

IDEA Due Process Hearings Where Parents Are Not Represented By Counsel

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I. Impartial Special Education Due Process Hearing: Basics Remain the Same

Introduction

A parent or a public agency may initiate a hearing on any of the matters described in Section 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of free appropriate public education to the child. 34 CFR Section 300.507.

Notice that the district proposes, or refuses, to initiate or change the identification, evaluation or educational placement of the child or the provisions of FAPE to the child and related information. 20 USC 1415 (b)(3), (c) and (d)

A. The Basic Procedural Requirements

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parties involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the state educational agency or the local education agency, as determined by State law or by the SEA.

B. Initiating the Due Process Appeal Parent notice to the public agency.

The public agency must have procedures that require the parent of a child with a disability or the attorney representing the child, to provide notice (which must remain confidential) to the public agency in a request for a hearing....

1. The notice must include:

- (a) The name of the child;
- (b) The address of the residence of the child;
- (c) The name of the school the child is attending;
- (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 resolution of the problem to the extent known and available to the parents at the time.

C. SEA Obligation:

1. Each SEA shall develop a model form to assist parents in filing a request for due process that includes the information required. . .
2. A public agency may not deny or delay a parent's right to a due process hearing for failure to provide the notice required (in this) section.

D. Hearing Rights. Any party to a hearing . . . shall be accorded:

1. the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
2. the right to present evidence and confront, cross-examine and compel the attendance of witnesses;
3. Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 business days before the hearing;
4. the right to written, or, at the option of the parents, electronic verbatim record of such hearing; and
5. the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be available to the public consistent with the requirements of section 617 (c) IDEA (relating to the confidentiality of data, information, and records) and shall also be transmitted to the advisory panel established pursuant to section 61 2(a)(21). See also 34 CFR 300-508 (a) and 20 USC 1415 (f)(2) and (h).
6. A hearing on any matter for which notice is required. 34 CFR 300.506
7. Information on any available free or low cost legal or other relevant service. 34 CFR 300.506 (c)
8. Have the hearing conducted at a time and place that is reasonably convenient to the parents. 34 CFR 300.512(d). An impartial hearing officer not involved in the education of the child or having a personal/professional interest conflicting with his/her objectivity.
9. Have a decision (written or electronic at parent's option) rendered not later than 45 days after the district received the request for hearing (except for specific extensions of time granted by the hearing officer) 34 CFR 300.512(c) and 20 USC 1415(h).
10. When provided under state law, appeal the decision to the state education agency 34 CFR 300.510. Thereafter, an appeal may be taken to either state or federal court. 34 CFR 300.501.

E. Parental rights at hearings.

Parents involved in hearings must be given the right to-

1. Have the child who is the subject of the hearing present; and
2. Open the hearing to the public 34 CFR 300.508 (b)
3. Record at no cost to the parents
4. Have the child remain in his/her present educational placement pending completion of the proceedings (absent agreement with the district otherwise) 34 CFR 300.513

F. Disclosure of evaluations and recommendations; complications for parent without legal counsel

At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

G. Failure to Disclose

A hearing officer may bar any party that fails to comply with 5 day disclosure from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

H. Independent Education Evaluation

A district may initiate a hearing in response to a parental request for an independent educational evaluation to show its evaluation is appropriate. 34 CFR 300.503 (b) or to override a parent's refusal to consent to a preplacement evaluation, initial placement or any other matter under state law requiring consent. 34 CFR 300.504 (b).

I. Parent Withdrawal of Consent

A parent's withdrawal of consent triggers a need for a district to initiate a hearing. *Garcia v. Bd of Education*, EHLR 558:152. Although with regard to a parental refusal to consent to reevaluations, see 20 USC 1414 (a)(1)(c)(ii) which says a district "may" seek to override the refusal.

II. Prehearing Conference; Preparation Prior to the Hearing for Both Parent and Local Education Agency Where Parent Without Counsel

A. Prehearing conferences are not mandatory under federal law.

If you follow state law or Administrative Procedures Act of the state, they are available and are essential to a successful hearing.

B. Hearing officers have the authority to order a prehearing conference.

Hearing Officers have the authority as a matter of due process by analogy to pretrial conferences under court rules and your state laws. With parents who are not represented by counsel, this may be essential to establish understandings early.

Typical introduction by Hearing Officer

This is the time and place for the prehearing conference on the matter of X, a disabled student, represented by Y, and the ABC school district, represented by D.

I am Jan Smith. I am the designated due process hearing officer, administrative law judge, designated to hear and decide the matters that are presented before me.

This is a prehearing conference. I will not take testimony or receive documents or other evidence. That process is conducted at the hearing. I have provided all parties with a prehearing conference order which outlines the items I will address and request both parties to address during this hearing.

If one party is speaking, the other party shall not interrupt or disrupt the other party. You will have an opportunity to respond to any statements or discussions

Only the attorneys/advocates can speak during this prehearing conference. If you have matters you want to assert, please utilize your attorney.

I will not engage in ex parte consultation or discussion. Ex parte discussion means discussing any aspect of this case or appeal without the presence of opposing counsel.

At the conclusion of this prehearing conference, I will prepare and issue a prehearing order. The order will outline the procedures of the hearing and will control all proceedings from that time on.

C. Accommodations

1. Hearing or visual impaired needs of both parents and student involved.
2. A record is not necessary unless the hearing officer can anticipate unusual circumstances. These circumstances include: motion arguments subject to appeal; difficult attorneys; need to preserve testimony.

D. Issue a Prehearing Conference Call Order.

Practical tips: Be prepared for the prehearing conference. Organize, and provide the hearing officer with a sense of preparedness and confidence.

The Prehearing Conference Call Order can delineate the following:

1. --- Assume nothing. Explain everything to the parent
2. --- Identification of Parties
3. --- Identification of Representative of district and role
4. --- Possibility of settlement or utilization of SEA mediation process.
5. --- Discovery requests and limitations on depositions and
6. interrogatories, setting time limits
7. --- Determining exchange of list of witnesses
8. --- Determining exchange of documents; making copy or original
9. available to hearing officer
10. --- Determining refinement of issues on appeal
11. --- Setting time, date and place for hearing (usually working
12. backward)
13. --- Simplification of issues
14. --- Stipulation or agreement of facts which are not in dispute, can be done in prehearing order or request of the parties ~
15. --- Prehearing Memorandum
16. --- Amendments to the pleadings
17. --- Procedural rules and establishing time limits on prehearing
18. motions, filings and responses.
19. --- Determination of whether settlement or mediation is an option.

Hearing officer is cautioned to take detailed notes. School District Sevastopol, 24 IDELR 482 (SEA W1, 1996) to the effect that IDEA procedural safeguards do not apply to prehearing, therefore, there is no right to any record.

E. Who will participate in the prehearing conference call:

1. Attorneys or advocates for the parties.
2. Parents; school officials
3. News media representatives (typically not and if parents waive right of confidentiality, hearing officer still has authority to close prehearing conference)

Practical tip: Parents and school officials desire to know about the hearing process and the hearing officer. This is a good opportunity to get a first sense of the hearing officer. However, parties should remain quiet during the proceedings.

F. In Person Conference

1. If there is the possibility to facilitate settlement then it is better to conduct prehearing conference in person.
2. The prehearing conference sets the tone. The hearing officer must take control of the procedure and assert himself/herself before the parties. It is a good idea to have a secretary set up the call to avoid hearing to converse with the parties.

3. In order to allow hearing officer and public agency to have some sense of the case, the hearing officer will request parent to forward the written complaint that generated the due process hearing. The SEA already may have possession of the same.
4. Also, the hearing officer may request of the district the most current IEP to become familiar initially with dates, times, places, placement, disability, etc.

G. Avoid delaying the prehearing conference.

1. Force the prehearing conference, as the time is running. If schedules have conflict, utilize after hours times, weekends. 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 parties in terms of preparation, etc.
2. Many parents who are pro se, will attempt to utilize the prehearing conference as an opportunity to influence the hearing officer and begin the evidentiary presentation. Whatever is said cannot serve as the basis of the hearing officer decision, but only evidence entered at the time of the hearing, excepting any stipulation of agreed upon facts.

H. Pro Se Parent

When a parent or party has no attorney or experienced advocate, it becomes increasingly difficult for the hearing officer to remain impartial and not be placed in a position to provide advice or to advocate for the nonrepresented party. The hearing officer may ask whether the district has provided information to the parent about the availability of no cost or low cost legal assistance. Identify nonprofit advocate group. Identify the State Bar lawyer referral service in your state. Also, without objection of opposing counsel, the hearing officer may suggest the names of attorneys who represent clients in IDEA and 504 cases.

Practical tip: Local educational agency should give the hearing officer some discretion on how she/he deals with pro se parent. Protect your client's interest but refrain from out-lawyering the other side.

I. Maintaining Impartiality

1. The hearing officer will identify any potential conflicts he/she may have regarding the case. The hearing officer will identify whether he/she has represented clients (school district or parents) in the past. Disclose any contact with either party or their representatives, even those which might give the appearance of partiality whether appointed or mutually selected. This becomes difficult when the parent represents self.
2. There is a presumption the hearing officer is 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. West Bend School District 24 IDELR 1125 (SEA WI 1996)

and *Brimmer v. Traverse City Area Public Schools*, 22 IDELR 5 (DC MI, 1994), where hearing officer 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 F 2d 8 (10th Cir, 1957).

J. What Are Issues on Appeal

1. It is essential the hearing officer identify, clarify and simplify issues on appeal. Do not allow parents to evolve issues as the hearing progresses. The hearing may soon run like a flooded Mississippi River and everything becomes an issue and wet.
2. Parents needs to identify and articulate the issues on appeal.
3. The responding party needs to know the disputed issues in order to prepare a defense for the hearing.
4. The parent usually appeals, however the district usually goes first to defend FAPE.
5. It is not unusual that responding party may have not known about the issue prior to the time the appeal is made. They may concede early and request the hearing officer to remand back to the IEP team for the purpose of completing what is necessary.
6. If the parties do not know what they are disputing, the process is less focused and takes more time. Some hearing officers will dismiss the appeal. Others will help the parents facilitate an issue.

K. Failure of Parent to formulate issues

1. If a parent is unable or unwilling to formulate or articulate issue(s), the hearing officer may seriously consider dismissing the appeal. That is where a transcript of the prehearing is necessary. It is also necessary to issue findings, conclusions and order in that regard for the appellate court to consider.
2. The hearing officer may also consider retaining jurisdiction to allow the parent to reopen the hearing upon condition the directive to identify the issues are obeyed. Be careful about the timing issues and the need to render an opinion within 45 days of appeal.

L. Ask for specifics

1. What are the services or programs in dispute? In particular what is lacking regarding the mandate of FAPE or lack of inclusion involving LRE? What in the IEP is on appeal? Parties have a tendency to allege "refusal to provide FAPE" as the reason for appeal. Everything can be related to denial of FAPE. Hearing officers are free to ask clarifying questions before allowing the other party to do so, state defenses or amend pleadings.
2. Parents:

- a. --- What do you want?
- b. --- What is it that the school district is doing or not doing that
- c. adversely affecting your child's education?
- d. --- What relief are you seeking?
- e. --- What would like me to order assuming you are right and the
- f. district is wrong?
- g. --- If you could write the decision as of right now, what would it say regarding this issue?
- h. --- Identify at the onset issues that are not in dispute as well.

M. If parents allege insufficient notice or lack of access to records.

Ask what relief or actions you asking of me that has resulted from this in an attempt to resolve the problem and dispose of the issues.

N. Do not overlook or assume other critical or fundamental issues which might be present.

1. --- Does the parent appealing have the right to assert the claim?
2. --- Is the person the parent?
3. --- Is there an issue of custody, surrogate parent, transfer of rights
4. to adult?
5. --- If divorced, does the requesting parent have legal custody?
6. --- Is the student over 18 and legally maintains capacity? IDEA
7. provisions regarding transfer of parental rights at age of majority.
8. 20 USC 1415 (m).
9. --- Is a non-parent acting on behalf of a student?
10. --- Does the student reside in the district?

O. Independent Educational Evaluation

1. If the district requests a hearing in response to a parent request for an IEE, determine what evaluation the parent contends is inappropriate and why? Answers to these questions can result in the hearing being more focused.
2. For example, ground breaking issue is a functional behavior assessment disputed by the parent entitles the parent to an independent educational evaluation?

P. Dealing with Non-IDEA issues.

Non-IDEA issues may be raised, complaints about FERPA. With the hearing officers assistance these issues may 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.)

Q. Failure of Parent to Raise Issue at IEP meeting

1. If the parent fails to participate in the IEP meeting, or participates but fails to raise an issue, a district might contend it is not hearable. The district argues the parent is avoiding the IEP process deemed essential in *Rowley*. This would deprive the district to develop an appropriate program and provide an IEP which is supposed to be a primary consideration in any hearing review.
2. Consideration might now also be given to whether the parent gave notice of reasons for going to hearings under IDEA 20 USC 1415 (b)(7) and if so, the district's response. Attempt to determine whether the parent tried to raise the issue but the district ignored or unduly delayed in responding.
3. Hearing Officer has several options including dismissal of the appeal, remand to an IEP meeting, proceed to a hearing with several issues or let the parent raise the issues at hearing because further discussions in addition to those which might have occurred after the IEP meeting would not be fruitful.
4. 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 part of the expensive hearing process.
5. Hearing Officers are cautioned when remanding a case to IEP meeting; specify:
 - a) timelines
 - b) directives should be given to the parties if completion of the IEP is ordered. See Northville, 16 EHRLR 847, at 857.

III. Procedural and Practical Problems:

A. Preliminary issues.

1. Advocate should always be present at the hearing and not conduct hearing by telephone conference.
2. Open hearing versus sequestering witnesses. Parents ultimately decide whether they will permit the hearing to be open, this relates to release of personally identifiable information. However, hearing officers should determine whether witnesses are to be sequestered. This is within the discretion of the hearing officer.

Exceptions: District clients (special education director; principal, district superintendent)

Exception: battle of experts, allowing one expert to hear the testimony of another expert in order to testify.

3. Witnesses are generally instructed not to discuss their testimony or case with other witnesses.

C. Access to records.

1. Parents have the right to access "educational records." 34 CFR 300.562. IDEA extends to parents the right to examine "all records." 20 USC 1415(b)(1).
2. Issues:
 - a. --- District staff personal notes
 - b. --- E-mail exchanges among staff or district counsel
 - c. --- Professionals must assert a privilege or argue the document is not a record. Hearing officer may require *in camera* inspection of the records.

D. Parents argument on private psychological records

1. Parents will assert the district has right to educationally relevant portions of psychological records. Hearing officers may be required to review the records *in camera* to determine what part of the records are relevant. It is also permissible to seek agreement among the parties to disclose records to opposing counsel for purpose of review, but only permit that part of the record to be used.
2. If a party refuses to disclose records after hearing officer has ordered release, the appeal may be dismissed, with hearing officer retaining jurisdiction to allow the hearing to be reopened upon the party agreeing to obey the order. Bd of Ed of Oak Park Public School, 20 IDELR 414; and School District of Sevastopol, 24 IDELR 482 (SEA WI, 1996).

D. 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. See state Administrative Procedures Act.

E. Transfer of Parent Rights at 18 years.

Also remember IDEA now transfers parental decision-making to student at age 18 years. Difficulty is when adult student has questionable legal capacity.

F. Parent's Right of Stay Put

Hearing officer's jurisdiction over the "stay put" placement is sometimes contested. In Heldman, 20 IDELR 621 (OSEP 1993), it opined that a dispute as to a student's "current placement" under the stay put should be determined by a hearing officer or a court. Decisions on the "stay put" can impact settlement.

G. Explain to parent how the hearing will be run.

The hearing officer should explain how the actual hearing will be conducted. This can be done at the prehearing conference; again stated in the prehearing Order and repeated at the beginning of the hearing. Where on party is not represented by an experienced 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.

H. Opening statement of Hearing Officer

--- Identification of parties and representatives on the record

--- Handle exhibits and other preliminary procedural matters

--- Opening statements:

A) party requesting the hearing

B) party responding (or party may wait and give statement before its case is presented)

Presentation of case of party requesting hearing

Presentation of responding party's case

Rebuttal testimony of party requesting hearing, if any.

Rebuttal testimony of party responding to hearing, if any.

Closing statements (unless written statement post hearing brief is to be provided)

1. Party requesting hearing

2. Party responding

Closing statement by hearing officer.

I. Parent testifying without advocate/attorney.

1. To provide structure to the parent's testimony, the parent should be provided two options in presenting testimony: Either ask himself/herself a question and answer it or have some other person ask prepared questions.

2. District will be very concerned about the parent providing a narrative of the testimony as it has no control on subject material.

J. The Five Day Rule Needs to Be Explained at Prehearing Conference

1. IDEA requires parties to exchange all documents five days prior to the hearing. Hearing officers should address the five day rule and identify the date at the prehearing

conference and in the prehearing order. The date can be amended by mutual agreement of the parties.

2. 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. As a matter of fairness, this ruling is questionable.
 1. If a party seeks to admit an exhibit not on the five-day list and opposing party objects, the hearing officer usually asks:
 - i. ask why it was not on the five-day list;
 - ii. how is the objecting party actually prejudiced if at all;
 - iii. can the prejudice be cured (allowing opposing party additional time to review);
 2. If it appears relevant, and the hearing officer believes it should be part of the record, the hearing officer will utilize the Steinke ruling if applicable or threaten to reconvene the hearing regarding just this exhibit in five days.
 1. IDEA also provides each party also has the right to copy of all "completed evaluations" at least five business days prior to hearing. 20 USC 1415 (f)(2).

V. Other Considerations

A. Ex parte communications

The general rule is *ex parte* discussions are prohibited but the practical ability to limit *ex parte* communication with parent may be difficult. On pure ministerial issues (scheduling telephone calls, court reporter, location), calls are permissible and will not prejudice the hearing officer. Hearing officers are wise not to engage in *ex parte* discussions on substantive matters unless there is an express agreement to the *ex parte* communication and the scope that such communication can cover. *Ex parte* consultation is a high risk venture for the hearing officer. All letters sent by parties to the hearing officer must be copied to the opposing party.

VI. Mediation

A. Availability

1. LEA must assure that procedures are established and implemented to allow parties to disputes involving any matter (identification, evaluation, educational placement or the provision of a free appropriate public education) to resolve such disputes through mediation process which, at a minimum, shall be available whenever a hearing is requested.
2. Mediation process must:

- a. be voluntary
 - b. not be used to deny or delay a parent's right to a due process hearing or to deny any other right afforded by the act;
 - c. conducted by a qualified and impartial mediator who is trained in effective mediation techniques.
3. An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.
 4. Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commitment of such process.
 5. Caveat: Is there trouble on the horizon if the mediation fails and parties assert objections because issues were raised during mediation?

VII. The Hearing

Aside from the legal requirements, parties are well advised not to antagonize each other to the point that they fail to work with each other. Build the framework upon which the parties can work together later and provide therapeutic benefits,

A. Parent May Have A Real Reason for Hearing

1. Participation in the due process hearing may be all that parent is seeking, realizing they are asking for attention to their plight.
2. Formality bring structure; informality brings less hostility.

B. When a parent does not appear or leaves

1. Default judgment is not mentioned in the statues or administrative rules. However, default has been used by hearing officers. Before in effect defaulting a party, they will check to see if a misunderstanding occurred, Hearing officers may proceed with the case, allow the appearing party, typically the district to present evidence on overriding the failure to consent or the argument of dangerous exception rule. The hearing officer may also:
 - a) adjourn the hearing;
 - b) allow the non-appearing party to have the opportunity to explain the non-appearance before deciding the case or terminating the appeal; or
 - c) continue the hearing.
1. If a party abruptly leaves during the course of the hearing, the hearing officer will want the party on the record of the potential consequences of that behavior.

C. Therapeutic testimony for parents

Hearing officers may give wide latitude (with limits possible off record) to the testimony of parents and sometime frustrated district staff, to express their feelings, frustrations and concerns if not prejudicial and the therapeutic value may be great even though the relevancy is little.

D. Witnesses

1. Parents and teachers who have not been through an administrative appeal may feel very frightened. Walk them through their testimony. Practice cross-examination. If they do not know the answer to the question, assure them that is acceptable.
2. Hearing officers treat witnesses differently. Hearing officers may introduce them to persons present and he/she may ask if they have any questions regarding the proceedings. Witnesses are sworn.
3. Remind parents that opposing party has the right to review any notes or files of the witness. I.D. v. Westmoreland Sch Dist., 17 EHLR 417; and Somerset County Pub. School, 21 IDELR 942 (SEA MD 1994).