

DEALING WITH EXPERT WITNESSES

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I. INTRODUCTION.

A. Given the breadth of the fields that can be involved in the evaluation and IEP processes, as well as the divergence in views as to how to address educationally the various needs of students, it is understandable why hearing officers are presented with a wealth of expert testimony.

B. Under IDEA decisions regarding the conduct of hearings are left to the discretion of hearing officers. Letter to Anonymous, 23 IDELR 1073 (OSEP 1994). But, check on whether your state has particular statutes, rules, or procedures that might affect your handling of expert witness testimony. While hearing officers are not bound by either federal or state court rules, they can look to them for guidance. See Attachment A regarding pertinent portions of the Federal Rules of Evidence (FRE) governing opinions and expert testimony.

C. As noted above, hearing officers have broad discretion to decide whether the testimony of a qualified expert should or should not be received (subject to reversal only upon showing such discretion was abused). And, IDEA hearings are less formal than court proceedings. But, this does not mean a hearing officer is required to receive the testimony of every person who a party claims is an expert!

This presentation is not intended to be a detailed study of the rules of evidence regarding expert testimony. Rather, its intent is to provide hearing officers with some general guidelines to consider in handling expert witnesses.

II. WHAT IS AN EXPERT WITNESS?

A. A lay witness is anyone who is not identified and qualified as an expert witness. Usually, lay witnesses testify to facts based on they have observed or heard. Generally, any opinion a lay witness would offer would be that witness's perception of an event or an explanation of the witness understood from statements or events at issue. See in this regard, FRE 701, noting that any opinion/inferences of a lay witness must be "rationally based on the perception of the witness" (i.e., firsthand knowledge) and helpful to a clear understanding of the witness's testimony or the determination of fact and issue.

B. An expert witness is a person who is qualified by virtue of specialized knowledge, skill, experience, training, or education to express opinions on matters that will assist the hearing officer to understand the evidence or determine any fact in issue. See, FRE 702.

C. Before receiving an expert witness's opinion testimony, a hearing officer must decide:

- Is the witness a qualified expert in the area concerning which they will render an opinion (i.e., does the witness have the requisite scientific, technical, or other specialized knowledge)?
- Will the expert's knowledge (i.e., opinion) assist the hearing officer to either understand the evidence or determine a fact in issue?
- If the testimony is scientific, technical, or based on specialized knowledge, is it not only relevant but also reliable?
- Is there a sufficient basis in firsthand observation or other facts which the expert relies upon to support the opinion?

III. IS THE WITNESS A "QUALIFIED" EXPERT?

A. The basic question here is does the witness have the knowledge, skill, experience, training, or education to express an opinion.

B. Often this is done by submitting the person's vita/resume as an exhibit and/or testimony. Given the informal nature of our proceedings, usually the hearing officer does not formally rule on whether the witness is or is not "qualified." But, if an objection is raised, it is within the discretion of the hearing officer to allow the opposing party to "voir dire" the witness in this regard. Then, the hearing officer would rule on whether the witness was "qualified" as an expert (and if appropriate the area(s)).

C. *Cautionary note:* Even though the qualification of experts is handled more informally in our hearings, hearing officers should be careful to insure that the opinions offered by the expert are only with regard to those areas where the expert has evidenced knowledge, skill, experience, training, or education. For example, while a physician may have the background to be an expert regarding various medical issues, he or she may not have any background to offer opinions on other matters regarding educational programming. Again, whether a witness is qualified or not, and in what areas, is within the discretion of the hearing officer to determine.

IV. WILL THE KNOWLEDGE OF THE EXPERT ASSIST THE HEARING OFFICER TO UNDERSTAND THE EVIDENCE OR DETERMINE A FACT IN ISSUE?

A. This is really a matter of the hearing officer applying common sense. Consider:

- Are facts unclear on a significant issue?
- May the witness's specialized knowledge, etc., assist your understanding of the evidence concerning the situation?

V. IS THE TESTIMONY THAT IS SCIENTIFIC, TECHNICAL, OR BASED ON SPECIALIZED KNOWLEDGE RELIABLE?

A. The U.S. Supreme Court in Daubert v Merrell Dow Pharmaceuticals, 509 US 579, 589 (1993), and Kumho Tire Co v Carmichael, 526 US 137 (1999), held that basically any testimony that is scientific, technical, or based on specialized knowledge is not only relevant, but reliable utilizing a two-step process:

- With regard to the testimony's reliability, the inquiry is to be on whether the methods utilized are sound (not the results) in an attempt to rule out subjective belief or unsupported speculation.
- If found reliable, the next step is whether the testimony is relevant in terms of assisting the hearing officer understand the evidence or determine a fact in issue.

B. While I have informally heard of this issue being raised in several hearings, I am aware of few published decision where it is discussed. Richland Sch Dist v Thomas P., 32 IDELR 233 (USDC WI 2000) is one. The federal court upheld an administrative law judge's decision to reverse an IEP determination that a student's conduct was not a manifestation of his learning disability.

In doing so, the court also upheld the ALJ's rejection of the district's arguments that the parent's expert testimony failed to meet the Daubert/Kumho standards. The district challenged the expert's testimony as not being scientifically reliable because she: 1) relied heavily on an evaluation that contained a scientifically-invalid report of a school psychologist; 2) lacked sufficient evidence upon which to formulate her opinion; 3) failed to consider the student's use of alcohol on the night in question; and 4) reached a conclusion that is not supported by the Diagnostic and Statistical Manual of Mental Disorders or DSM-IV. The court noted that while these challenges may be reasons to discount the expert's testimony, they were not sufficient to demonstrate that the methods she utilized were so questionable as to render her opinion unreliable under Daubert. Noting the psychologist had 26 years of experience in treating children, had met with the student on 2 occasions, obtained a detailed history, and reviewed the student's educational records, even if as the district contends the various authorities support its claim that the witness should have done more by way of testing and observation, the court was unpersuaded that the witness's methodology was unreliable. It stated: "If anything, the authorities cited by the district simply established that there is no 'magic formula' for diagnosing ADD in adolescents."

C. While it is certainly possible that some expert testimony might not meet the "reliability" standard of Daubert/Kumho, it will be unusual. Most attorneys representing both parents and districts recognize this and, accordingly, will, as suggested by the court in the Richland decision, focus their challenges to an expert's testimony on the weight it should be given rather than it is "unreliable" under Daubert/Kumho.

VI. IS THERE A SUFFICIENT FACTUAL BASIS FOR THE EXPERT TO SUPPORT AN OPINION?

A. An expert's opinion may be based on facts and data from: firsthand observation; evidence presented at the hearing; data provided the expert outside the hearing. See, FRE 703, which also notes if the facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions on the subject, the facts or data need not be admissible in evidence. (Remember that these facts/data are in the record solely to explain the basis for the expert's opinion and not for the truth of the matters they refer to if they are otherwise admissible.)

Accordingly, an expert does not need to be personally familiar with the facts/data regarding a case provided his/her opinion is based on any type of evidence commonly used by experts in the witness's field.

As FRE 703 explains, an expert witness may base an opinion on facts explained to the expert before the trial. Accordingly, the fact that the counsel for the party calling the expert has discussed the case at length before the hearing does not establish that the expert is biased.

Whether an expert was to be allowed in the hearing to gain knowledge of the evidence is again in the discretion of the hearing officer. Whether the presence of the witness is required for the preparation/management of the parties' case, would expedite the hearing or taint the witness's objectivity are all factors that a hearing officer might consider.

Generally, an expert may testify as to an opinion without first testifying to the underlying facts or data. Opposing counsel may then cross-examine the expert to elicit the bases for the opinion. See in this regard, FRE 705.

VII. HOW CAN THE EXPERT GIVE THE OPINION?

A. There are basically three ways: a hypothetical question, question-by-question, or narrative.

If the hypothetical approach is used and the facts included in it are not yet in evidence, the opinion can be given subject to such evidence being put in the record later. If the evidence is not thereafter provided, the hypothetical question would fall.

B. The expert can give an opinion on an ultimate issue to be decided by a hearing officer. See, FRE 704. But, it is fairly clear that experts may not express an expert opinion as to a legal issue (i.e., the operative language of the law).

VIII. COULD THE HEARING OFFICER APPOINT AN EXPERT?

A. In a way, yes. Under 34 CFR 300.502(d) a hearing officer can order that an independent educational evaluation be conducted as part of the hearing, with the district paying the expense. See by way of an analogy, FRE 706 regarding court-appointed experts.

Among the policy considerations underlying FRE 706 were that some parties were unable to obtain the assistance of an expert for economic reasons, the tendency of some parties to produce an expert would be the best witness rather than the most qualified, and that the use of an impartial expert might promote settlement.

B. If considering ordering an IEE (or expert), a hearing officer might request the parties to suggest qualified persons. If there is not agreement, and the hearing officer must select, a tentative selection might be indicated requesting the parties to note any objections (which might result in another selection or at least the opportunity for the hearing officer to address the objections).

C. The biggest problem a hearing officer confronts in ordering an IEE is one of time. To get an IEE will probably take 30 to 45 days. If this impacts the 45 day deadline, unless a party seeks a continuance, the hearing officer has a real dilemma. The hearing officer can't continue the hearing on her/his own and IDEA doesn't provide any other solution to the problem.

IX. ANY OTHER SUGGESTIONS IN DEALING WITH EXPERTS?

Based upon my experiences and those of others, consider:

- Require that vitas for experts be made an exhibit.
- If an expert's qualifications are disputed, allow voir dire. But, if necessary, take over the questioning to avoid spending a great deal of time on a matter that is ultimately within your discretion.
- Look out for "jargon" problems where the witness comes from a clinical or non-educational setting. Intercede gently, if necessary, to insure questions and responses relate to special education terminology so that it is understandable and helpful to you in terms of the issues you must decide.
- If the expert has submitted an evaluation/report, do not allow the witness to rehash the entire report. Suggest that only matters of clarification or supplementation be addressed.
- Some experts have a tendency to be very expansive in their response to questions, even to the point of not being responsive! Gently try to focus the witness's responses to the question asked, noting that if further explanation is needed, such will be requested by counsel or you.
- If appropriate, consider multiple witness testimony (i.e., having more than one expert testify at the same time).
- As you are making determinations about an expert's testimony and listening to it, remember you will need to weigh it, together with all of the other evidence, considering its relevancy and the expert's credibility (including demeanor,

responsiveness, expertise, prior experience, educational background/publications, specific involvement with student and program/services at issue, consistency of testimony, and potential bias).

C:Outlines/ Dealing With Expert Witnesses
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