sure parties understand persons on the other party's list may not be called. *See* Mountain Home Pub Sch, 17 EHLR 374 (SEA AR 1991).

D. Exhibits. Copies of proposed exhibits must be exchanged under the five-day rule unless the parties agree otherwise because they already have a copy.

Force the parties to discuss their exhibits to avoid duplications (i.e., joint exhibits) and to identify which they find objectionable. Have them mark all their exhibits and provide you with a list and a copy before the hearing (with the possible exception of exhibits objected to in some circumstances.) Be sure the parties understand that non-paper exhibits such as videotape, tape recordings, photographs, etc., must also be copied and exchanged under the five-day rule.

E. Security. On occasion, a district may raise a concern if a parent has assaulted or threatened staff. If you believe a real risk is presented use the least intrusive

measures necessary, e.g., security staff immediately on call or in area, hold hearing in police building, security staff in hearing room, etc.

F. Stipulation of facts. If reasonably possible, suggest to the parties that they stipulate as to certain facts (e.g., educational history, etc.) in order to reduce the number of needed documents and shorten the time of the hearing. Stress, however, that if such a process is going to lead to much wrangling, it's not worth it.

G. Prehearing statements/briefs. Typically, these would not be required, but if thought to be helpful, may be requested at the option of the hearing officer (e.g., uncertainty regarding the law as to what must be shown, etc.). The deadline for submission would not be the five-day rule, but would be set by the hearing officer.

At the time of the prehearing conference call, the parties are not usually ready to decide on whether to submit post-hearing briefs. But, if they are, the deadline for doing so, typically tied into receipt of the record, should be set.

H. Exploring settlement. Even though the parties may have discussed settlement in the past (possibly in conjunction with the new parent notice of reasons and proposed resolutions) or engaged in mediation (now strongly encouraged under IDEA-97 and regs), depending upon the nature of the issues in dispute, the attitude of the advocates, and their parties, I will sometimes ask them if they would like my ideas on possible settlement options. For example, offering tentative conclusions regarding disputed issues or suggesting possible areas of compromise.

No doubt, the reputation and the party's perceptions of the hearing officer otherwise will be a major factor in how far the parties will let the hearing officer go and the extent of the risk the hearing officer takes when he/she chooses to be more aggressive in exploring settlement opportunities. It's a delicate balance to strike, full of risks, but most satisfying and in the best interest of all parties, particularly the student, if the hearing officer can prompt a good settlement. But, as some would say, unless you have a "feel for the deal" in terms of whether it is there and when to explore it, it might be best to not pursue settlement at all or too vigorously.

I. Subsequent telephone conferences. Stress to the party that if problems arise after the initial conference to discuss them between themselves and, if necessary, seek another conference call with you to address the problem prior to the hearing. Oftentimes such calls are prompted by needs for adjournments, the unavailability of a witness or a desire to gain assistance on a possible settlement. Such conferences are clearly preferable to getting to the hearing and not being able to proceed at all or as expeditiously as might otherwise have been possible. Be sure to document the results by letter!

J. Ex-parte communications. Generally, as a matter of due process, such communications are prohibited. But, on purely logistical matters, such as scheduling telephone conference calls, that would be okay. With regard to ex parte communications of anything more substantive, they should be engaged in by the hearing officer only if there is an express agreement to the ex parte communication and the scope that such communications can cover. Under any circumstances they are very risky. Such an agreement must be confirmed in writing. Any letter to you not copied to the other party should be sent to that party at once.

K. A word of caution. The manner in which this prehearing conference is conducted by the hearing officer and other participants can be critical in moving the parties towards settlement or at least reducing the issues in dispute. Further, it will impact the tone and nature of the hearing in terms of its civility, efficiency, fairness, etc. But, all of the above actions taken during the prehearing conference(s) and possibly related discussions must be done carefully to avoid any appearance of partiality, prejudgment, or unfairness. *See*, e.g., the problems caused by a hearing officer's reference to the testimony of one party's expert as his "spiel." Mass Dept of Ed, 18 IDELR 286 (OCR 1991).

L. Letter/order summarizing prehearing conference call. Such a written document is imperative and should be sent to the parties shortly after the call. The parties should be advised they would have the opportunity to object or offer corrections to the summary when it is admitted as part of the record at the start of the hearing. Documenting the results of a conference is important to make sure that everyone has a record of what has been decided or agreed upon. It can also have consequences with regard to a potential future claim by the parent for reimbursement of attorney fees (in terms of prevailing party status, the number of issues and their disposition).

M. Party wants to terminate hearing. Where one party, usually the parent, wants to terminate the hearing and the other party objects, consider asking why the one party wants to, why the other opposes, how will the IEP and hearing processes be effected, the stability of the district/parent relationship, and the impact on the student's program. Although *see* Florida Union Free Sch Dist, 17 EHLR 971 (SEA FL 1991), which comments the request must be granted and Minisink Cent Sch Dist, 16 EHLR 331 (SEA NY 1989), to the same effect because withdrawal implies agreement with the IEP.

VI. CONCLUSION.

A. The prehearing is finally over! Yes, and no doubt some time has been spent doing it to prepare for the hearing. But, that time will almost without exception save far more time at the hearing and lead to a much more orderly and fair hearing.

B. Depending upon whether the parties have counsel (and whether they have experience in special education cases), the average prehearing telephone conference call would range from 30 to 45 minutes.

