MAKING DUE PROCESS HEARINGS MORE EFFICIENT AND EFFECTIVE

Lyn Beekman
Special Education Solutions
ses@spedsolutions.com

I. INTRODUCTION.

A. Types of hearings in the school setting. Various hearings are held in the school setting. There are formal and/or informal hearings with respect to Section 504, discipline, corporal punishment, student records (FERPA), and others. But, no hearing in the school setting is as broad, as well regulated, or as intrusive into the administrative and professional decisions of district staff as the hearing under the Individuals with Disabilities Education Act (IDEA).

B. The result of hearings. Several studies have shown that it is rare when a special education due process hearing decision actually is accepted and resolves disputes between the parties. These studies reflect that the lengthy preparation for a hearing, the attendant anxiety, the win/lose atmosphere, the high cost, and the wait for a decision, too often operate to increase alienation and sustain antagonism, particularly for the parent. In short, it has been found that after the hearing ends, usually the parents and school tend to resume their conflict. *See*, e.g., Budoff and Orenstein, Due Process in Special Education: On Going to a Hearing, Brookline Books, 1982.

C. Functions of the hearing. The special education due process hearing should be distinguished from court litigation in several ways. Granted, the due process hearing should provide a "legal" resolution to the dispute. But, it should also serve additional functions because unlike in court litigation the parties must continue to interact to educate the student after the hearing! Therefore, the hearing process should attempt to establish a post-decision basis for the parties to work together as partners to educate the student. Finally, there is a certain "therapeutic" aspect for both parents and district staff in giving their views/telling their story/venting their frustrations (although this must be limited and entails certain risks).

D. Abuses of the process. Increasingly, a few parents, districts, and their advocates/attorneys, for a variety of motivations, abuse due process procedures. Such actions can be the result of a party's love for "the fight," the lack of an advocate/ attorney knowledgeable in special education, a dysfunctional family/administration, or other reasons. The price for abuse of due process procedures is twofold. Such abuse can consume extraordinary amounts of time and expense. In addition, during the ensuing "battle," the parent/district relationship deteriorates and often a student suffers educationally and otherwise.

E. Conduct. How the hearing officer conducts himself/herself, allows the parties to conduct themselves, handles the prehearing conference and the hearing, and articulates the decision are all extremely important in accomplishing all of the above functions (i.e., legal resolution, basis to work together, and therapeutic).

F. Responsibility. The hearing officer's primary responsibility in resolving the dispute is to implement the law (both IDEA and its regulations) to assure the student receives the programs and services IDEA mandates--even if that means intruding to some extent on the adversary aspect of the process.

G. Extent of authority. Hearing officers do, and must, wisely exercise broad authority in their handling of the hearing and determining the scope of appropriate relief, if any. Kohn, 17 IDELR 522;[1] S-1 Spangler, 558 IDELR179, *vacated as moot* 559 IDELR 266; Cocares v Portsmouth Sch Dist, 18 IDELR 461, 462-463. In short, these authorities support the proposition that a hearing officer is able to grant any relief which could be later obtained in federal/state court. The U.S. Supreme Court in Burlington v U.S. Dept of Ed, 556 IDELR 389, stated that under IDEA a court (or hearing officer) has the broad authority to fashion appropriate relief, considering equitable factors, which will effectuate the purposes of IDEA relying upon 20 USC 1415(e)(2). But, the hearing officer must not be tempted by the disgusting, illegal, or outrageous conduct of either a parent, a district, or their advocates to step beyond what IDEA (or possibly state law) provides.

Consider: Where the policies/procedures of a district or the state violate IDEA or its regulations, does the hearing officer have the authority to determine that to the extent necessary to resolve the subject case, IDEA preempts/prevails? Probably yes.

H. Focus. The primary focus for this presentation will be to identify various strategies which hopefully lead to:

- A more efficient and effective use of the due process procedure.
- A resolution of the dispute by decision or otherwise which will serve as the basis for a stable working relationship between the parent(s) and district staff in the future.

II. THE BASIC PROCEDURAL REQUIREMENTS/SUPPORTS.

A. Under IDEA the parent has the right to:

- Notice that the district proposes, or refuses, to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child and related information (34 CFR § 300.503).

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[1] IDELR (previously EHLR) is a citation to the "Individuals with Disabilities Education Law Report" (previously known as the "Education for the Handicapped Law Report"). The report contains the most complete compilation of federal and state court decisions, hearing officer decisions, Office of Special Education (OSEP) policy letters, Office of Civil Rights (OCR) letters, and related matters on special education, early intervention services, and Section 504.

- A hearing on any matter for which notice is required (34 CFR § 300.507).
- Information on any available free or low cost legal or other relevant service (34 CFR § 300.507(b)).
- Information they may be awarded reasonable attorney's fees if a "prevailing party" (34 CFR § 300.517).
- An impartial hearing officer not involved in the education of the child or having a personal/professional interest conflicting with his or her objectivity (34 CFR § 300.511(c)).
- At the hearing, to have counsel (or an individual with special knowledge/training), present evidence, confront, cross-examine and compel the attendance of witnesses, prohibit the introduction of evidence not disclosed at least five business days prior to the hearing, be provided with a copy of evaluations completed by this date and recommendations intended to be used at the hearing five business days before the hearing, obtain a written or electronic verbatim record of the hearing at their option, and obtain a decision with written or electronic findings of fact at their option (34 CFR § 300.512).
- Determine whether the hearing is open or closed and whether the child will be present (34 CFR § 300.512(c)).
- Have the hearing conducted at a time and place that is “reasonably convenient to the parents” (34 CFR § 300.515(d)).
- Have a decision (written or electronic at parents' option) rendered not later than 45 days after the resolution meeting period ends (except for specific extensions of time granted by the hearing officer) (34 CFR § 300.515(a)).
- An appeal of the decision may be taken to either state or federal court (34 CFR 300.516).
- Have the child remain in his/her present educational placement pending completion of the proceeding (absent agreement with the district otherwise) (34 CFR § 300.518(a)). But, if the decision of the hearing officer agrees with parent placement, it’s the stay put (34 CFR § 300.518(d)). The exception to these “stay put” rights is when the situation involves discipline. 34 CFR 300.533.

B. 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 § 300.502(b)(2)) or if it believes that maintaining the current placement of the student is substantially likely to result in injury to the student or others (34 CFR 300.532).

C. Hearings under IDEA should provide due process. The essential elements of due process are notice, the opportunity to be heard, and to defend in an orderly proceeding adapted to the nature of the case. DiMaio v Reid, 37 A2d 829, at 830. Aside from everything else, due process means "fundamental fairness." Pinkerton v Farr, 227 SE2d 682. But, as Mr. Justice Frankfurter once observed: . . . "it is not easy to satisfy interested parties, and defeated litigants, no matter how fairly treated, do not always have the feeling they have received justice."

D. With regard to the handling of proceedings in federal district courts, Rule 1 of the Federal Rules of Civil Procedure provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Most states have a comparable court rule. When applying and interpreting IDEA's due process rules, you should seek no less and might note such as one basis for a ruling where appropriate.

E. Another basic "law" is: "You can accomplish more with a kind word and a gun, than a kind word alone." So said Al Capone. Hearing officers must remember the maxim as well. You've got the "gun," i.e., due process, analogy to the federal/state rules, etc. and the obligation to do what is required under IDEA for the child. If it's necessary--use it! Oftentimes, warnings before pulling the trigger will obtain the desired result. Therefore, clearly try such first.

F. The discretion granted a hearing officer in conducting the hearing is broad. IDEA and its regs provide that among the specific rights available to the parties to a due process hearing is the right to "present evidence, confront, cross examine, and compel the attendance of witnesses." 34 CFR 300.509(a)(2). In this regard OSEP has noted that it is the responsibility of the hearing officer to accord each party a "meaningful opportunity to exercise these rights during the course of the hearing." It also stated that the hearing officer "is expected to insure that the due process hearing serves as an effective mechanism for resolving disputes between parents" and the district. Apart from the hearing rights set forth in IDEA (and its regs), "decisions regarding the conduct of Part B due process hearings are left to the discretion of the hearing officer." Letter to Anonymous, 23 IDELR 1073 (OSEP 1994). See also the discussion by OSEP in conjunction with the 2006 regs at pp.46699 and 46704-46706 to the effect that hearing officers have the discretionary authority to handle various prehearing procedural matters as long as they do so consistent with the parties rights under IDEA.

G. Usually decisions on procedural and evidentiary matters will at least be given "due deference" and often the stricter standard of an "abuse of discretion" will need to be met for the ruling to reversed. *See*, e.g., Lewis v Loudoun County, 19 IDELR 712, at 714. Thus, the test for reversal is not would the reviewing judge have ruled the same way you did. But, if ruling on a matter of any significance it is important that you state for the record the factors you considered, and how you balanced them, to give the reviewing court a better basis to defer.

III. PREHEARING CONFERENCE.

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). In any event take copious notes.

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 you should consider 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).

Fax, e-mail or mail to the parties/advocates a letter setting forth the agenda for the call. It starts to set the tone for the process.

You will need to prepare for the conference by carefully reviewing the due process complaint and response. Tentatively identify questions to clarify issues/relief sought and roughly organize the issues. Consider the standards necessary to decide each issue so, if necessary, you can advise them of evidence you will need e.g., regarding comp ed so you have the record to fashion an appropriate remedy.

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.

C. Potential conflicts. Disclose any contacts with either party or their advocates, even those which 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 (DC 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).

Allow the parties or their advocates to ask questions of you if they have any concerns and confirm that neither has any objections to you serving. *See* Minisink Cent Sch Dist, 16 IDELR 331 (regarding a record to challenge impartiality).

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 recuse/disqualify as soon as possible. The issue must be timely raised.

D. 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. 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 (1993).

E. Identifying the issues. Under IDEA the party requesting the hearing must provide a "sufficient" notice. But, whether it does so or not in the view of the responding party, 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!) Second, when parties don't know what they're fighting about, the process is less focused and takes more time. Plus, it will give you a solid basis to rule on what evidence is truly relevant, and thereby, allow you to better control the hearing. 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. Finally, a fair, clear and organized statement of the issues/relief, confirmed in your prehearing order, will serve as the statement of issues in your decision and provide greater focus for it. See for an extensive discussion of these and other reasons Walled Lake Cons Sch Dist, 40 IDELR 89 (SEA MI 2003).

On rare occasion, an appealing party will contend it need not identify the issues. 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 are appropriate. A party's refusal to identify issues could result in adverse consequences being imposed.

If they can't do so (because they need an attorney or consult with an expert) give them time to do so but set a deadline for them to get back to you in writing with a copy to the opposing party or set up another conference call. The opposing party must also be given a set time to respond to you regarding objections to the issues, if necessary.

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. 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 is it they want, e.g., What relief do you desire?; What would you like me to order assuming you are right?; What part(s) of the IEP do you object to and what would you put in there?; 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 noting your "understanding of the law," subject to the parties showing you otherwise, 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 which 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 § 300.520.) 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?

F. Non-hearable issues. The parties may contend (or you may offer) that a particular issue is not hearable [e.g., FERPA issue (Bd of Ed of Ellenville Cent Sch Dist, 21 IDELR 235 (SEA 1994)), beyond the applicable statute of limitations, issue previously litigated and determined

(Bd of Ed of Duanesbury Cent Sch Dist, 20 IDELR 641, at 645 (SEA 1993)), a specific teacher is desired, alleged retaliation by district (Florida Union Free Sch Dist, 17 IDELR 971 (SEA 1991)), district pursues truancy (Maine Admin Sch Dist 54, 19 IDELR 754 (SEA 1991)), the qualifications of a service provider (Ludington Area Schs, 20 IDELR 211 (SEA 1993)), 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 fax or e-mail 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.

G. Failure to complete the IEP. If the parties only partially completed the IEP prior to hearing, consideration should be given to requiring the district to complete it as opposed to completing it as a part of the expensive hearing process. Whenever remanded to an IEP meeting, specific timelines and directives should be given to the parties if completion of the IEP is ordered. *See* Northville, 16 IDELR 847, at 857.

H. Potential procedural 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. 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, 501 IDELR 348, at 351. The witnesses should also be instructed, by counsel, not to discuss their testimony with each other.

2. 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.

3. Access to records. Clearly a parent has access to "educational records." 34 CFR § 300.613. Under the regs the parent has the right to examine "all records" (34 CFR § 300.613(a)). But what about a district staff's notes that 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").

4. 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 IDELR 417 and 684. 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 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 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, 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.

5. 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. And if done, I strongly suggest what you see and are told by staff during the visitation be videotaped and made a part of the record.

6. Discovery. There is no express right to discovery in a special education due process hearing (except the 5 day disclosures and 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 IDELR 1340 and 1392, and Letter to Stadler, 24 IDELR 973 (OSEP 1996). Allow discovery in limited circumstances and only when necessary for proper presentation or preparation of a party's case subject to limitations in the event of privileges or harassment. The hearing timeline is a factor to weigh when considering limited discovery.

7. 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.).

8. 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.

9. 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 a witnesses have a privilege against testifying regarding communications interpreted unless waived.)* See the SHO directive regarding "Guidelines for Interpreter Services".

10. Burden of proof. In Schaffer v Weast, 44 IDELR 150 (US Sup Ct 2005), the court held that the burden of proof (i.e., the burden of persuasion) in an IDEA hearing challenging an IEP is properly placed on the party seeking relief. But, the court noted a state under IDEA could by statute place the burden differently. 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 prehearing conference call to avoid any misunderstanding.

11. 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 IDELR 518, and Las Virgenes Unif Sch Dist, 17 IDELR 373. To the contrary, *see* Walled Lake Cons Sch v Jones, 24 IDELR 738 (DC MI 1996). Be sure to provide the telephone witness with copies of exhibits which may

be utilized, have a copy of the witness's file should that be necessary, and have a speaker phone set up—and tested. And, before the witness testifies make sure the witness is alone, in a confidential area and has no documents before them (unless permission to look at one is obtained).

12. 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.

13. 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.

14. 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.

15. Stay put. Hearing officer's jurisdiction over the "stay put" placement used to on occasion be 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* Wessels, 16 IDELR 735, Stohrer, 17 IDELR 55. 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.

    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 the regs a hearing officer has the authority to consider a district's belief that maintaining the current placement of the student is substantially likely to result in injury to the student of others, as well as review interim alternative placements (and manifestation determinations) on an "expedited basis" (34 CFR §§ 300.532).

16. 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.

17. 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.

18. 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 a 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.

    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).

I. Setting hearing date(s). The law requires the decision to be rendered within 45 days after the resolution meeting period ends 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., appeals of manisfestation determinations, interim alternative educational services or current placements substantially likely to result in injury) must be held on an "expedited basis" (34 CFR § 300.532). Further, once the hearing officer is selected, it is within his/her discretion to grant adjournments. Steinke, 18 IDELR 739. 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. While the time and place must be "reasonably convenient" to the parent, the fairness to the parties in presenting their case vis-à-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. 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 IDELR 80. *See also* Anonymous, 18 IDELR 1303, in that district can consider own needs. Again, when dates cannot 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.

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 HO 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, they almost seem to welcome the "nudge" to be efficient.

J. 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 § 300.512(a)(4)).

K. The Five Business Day Rule. 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. 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 suggest 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 § 300.512(b)).

Generally, the list of witnesses to be exchanged must reveal the "general thrust" of the witnesses' testimony. Bell, 211 IDELR 166. 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. Watch for abuses (e.g., excessive witnesses just to cover everyone possible or saying "all current staff serving the child").

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

Encourage 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.

M. 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.

N. 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 a lot of wrangling, it's not worth it.

O. 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 by party or counsel to subtly educate them, 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 should be set in conjuction with the 45 day deadline.

P. Exploring settlement. Even though the parties may have discussed settlement in the past (e.g., in a resolution meeting or engaged in mediation), depending upon the nature of the issues in dispute, the attitude of the advocates, and their parties, exploring settlement with the parties may still be an option. For example, offering tentative conclusions regarding disputed issues, suggesting areas of compromise, proposing a trial placement.

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.

Be careful not to disqualify yourself!

Q. 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 or an order!

R. 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. Any letter or email to you not copied to the other party should be sent to that party at once.

S. 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.

T. Letter/memo 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 will 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, not only to make sure that everyone has a record of what has been decided or agreed upon, but it can also have consequences with regard to a potential future claim by the parent for reimbursement of attorney fees (in terms of the number of issues and their disposition).

U. The prehearing is finally over! Yes, and no doubt a lot of time has been spent preparing 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 which will accomplish all three of its underlying functions.

IV. THE HEARING.

A. General approach. Again, in conducting the hearing you should keep in mind all the functions of the hearing. In addition to providing a record upon which you will base your decision, you should be trying to have it build the framework upon which the parties can work together later and provide therapeutic benefits. Plus, how you conduct yourself may be a significant factor in how the parties accept/receive your decision in terms of a possible appeal or basis for settlement.

Never close your eyes to a possible settlement opportunity merely because the hearing has started. Unexpected testimony, or just participation in the process itself, may cause changes in each party's position.

B. Preparation before hearing. All correspondence and other documents exchanged between the hearing officer and counsel/parties should be marked as a hearing officer exhibit. A list of

the items should be sent to counsel about the time of the five-day exchange asking them to be ready at the start of the hearing to note any objections or additions to the list.

Consider the issues and, if you are not familiar with the law on them, do a little research in order that you will know what is and is not relevant, what facts you need to know to apply the law, etc. Review basic exhibits, such as an IEP, evaluations, etc., so you can get a "feel" for the entire case in order to better be able to respond to objections on relevance to the testimony of early witnesses, know what questions you might want to ask those early witnesses, etc. If you suspect particular problems might arise during the hearing, give some thought as to how you will handle them and, if necessary, do some research (e.g., more than one person sitting with the attorney for the district at the table, testimony by the use of facilitated communications, a particularly obnoxious attorney, etc.). Finally, prepare an opening statement describing the case and the basis for the hearing.

Prepare an opening statement including the parties, the date, your name, that the hearing is under IDEA, it's an appeal of an IEP developed on a certain date, the parent requested this hearing, it's open or closed, and other things your state law or procedures may require.

Get there early.

C. Setting the tone of the hearing. Immediately preceding, after, and during breaks, you can try to keep conversations with the parties and their advocates light and social. But, do it openly and, if a party approaches you to discuss an aspect of the case, request them to (or you) find the opposing party to have them present during the discussion.

During the hearingavoid body language or comments which actually, or could be perceived to, show premature judgment, favor, disfavor, etc. (e.g., discussing great old times with an old friend who happens to be a witness). Also, watch your note-taking--the parties will!

Listen!--to questions, objections--everything very closely to understand and be ready.

D. 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 and to confer with their party can actually save time. Make sure parties representing themselves understand that breaks can be taken before cross-examination, to confer with their client, etc. Never cut off or limit the party's presentation due to your personal time constraints!

E. Opening statements. Listen carefully for new issues, misunderstandings, possible areas of agreement, etc. Ask questions if you don't understand a party's position.

F. Off-the-record conferences. Such conferences can often be very effective to discuss a line of questioning which is irrelevant, particularly sensitive or necessary not because of its relevance but because a party just has to say it. At other times, such conferences can assist in keeping control over attorneys (or their clients) who engage in name calling, show boating,

intimidation tactics, etc. Consider whether the conference will be most effective in the presence of, or outside the presence of, the attorneys' clients. With any off-the-record conference, initially advise the participants that you will put everything you say on the record if they want it--they usually do not take you up on the offer. When you return to the record, depending upon what was discussed you may or may not want to generally describe the understanding reached and ask each counsel to note his or her concurrence with how you stated it. Remember you can only consider in your decision what is on the record.

Off the record conferences should be limited, and only done out of necessity.

G. Controlling attorneys. In addition to off-the-record conferences, the hearing officer can warn the attorney to discontinue such conduct on the record, if it is the parent's attorney, threaten to comment upon the conduct in the decision as an adverse factor which should be considered in any claim for attorney's fee, seek the assistance of a court if litigation is pending, warn, restrict, award costs/sanctions against attorney and/or party, or actually remove an attorney from continuing to handle the matter. *See* Indiana Pub Sch No. 729-93, 21 IDELR 423 (SEA 1994), and District City 1, 24 IDELR 1081 (SEA MN 1996), regarding monetary sanctions.

H. Controlling parties. Parties making gestures, laughing, commenting, or otherwise acting inappropriately must be dealt with firmly. Warnings are the first step with removal from the hearing temporarily or permanently the ultimate solution.

I. Evidentiary matters. Granted, the rules of evidence utilized in courts generally do not apply. The test is that used typically in administrative matters, evidence ". . . of the type commonly relied upon by reasonably prudent persons in the conduct of their affairs." Therefore, hearsay is admissible, but usually is given much less weight. Relevancy is determined by whether the facts sought to be elicited will assist you in determining an issue. Redundant or cumulative testimony is a matter of what is reasonable. Generally, ask what is the necessity for the evidence and its probative value, as compared with the possibilities for prejudice, inconvenience, and error resulting from its admission. **Or, to be more blunt, "how will it help me decide any issue before me?"** Still, a multitude of evidentiary problems can arise, such as the following:

1. Irrelevant testimony without objection. Testimony regarding the alleged bad faith of either party, lack of cooperation, prior violations, unnecessary historical matters, etc., can be cut off, preferably subtly. Be careful in that sometimes such testimony is relevant with respect to compensatory education, retroactive reimbursement, deference to IEP or evaluation, etc.

2. Testimony on distant events. Generally, a three year rule of thumb is a good starting point given it's the period required for automatic reevaluation under IDEA. If the event is older, request a reason as to why it is relevant and not "stale."

3. Evidence relating to grounds for attorney's fees. Do not allow attorneys to utilize the hearing record to introduce otherwise irrelevant testimony merely for the purpose of building such a record.

4. Articles, policies, or regulations. If you are asked to consider articles and you find them relevant they should be made an exhibit. The same with state or district policies, but state regulations need not be introduced since they are law.

5. Judicial notice. If you are considering taking "judicial notice" of some document or fact, advise the parties of it as soon as possible in order to give them the opportunity to object and, if necessary, respond as a part of their presentation. Sometimes a state's administrative procedures act has specific notice requirements which might be used by analogy.

6. A document without testimony of its preparer. Such is admissible. However, since the opposing party has no opportunity to cross-examine the preparer, it usually would be given less weight and such should be noted on the record. Consider, however, options to allow cross-examination, e.g., testimony by telephone, interrogatories, etc.

7. Experts. The qualifications of an expert (including the parent) should be placed on the record. Having a party introduce their 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 lay person 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. But, be sure to clarify if necessary the area of expertise (e.g., diagnosis versus programming). Consider having conflicting experts discuss an issue with each other on the record. The consent of both parties is advisable.

8. Exhibits. Keep close track of proposed exhibits in terms of whether they are or are not admitted on the record. Be sure they do not get lost in witnesses' other papers. As for those identified but not admitted check as to the intentions of the parties.

9. Testimony through interpreter for deaf or facilitated communication. Remember an interpreter or communicator must also be sworn to accurately perform their task.

10. Settlement discussions. What was said in mediation or otherwise in an attempt to settle the dispute is typically inadmissible. Public policy encourages settlement of disputes and this would be hindered if discussions were admissible. While the parental notice of reasons and proposed resolutions is to be "confidential," it will not be considered to be part of "settlement" discussions for this purpose. Also, the regs emphasize the mediation process is confidential (34 CFR 300.506(b)(6)(i)).

    Also problematic in this regard is the failure of IDEA to state the discussions during resolution meetings are confidential. This has already led to a host of conflicting rulings as to what, if anything, and for what reasons discussions or documents

evolving from resolution meetings can be introduced into evidence. OSEP has opined that while the parties can agree to have the discussions confidential, neither party can demand such as a precondition for participating. Letter to Bagin, 53 IDELR 164 (OSEP 2008).

11. Hearing officer involvement. After the advocates have finished questioning the witness, ask questions (subject to objection) on points you believe 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. Be sensitive to strategies of counsel and, if necessary, ask if this witness or another has knowledge of this fact(s).

    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, ask if one of them would be willing to do so. The hearing officer can also seek an IEE. 34 CFR § 300.502(d). But, doing so would usually create problems in meeting the 45 deadline and you cannot extend the deadline nor ask for a request to do so.

    If at any time during the hearing you believe that, given your understanding of the law, additional facts are necessary, discuss it with counsel to give them the opportunity to present evidence on such points as part of their case.

12. Observers. Such persons should not be allowed to participate in the hearing (e.g., other supportive parents and relatives who sometimes desire to say something).

J. Handling objections. Sometimes when an objection is made, the grounds are understood and there is not even a need for a response from the opposing party. But, otherwise, the following steps should be taken:

1. Have the objecting party explain why.

2. Ask the position of the opposing party.

3. Either suggest an alternative approach to the question agreeable to the questioner or rule on the motion, noting your basis on the record.

4. If a party requests, allow them to make a separate record (i.e., having them say on the record what the testimony of the witness would have been had they been allowed to answer). This typically is done at the end of the witness's testimony.

As a matter of fairness, try to be consistent with regard to your rulings on objections throughout the course of the hearing. Where the objection will arise again, note a continuing objection on the record. If the objection is tough or its implications for the hearing uncertain—take a recess and think before you rule on it.

Where attorneys spend too much time stating, or responding to, an objection, establish ground rules. For example, just allow one or two words as basis for an objection like "relevancy." If you need more information, a clarification, or response, you'll ask for it!

Remember, even if a party moves to strike testimony and the request is granted, stricken testimony continues to appear on the transcript. It is just not to be considered by the hearing officer in rendering the decision.

K. Handling witnesses. You might introduce a witness to persons present and ask if he/she has any questions regarding the proceeding. Then swear the witness (you will need only remind the witness he/she is under oath if he/she returns to the stand).

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 within the discretion of the hearing officer. If a witness is hostile or adverse, the questioning can be leading.

Where a witness and attorney are just "jousting" or the witness is nervous to the point of not being able to understand, restate the question fairly, i.e., get to the point.

The opposing party has the right to review any notes or file of a witness. I.D. v Westmoreland Sch Dist, 17 IDELR 417 and 684. and Somerset County Pub Sch, 21 IDELR 942 (SEA MD 1994).

A hearing officer has discretion to forbid a witness to discuss his/her testimony with others, including counsel, during a recess. Geders v U.S., 425 US 80, at 83 (1976).

A witness could be allowed to have an attorney present but the attorney participation should be limited to protecting the witnesses' rights (i.e., self-incrimination on child abuse). The attorney should not be allowed to ask questions.

A question of competency can arise with a witness of few years or diminished mental capacity. Some initial questioning by the party calling the witness or you is necessary to show the witness has an understanding of truth and the capability to process questions.

L. Be sure to make the record. Check to make sure the recorder is working. And, try to always be mindful of problems that will adversely affect the record being made, such as: overlapping conversations, acronyms, proper spelling of names, questioners/witnesses referring to exhibits by number, clarifying gestures, etc. *See* "Making the Record," a publication of the National Shorthand Reporters Association, a copy of which is available from most court reporters. The record is extremely important if your decision is appealed.

M. Rebuttal testimony. The hearing officer is given wide discretion on whether to allow rebuttal testimony by either party. Testimony which might have been offered by the parties earlier

can be allowed but, basically, such testimony should not merely reiterate issues but respond, explain or contradict new matters raised by the responding party. The five-day rule on witnesses as a practical matter probably cannot apply but fairness must still be considered.

O. Closing arguments/briefs. Discuss with the parties, given the situation, which they would prefer and you find most appropriate. Consider giving the parties' specific advice as to issues you want addressed.

The parties can also be required to provide copies of any decisions relied upon. Consider also requiring the parties to provide proposed findings of fact.

P. Decision and comments. Advise the parties when you intend on rendering the decision and that, if delayed for any reason, you will inform them.But, remember you cannot initiate or request an extension of the 45 day deadline.

V. "BUSINESS" CONSIDERATIONS.

A. You serve as an individual. Your service as a hearing officer is as an individual. Your university, law firm, or other type employer is not providing the service. Accordingly, if you use organizational letterhead, care should be taken to avoid misunderstandings when corresponding, billing, etc., by clearly doing so as the "hearing officer" on the matter.

B. Liability. A hearing officer's potential liability will be governed by state law. In most states, hearing officers by statute or case law have been granted quasi-judicial immunity (like arbitrators or administrative law judges) due not to "the source of their decision-making power, but rather upon the nature of that power." Such immunity has been deemed essential to protect the decision maker from undue influence and reprisals by dissatisfied litigants, e.g., the threat of or actual bringing of lawsuits. See, e.g., discussion in Corey v New York Stock Exchange, 691 F2d 1205, at 1209 (6th Cir 1982).

C. Confidentiality. Make sure any fellow employees or contracted service persons working on the decision understand confidentiality requirements.

VI. CONCLUSION.

A. Your actions in trying to make the hearing process both efficient and effective must always be tempered by ensuring due process--most notably always being fair to both parties.

B. Remember, you're in charge and it's up to you to keep control of the process in an attempt to ensure that all the functions of the hearing are fulfilled, namely a decision on the dispute based upon a good record, a framework for the parties to work together, and "therapeutic" relief. How you conduct yourself and the hearing, in terms of keeping control, will be the significant factor in whether you're successful!