BASIC HEARING PROCEDURES AND MANAGEMENT

AN OVERVIEW FOR NEW IDEA HEARING OFFICERS

HEARING OFFICER ORIENTATION – D.C.
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I. INTRODUCTION

A. In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act.[1] Implementing regulations followed in August 2006.[2] Both the IDEA and its implementing regulations added numerous requirements to the hearing process.

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

C. When a hearing is necessary, the parties can come before

[1] *See* Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act ("IDEA"). *See* Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) ("This chapter may be cited as the 'Individuals with Disabilities Education Act.'").

[2] *See* 34 C.F.R. Part 300 (August 14, 2006). In December 2008, the regulations were clarified and strengthened in the areas of parental consent for continued special education and related services and non-attorney representation in due process hearings. *See* 34 C.F.R. Part 300 (December 1, 2008).

independent, contractual hearing officers or an independent, central panel agency that holds administrative hearings on behalf of certain other agencies, including local educational agencies ("LEA").

D. This outline highlights the major Federal statutory and regulatory requirements pertaining to the IDEA hearing process.

II. DUE PROCESS COMPLAINT

A. Subject Matter – A parent or the LEA may file a due process complaint on *any* of the matters relating to the identification, evaluation or educational placement of a child with a disability or the provision of a free appropriate public education ("FAPE") to the child.[3] The due process complaint shall remain confidential.[4]

The word "'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"[5]

B. Content of Complaint – The due process complaint must include –

1. the name of the child;

2. the address of the residence of the child[6];

3. the child's attending school;

4. 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,

5. a proposed solution to the problem, to the extent known and available to the complaining party at the time.[7]

A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets these requirements.[8]

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[3] 20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.507(a).
[4] 20 U.S.C. § 1415(b)(7)(A).
[5] *Lillbask v. State of Connecticut Dep't of Educ.*, 397 F.3d 77, 42 IDELR 230 (2d Cir. 2005) *quoting Department of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002).
[6] Should the child be homeless, the complaining party must provide available contact information and the name of the school the child is attending. 20 U.S.C. § 1415(b)(7)(A)(ii)(I), (II); 34 C.F.R. § 300.508(b)(4).
[7] 20 U.S.C. § 1415(b)(7)(A)(ii); 34 C.F.R. § 300.508(b).
[8] 20 U.S.C. § 1415(b)(7)(B); 34 C.F.R. § 300.508(c).

C. Judicial Decisions / Federal Policy/Guidance

1. Although parents may have their own rights under the IDEA, States are free to enact laws that transfer all of the parent's IDEA rights to the student when the student reaches the age of majority.[9] Because the student had reached the age of majority under state law, the District Court concluded that the mother lacked standing to pursue an IDEA action and granted the LEA's motion to dismiss her from the due process complaint. *Neville v. Dennis*, 48 IDELR 241 (D. Kan. 2007).

2. An LEA has the right to initiate a hearing after the parent notifies the LEA that the parent intends to unilaterally place his or her child in a private school because FAPE is at issue to demonstrate that its proposed program offered the child a FAPE. *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, Question C-3 (OSERS 2009) *citing Yates v. Charles County Bd. of Educ.*, 212 F. Supp. 2d 470, 37 IDELR 124 (D. Md. 2002).

3. Hearing Officers have jurisdiction to review IEP safety challenges related to the educational placement or receipt of FAPE for children with disabilities. *Lillbask v. State of Connecticut Dep't of Educ.*, 397 F.3d 77, 42 IDELR 230 (2d Cir. 2005).

4. Hearing Officers can consider only those issues that are raised in the due process complaint. *Saki v. State of Hawaii, Dep't of Educ.*, 50 IDELR 103 (D. Haw. 2008).

5. The hearing officer exceeded his authority by hearing a claim on the appropriateness of the IEP for the 2006 – 2007 school year and granting the parents' request for relief on said IEP although the claim was not presented as an issue in the due process complaint. *Lago Vista Indep. Sch. Dist. v. S.F.*, 50 IDELR 104 (W.D. Tex. 2007).

[9] A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined incompetent under State law), the LEA must provide any notice required by the IDEA to both the child and the parents and all rights accorded to parents under the IDEA transfer to the child. 20 U.S.C. § 1415(m); 34 C.F.R. § 300.520(a)(1).

III. SUFFICIENCY CHALLENGES

A. Sufficient Notice. The IDEA requires the complaining party to provide sufficient notice to the other side. Failure to provide sufficient notice may result in the complaining party not having a hearing[10] or in a reduction of attorneys' fees if the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint.[11]

B. Timeline. The due process complaint must be deemed sufficient unless the party receiving the complaint notifies the hearing officer and the complaining party in writing, within 15 calendar days of receipt of the complaint, that the receiving party believes the complaint does not include the requisite content.[12]

C. Determination. Within five days of receipt of the notification, the hearing officer must decide on the face of the complaint of whether the complaint includes the requisite content.[13] Should the hearing officer agree that the complaint is not sufficient, the hearing officer must notify the parties in writing of that determination and identify how the complaint is insufficient.[14] The complaining party may amend the complaint.[15] An amended complaint resets the timelines for the resolution meeting and the resolution period.[16]

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[10] 20 U.S.C. § 1415(b)(7)(B); 34 C.F.R. § 300.508(c).
[11] 20 U.S.C. § 1415(i)(3)(F)(iv); 34 C.F.R. § 300.517(c)(4)(iv).
[12] 20 U.S.C. § 1415(c)(2)(A), (C); 34 C.F.R. § 300.508(d).
[13] 20 U.S.C. § 1415(c)(2)(D); 34 C.F.R. § 300.508(d)(2).
[14] *Id*.; *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46698 (August 14, 2006).
[15] The party may amend the complaint if the other party consents in writing and is given the opportunity to resolve the complaint through a resolution meeting or the hearing officer grants permission not later than five days before the due process hearing begins. 34 C.F.R. § 300.508(d)(3)(i) and (ii).
[16] 34 C.F.R. § 300.508(d)(4). The resolution meeting, however, should not be postponed when the school district believes that a parent's due process complaint is insufficient. OSEP advises that the resolution meeting should nonetheless go forward:

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

Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, Page 46698 (August 14, 2006).

D. Judicial Decisions / Federal Policy/Guidance

1. Should the hearing officer determine that the complaint is insufficient and the complaint is not amended (*see* Section VI, *infra*), the hearing officer may dismiss the complaint. *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 52 IDELR 266, Question C-4 (OSERS 2009).

2. There is no requirement that the party who alleges that a notice is insufficient state in writing the basis for the belief. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46698 (August 14, 2006).

3. The complaining party, however, is not required to include in the due process complaint all the facts relating to the nature of the problem. Nor is the complaining party required to set forth in the due process complaint all applicable legal arguments in "painstaking detail." *Escambia County Bd. of Educ. v. Benton*, 44 IDELR 272 (S.D. Ala. 2005)." *See also Anello v. Indian River Sch. Dist.*, 47 IDELR 104 (Del. Fam. Ct. 2007) (finding that the alleged facts and requested relief contained in the parents' due process complaint were consistent with a child find claim and that the school district was not denied ample notice to prepare for a child find claim because of the parents' failure to explicitly cite the child find provisions of the IDEA).

   The IDEA's due process requirements imposes "minimal pleading standards." *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005). *But see M.S.-G., et. al v. Lenape Regional High Sch. Dist. Bd. of Ed.*, 51 IDELR 236 (3d Cir. 2009) (refusing to accept the suggestion that Schaffer's "minimal" pleading standard equates to a "bare notice pleading requirement").

4. Absent a hearing on the sufficiency of the parents' due process complaint, the District Court held, and the Eighth Circuit affirmed, that it lacked jurisdiction to hear an appeal from a hearing officer's decision that the complaint was not sufficient. *Knight v. Washington Sch. Dist.*, 54 IDELR 185 (E.D. Mo. 2010) *aff'd* 56 IDELR 189 (8th Cir. 2011) (unpublished) (note the Eighth Circuit modified the decision insofar as the dismissal would be without prejudice). *See also G.R. v. Dallas Sch. Dist. No. 2*, 55 IDELR 246 (D. Or. 2010) (holding that judicial review is limited to findings and decisions resulting from due process hearings).

5. A due process complaint is required for each child with a disability. The Ninth Circuit held that OAH was within its authority to reject a joint due process request, noting that the IDEA requires parents to file a due process request to address their individual child, and not the collective or common issues of a group of children. *Z.F. v. Ripon Unified Sch. Dist.*, 54 IDELR 3 (9th Cir. 2010).

6. Absent the State educational agency ("SEA") providing direct services to the child with a disability, or developing the IEP for the child with a disability, the SEA may not be a proper party to a due process complaint. *Chavez v. New Mexico Public Educ. Dep't.*, 621 F.3d 1275, 55 IDELR 121 (10th Cir. 2010).

7. A hearing officer erred by dismissing a parent's due process complaint because the student was not enrolled in a public school when the request was made. The District Court noted that the IDEA's child find requirement creates an affirmative, ongoing obligation on the LEA to identify, locate and evaluate all children with disabilities residing within the jurisdiction regardless of a child's enrollment status. *D.S. v. District of Columbia*, 54 IDELR 116 (D.D.C. 2010).

IV. STATUTE OF LIMITATIONS

A. Timeline. The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint.[17]

A parent or agency shall request an impartial due process hearing within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.[18]

A State may adopt a different timeline but the exceptions to the timeline described below shall also apply.[19]

B. Exceptions. The timeline shall not apply to a parent if the LEA made specific misrepresentations to the parent that it had resolved the problem forming the basis of the complaint or it withheld information from the

[17] 20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2).
[18] 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e).
[19] 20 U.S.C. §§ (b)(6)(B) and 1415(f)(3)(C); 34 C.F.R. §§ 300.507(a)(2) and 300.511(e).

parent that was required to be provided to the parent.[20]

C. Judicial Decisions / Federal Policy/Guidance

1. The statute of limitations is triggered when the parent knew or should have known about the alleged action that forms the basis of the due process complaint and not when the parent becomes aware that the LEA's actions are actionable. *J.P. v. Enid Pub. Sch.*, 53 IDELR 112 (W.D. Okla. 2009).

2. A parent must be provided with actual notice of the procedural safeguards but IDEA does not require that the LEA explain to the parent what specific changes were made to the revised procedural safeguards. Telling the parent that one procedural safeguard statement replaced another, without more, did not result in the withholding of any information. *Natalie M. v. Dep't of Educ., State of Hawaii*, 47 IDELR 301 (D. Haw. 2007).

   However, an administrator's remarks to the parents that the "laws remain 'basically the same,'" resulted in a remand to the hearing officer to determine whether the LEA withheld procedural safeguards information from the parents. *R.M. v. Dep't of Educ., State of Hawaii*, 47 IDELR 99 (D. Haw. 2007).

3. The failure to include key personnel in an IEP team meeting resulted in the District Court holding that the State's statute of limitations did not apply because the LEA withheld requisite information from the parent, denying the parent the availability of important input regarding the student's need for services. *S.H. v. Plano Indep. Sch. Dist.*, 54 IDELR 114 (E.D. Tex. 2010).

4. Failure to provide the parents with the procedural safeguards after the LEA denied the parents repeated requests that her child be evaluated for eligibility for special education services resulted in the District Court setting aside the two-year statute of limitations because the LEA withheld information, i.e., that the parents can file a complaint and request a due process hearing. *D.G. v. Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 50 IDELR 70 (D.N.J. 2008). *See also El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 50 IDELR 256 (W.D. Tex. 2008) *aff'd El Paso Indep. Sch Dist. v. Richard R.*, 591 F.3d 417, 53 IDELR 175 (5th Cir. 2009) (failure to provide the parent with the procedural safeguards and prior written notice resulted in the LEA withholding information from the parents).

[20] 20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(f).

V. RESPONSE TO DUE PROCESS COMPLAINT

A. Response. When the LEA has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint, the LEA shall send to the parent a response within 10 days of the LEA receiving the complaint.[21]

B. Content. The response shall include –

1. An explanation of why the LEA proposed or refused to take the action raised in the due process complaint;

2. A description of other options that the IEP team considered and the reasons why those option were rejected;

3. A description of each evaluation procedure, assessment, record, or report that the LEA used as the basis for the proposed or refused actions; and

4. A description of the factors that are relevant to the LEA's proposal or refusal.[22]

C. Sufficiency. Filing of the response by the LEA shall not be construed to preclude the LEA from asserting that the parent's due process complaint is insufficient, where appropriate.[23]

D. Other Party Response. Parents, too, are required to file a response when the LEA has initiated the due process hearing.[24]

E. Judicial Decisions / Federal Policy/Guidance

1. The IDEA does not establish consequences for either party's failure to respond. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46699 (August 14, 2006).

2. An LEA may not determine the form of its response. The required content of the written response must be consistent with what is required by the IDEA. *Massey v. District of Columbia*, 400 F. Supp. 2d 66, 44 IDELR 163 (D.D.C. 2005).

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[21] 20 U.S.C. § 1415(c)(2)(B)(i)(I); 34 C.F.R. § 300.508(e).
[22] 20 U.S.C. § 1415(c)(2)(B)(i)(I)(aa) – (dd); 34 C.F.R. § 300.508(e)(1)(i) – (iv).
[23] 20 U.S.C. § 1415(c)(2)(B)(i)(II); 34 C.F.R. § 300.508(e)(2).
[24] *See* 20 U.S.C. § 1415(c)(2)(B)(ii); 34 C.F.R. § 300.508(f).

3. IDEA does not specify default as the penalty for failure to serve an appropriate response to a due process complaint. Granting a default judgment would subvert the administrative process and assigned the student to the parent's preferred placement without a full examination of the record or his needs. *Sykes v. District of Columbia*, 518 F. Supp. 2d 261, 49 IDELR 8 (D.D.C. 2007). *See also Jalloh v. District of Columbia*, 535 F. Supp. 2d 13 (D.D.C. 2008) (the fact that the LEA issued a general denial of wrongdoing in response to the parent's due process complaint did not entitle the parent to a default judgment).

VI. AMENDING THE DUE PROCESS COMPLAINT

A. New Issues. The party requesting the due process hearing may not raise issues at the hearing that were not raised in the complaint, unless the other party agrees otherwise.[25]

B. Amending the Complaint. A party may amend its due process complaint notice only if –

1. the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a resolution meeting; or

2. the hearing officer grants permission. The hearing officer may only grant such permission at any time not later than five (5) calendar days before a due process hearing occurs.[26]

C. Timeline Recommences. When an amended due process complaint is filed, the timelines restart anew, including the resolution meeting timeline.[27]

D. Judicial Decisions / Federal Policy/Guidance

1. The IDEA does not address whether the non-complaining party may raise other issues at the hearing that were not raised in the due process complaint. The comments specify that such matters should be left to the discretion of hearing officers in light of the particular facts and circumstances of a case. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46706 (August 14, 2006).

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[25] 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d).
[26] 20 U.S.C. § 1415(c)(2)(E)(i); 34 C.F.R. § 300.508(d)(3).
[27] 20 U.S.C. § 1415(c)(2)(E)(ii); 34 C.F.R. § 300.508(d)(4).

2. A plain reading of § 1415(f)(3)(B) prevents only "the party requesting the due process hearing" from raising any new issues not included in the due process complaint. § 1415(f)(3)(B) does not address whether a respondent may raise new issues. Nonetheless, and in contrast to the Comments, the District Court held that the non-complaining party can only contest issues raised in the due process complaint and that hearing officers do not have discretion to hear issues raised by the non-complaining party which are not included in the due process complaint. *Saki v. State of Hawaii, Dep't of Educ.*, 50 IDELR 103 (D. Haw. 2008).

VII. RESOLUTION SESSIONS

A. Resolution Meeting. Prior to the opportunity for an impartial due process hearing, the LEA shall convene a meeting with the parents and the relevant member(s) of the IEP team who have specific knowledge of the facts identified in the due process complaint –

1. within 15 calendar days of receiving notice of the due process complaint;

2. which shall include a representative of the LEA who has decision-making authority on behalf of the LEA;

3. which may not include an attorney of the LEA unless the parent is accompanied by an attorney; and

4. where the parents discuss their due process complaint, and the facts that form the basis of the complaint, and the LEA is provided the opportunity to resolve the complaint.

The resolution meeting is not required when the parents and the LEA agree in writing to waive the meeting, or agree to use the mediation process in lieu of the resolution process.[28]

B. Agreement. When the parents and the LEA resolve the complaint at the resolution meeting, the parties shall execute a legally binding, written agreement that is –

1. signed by both the parents and a representative of the LEA who has the authority to bind the LEA; and

[28] 20 U.S.C. § 1415(f)(1)(B)(i); 34 C.F.R. § 300.510(a).

2. enforceable in any State court of competent jurisdiction or in a district court of the United States.[29]

C. Review Period. Either party may void the signed, written settlement agreement within three (3) business days of the agreement's execution.[30]

D. Timelines

1. 30-day Resolution Period. If the LEA has not resolved the due process complaint to the satisfaction of the parents within 30 calendar days of the receipt of the complaint, the due process hearing may occur.[31]

2. Adjustments to 30-day Resolution Period. The 45-day timeline for the due process hearing starts the day after –

a. both parties agree in writing to waive the resolution meeting;

b. the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or

c. both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or the LEA withdraws from the mediation process.[32]

3. Filing with the SEA. A State can adopt procedures that include a requirement that an LEA or SEA advise the parent in writing that the timeline for starting the resolution process will not begin until the complainant provides the LEA and SEA with a copy of the due process complaint, as required by 34 C.F.R. § 300.508(a).[33]

E. LEA Complainant. There is no provision requiring a resolution meeting when an LEA is the complaining party.[34] Since the resolution process is not required when the LEA files a complaint, the 45-day timeline for issuing a written decision begins the day after the parent and the SEA

[29] 20 U.S.C. § 1415(f)(1)(B)(iii); 34 C.F.R. § 300.510(d).
[30] 20 U.S.C. § 1415(f)(1)(B)(iv); 34 C.F.R. § 300.510(e).
[31] 20 U.S.C. § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.510(b)(1).
[32] 34 C.F.R. § 300.510(c).
[33] *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 52 IDELR 266, Question C-1 (OSERS 2009).
[34] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46700 (August 14, 2006).

receive the LEA's complaint.[35] However, if the parties choose to use mediation, the 30-day resolution period is still applicable.[36]

F. Failure to Participate / Hold Meeting

1. Except where the parties have jointly agreed in writing to waive the resolution process or to use mediation, the failure of the parent to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.[37]

2. When the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and document, the LEA may request that the due process complaint be dismissed at the conclusion of the 30-day period.[38]

3. Should the LEA fail to hold the resolution meeting within 15 calendar days of receiving notice of the parent's due process complaint or fails to participate in the meeting, the parent may seek the intervention of the hearing officer to begin the 45-day timeline.[39]

G. Judicial Decisions / Federal Policy/Guidance

1. It is inconsistent with the IDEA and its implementing regulations for the State to adopt a regulation that permits suspension of the resolution timeline when the SEA/LEA receives the parent's due process complaint shortly before or during an LEA's winter break. *Letter to Anderson*, 110 LRP 70096 (OSEP 2010).

2. Discussions held during the resolution meeting are not confidential. The District Court held that the hearing officer erred in excluding evidence from a resolution session. *Friendship Edison Pub. Charter Sch. v. Smith*, 561 F. Supp. 2d 74 (D.D.C. 2008).

3. Nothing in the IDEA or the regulations would prevent the parties from voluntarily agreeing that the resolution meeting discussions will remain confidential, including prohibiting the introduction of

[35] *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 52 IDELR 266, Question D-1 (OSERS 2009).
[36] *Id.* at Question D-6.
[37] 34 C.F.R. § 300.510(b)(3).
[38] 34 C.F.R. § 300.510(c)(4).
[39] 34 C.F.R. § 300.510(c)(5).

those discussion at any subsequent due process hearing. *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 52 IDELR 266, Question D-4 (OSERS 2009). However, neither the SEA nor an LEA can require a confidentiality agreement as a condition of participation in the resolution meeting. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46704 (August 14, 2006).

VIII. HEARINGS

A. Hearing Officer

1. Qualifications

a. IDEA 2004 sets forth minimum qualifications for hearing officers who preside over IDEA hearings.[40] Specifically, an IDEA hearing officer shall -

i. possess knowledge of, and the ability to understand, the provisions of the IDEA, Federal and State regulations pertaining to the IDEA, and legal interpretations of the IDEA by Federal and State courts;

ii. possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

iii. possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.[41]

b. However, because standard legal practice will vary depending on the State in which the hearing is held, the requirements that the hearing officer possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice, are general in nature.[42]

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[40] *See*, *generally*, 20 U.S.C. § 1415(f)(3)(A).
[41] 20 U.S.C. § 1415(f)(3)(A)(ii) – (iv).
[42] *See*, *generally*, *id.*

c. Equally, the IDEA does not provide for training requirements.[43] However, each State must ensure that individuals selected to conduct impartial due process hearings are sufficiently trained.[44] Each State is tasked with determining the required training and the frequency of the required training, consistent with State rules and policies.[45]

2. Impartiality

a. The IDEA recognizes the importance of an independent, fair and impartial hearing system. The IDEA prohibits –

i. an employee of the SEA or LEA involved in the education or care of the child from serving as a hearing officer.[46]

ii. persons with an actual bias because of a personal or professional conflict of interest from also serving as hearing officers.[47]

b. However, IDEA does not establish standards for the ethical conduct of hearing officers. The application of State judicial code of conduct standards is a State matter.[48]

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[43] *See*, *generally*, 20 U.S.C. § 1415(f)(3)(A); *see also C.S. by Struble v. California Dep't of Educ.*, 50 IDELR 63 (S.D. Cal. 2008) (denying the parent's request for a temporary restraining order to enjoin the California's Department of Education from contracting with the Office of Administrative Hearings on the grounds that the parent did not have standing to challenge the Department's training requirements, as the requirement is not in the IDEA but an obligation between two contracting parties); *Carnwath v. Grasmick*, 115 F. Supp. 2d 577, 33 IDELR 271 (D. Md. 2000) (dismissing the parent's claims against the State education agency because there is no federal right to a competent or knowledgeable ALJ); *Cavanagh v. Grasmick*, 75 F. Supp. 2d 446, 31 IDELR 158 (D. Md. 1998) ("Standards for ALJ competency and training are not found within the statutory provisions of the IDEA….Thus, ALJ competency and training appear to be governed solely by state law standards.")

[44] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46705 (August 14, 2006).

[45] *Id.*

[46] 20 U.S.C. § 1415(f)(3)(A)(i)(I).

[47] 20 U.S.C. § 1415(f)(3)(A)(i)(II).

[48] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46705 (August 14, 2006).

3. Judicial Decisions / Federal Policy/Guidance

a. Hearing officers need only meet minimum standard of impartiality set out in the IDEA and "enjoy[] a presumption of honesty and integrity, which is only rebutted by a showing of some substantial countervailing reason to conclude that [the hearing officer] is actually biased with respect to factual issues being adjudicated." *L.C. v. Utah State Bd. of Educ.*, 125 F. App'x 252, 43 IDELR 29 (10th Cir. 2005) *quoting Harline v. Drug Enforcement Admin.*, 148 F.3d 1199 (10th Cir. 1998).

b. Administrative adjudicators are entitled to a "presumption of honesty and integrity," and in order to overcome this presumption and establish bias, "evidence is required that the decision maker 'had it in' for the party for reasons unrelated to the officer's view of the law." *B.H. v. Joliet Sch. Dist.*, 54 IDELR 121 (N.D. Ill. 2010) *citing Keith v. Massanari*, 17 Fed. Appx. 478 (7th Cir. 2001).

c. An LEA superintendent is sufficiently involved in the child's education and, therefore, is not able to sit as the hearing officer in the due process hearing. *Robert M. v. Benton*, 634 F.2d 1139, 552 IDELR 262 (8th Cir. 1980); *see also Helms v. McDaniel*, 657 F.2d 800, 553 IDELR 205 (5th Cir. 1981) (finding that Georgia's then State review procedures which treated the findings of the State review officer as the findings of a special master, without an automatic appeal to State or Federal court, conflicted with the Education for All Handicapped Children Act's, the IDEA's predecessor, prohibition against employees of the State agency from conducting hearings).

B. Burden of Persuasion

1. IDEA is silent on which party has the burden of persuasion and/or production.

2. Judicial Decisions / Federal Policy/Guidance

a. Generally, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief.

Shaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005).[49]

b. Even though Minnesota law explicitly assign the burden of persuasion on the LEA, the Eighth Circuit held that it was error to assign the burden of persuasion to a Minnesota school district in light of the *Weast* decision. The Eighth Circuit explained that the *Weast* Court declined to decide whether the default rule would apply in States such as Minnesota that explicitly assign the burden elsewhere. *M.M. v. Special Sch. Dist. No. 1*, 512 F.3d 455, 49 IDELR 61 (8th Cir. 2008) *citing School Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 45 IDELR 117 (8th Cir. 2006).

D. Hearing Rights

1. The IDEA mandates that <u>any</u> <u>party</u> to a hearing has the right to –

a. be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

b. present evidence and confront, cross-examine, and compel the attendance of witnesses;

c. prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

d. obtain a written or, at the option of the parents, an electronic verbatim record of the hearing; and

e. written or, at the option of the parents, an electronic findings of fact and decisions.[50]

2. The IDEA also provides that, not less than five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date, and recommendations on the offering party's evaluations, that the party intends to use at the hearing.[51] However, unlike the right found in § 300.512(a)(3), i.e., any evidence, the hearing officer has discretion on whether to bar

[49] The *Weast* Court did not address the burden of production. Nor does the decision address whether States can have laws shifting the burden of persuasion to their LEAs.
[50] 20 U.S.C. § 1415(h)(1) – (4); 34 C.F.R. § 300.512(a)(1) – (5).
[51] 20 U.S.C. § 1415(f)(2)(A); 34 C.F.R. § 300.512(b)(1).

any party that fails to comply with § 300.512(b) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.[52]

3. The IDEA provides the parent with three additional hearing rights.

   a. The right to have the child who is the subject of the hearing present;

   b. The right to open the hearing to the public; and

   c. The right to have the record of the hearing and the findings of fact and decisions provided to the parent at no cost.[53]

4. Convenience of Hearings. Each hearing must be conducted at a time and place that is reasonably convenient to the parents and child involved.[54]

5. Judicial Decisions / Federal Policy/Guidance

   a. The IDEA permits a non-attorney advocate to *accompany* and *advise* a party at a hearing. *See* 20 U.S.C. § 1415(h)(1); 34 C.F.R. § 300.512(a)(1). However, the IDEA does not address whether non-attorney advocates who have "special knowledge or training with respect to the problems of children with disabilities" can *represent* parties at hearings. The issue of whether non-attorney advocates may *represent* parties to a due process hearing is a matter that is left to each State to decide.[55] *Analysis and Comments to the Regulations*, Federal Register, Vol. 73, No. 156, Page 73017 (December 1, 2008). If State law is silent on the issue, a non-attorney advocate may *represent*, not just *accompany* and *advise*, a party at a hearing. *Analysis and Comments to the Regulations*, Federal Register, Vol. 73, No. 156, Page 73018 (December 1, 2008).

   b. The failure to provide a complete transcript or recording is not necessarily a denial of a free and appropriate public

[52] 20 U.S.C. § 1415(f)(2)(B); 34 C.F.R. § 300.512(b)(2).
[53] 34 C.F.R. § 300.512(c).
[54] 34 C.F.R. § 300.515(d).
[55] There are a number of States that expressly prohibit representation by non-attorney advocates while others expressly permit it. *See* Perry A. Zirkel, *Lay Advocates and Parent Experts under the IDEA*, 217 EDUC. L. REP. 19 (2007).

education unless the student's substantive rights under the IDEA were affected. *Kingsmore v. District of Columbia*, 46 IDELR 152 (D.C. Cir. 2006). *Cf. J.R. v. Sylvan Union Sch. Dist.*, 50 IDELR 130 (E.D. Ca. 2008) (holding that the ALJ had to rehear the last day of testimony because the missing testimony was so significant).

c. Admission of hearsay is permissible and does not deprive the other party of the right to confront witnesses. *Jalloh v. District of Columbia*, 535 F. Supp. 2d 13, 49 IDELR 190 (D.D.C. 2008).

d. A party to a hearing may attempt to introduce evidence at any time during the hearing process, provided the disclosure of the additional evidence would satisfy the five-day rule and the introduction of such evidence is not the sole reason for the hearing delay. *Letter to Steinke*, 18 IDELR 730 (OSEP 1992).

e. The five-day rule has two purposes. First, is to prevent the non-moving party from having to defend against undisclosed evidence produced at the last minute in the hearing. Second, is to ensure the prompt resolution of disputes. *L.J. v. Audobon Bd. of Educ.*, 51 IDELR 37 (D.N.J. 2008).

f. Other than the five-day rule, the IDEA does not provide for pre-hearing discovery. *Horen v. Bd. of Educ. of City of Toledo Pub. Sch. Dist.*, 655 F. Supp. 2d 794, 53 IDELR 79 (N.D. Ohio 2009). *See also Hupp v. Switzerland of Ohio Local Sch. Dist.*, 51 IDELR 131 (S.D. Oh. 2008) (holding that the parent is not entitled to information about all students within the LEA's borders who received special education services); *B.H. v. Joliet Sch. Dist.*, 54 IDELR 121 (N.D. Ill. 2010) (holding that IDEA hearings do not provide for the sort of extensive discovery that often occurs in litigation). *But see Letter to Stadler*, 24 IDELR 973 (OSEP 1996) (advising that IDEA does not prohibit or require use of discovery proceedings and that the nature and extent of discovery methods used are matters left to discretion of the hearing officer, subject to State or local rules and procedures).

E. Procedural Issues

1. Hearing Decisions – Generally. A decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a FAPE.[56]

2. Procedural Issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies –

   a. impeded the child's right to a FAPE;

   b. significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

   c. caused a deprivation of educational benefits.[57]

3. Compliance with Procedural Requirements. A hearing officer may order an LEA to comply with the IDEA's procedural requirements.[58]

4. Judicial Decisions / Federal Policy/Guidance

   a. A procedural violation alone without a showing that the child's education was substantively affected, does not establish a failure to provide a FAPE. *See*, *e.g.*, *A.C. v. Bd. of Educ.*, 553 F.3d 165 (2d Cir. 2009) (the failure to conduct an FBA in accordance with State regulation did not deprive the student of a FAPE); *Lesesne v. Dist. of Columbia*, 447 F.3d 828 (D.C. Cir. 2006) (the failure to complete an evaluation in a timely manner did not result in substantive harm to the child); *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 (2d Cir. 2003) (the failure of the LEA to develop and review the student's IEP in a timely manner did not result in a denial of a FAPE where the parents had removed the student from the LEA and placed her in a private school months before they challenged the IEP).

   b. Only material failures to provide the services in an IEP are compensable under the IDEA. *See*, *e.g.*, *Banks v. District*

[56] 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a)(1).
[57] 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2).
[58] 20 U.S.C. § 1415(f)(3)(E)(iii); 34 C.F.R. § 300.513(a)(3).

of Columbia, 720 F. Supp. 2d 83, 54 IDELR 282 (D.D.C. 2010); 583 F. Supp. 2d 169; *S.S. v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 51 IDELR 151 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 47 IDELR 223 (D.D.C. 2007). Minor discrepancies between the services recommended in the IEP and the services actually provided to the student are not a violation of the IDEA. A court and/or hearing officer must first ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material." *A.P. v. Woodstock Bd. of Educ.*, 370 F. Appx. 202, 55 IDELR 61 (2d Cir. 2010); *Van Duyn v. Baker Sch. Dist.*, 481 F.3d 770, 47 IDELR 182 (9th Cir. 2007); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, n.3, 38 IDELR 61 (8th Cir. 2003); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 31 IDELR 185 (5th Cir. 2000).

c. Failure to notify the student's parents that the student was removed from an alternative assessment program and to inform the parents of their due process rights were not harmless, technical violations of the IDEA. *County Sch. Bd. of York Cty. v. A.L.*, 194 F. App'x 173, 46 IDELR 94 (4th Cir. 2006) (unpublished).

F. Timelines

1. Non-Discipline Hearings

a. Within 45 calendar days after the expiration of the 30-day resolution period, or the adjusted time periods described in 34 C.F.R. § 300.510(c), a final decision must be reached in the hearing and mailed to each of the parties.[59]

b. A hearing officer may grant specific extensions of time beyond the 45-day period but only at the request of either party.[60]

2. Discipline Hearings

a. Subject Matter. A parent of a child with a disability may challenge the placement decision resulting from a

[59] 34 C.F.R. § 300.515(a).
[60] 34 C.F.R. § 300.515(c).

disciplinary removal or the manifestation determination.[61] An LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may seek to have the child placed in an interim alternative educational setting ("IAES").[62]

b. Expedited Hearing. In matters involving a challenge to the placement decision resulting from a disciplinary removal, the manifestation determination, or placement in an IAES, the parent or LEA must be given an opportunity for an expedited due process hearing, which must occur within 20 school days of the date the complaint is filed.[63] A decision must be made and provided to the parties within 10 school days after the hearing.[64]

c. Resolution Period. A resolution meeting must occur, unless waived in writing by both parties, within seven calendar days of receiving notice of the due process complaint and the due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of the receipt of the due process complaint.[65] The resolution period runs concurrent with the hearing period.[66]

d. Sufficiency Challenges. The sufficiency provision in § 300.508(d) do not apply to the expedited due process hearing.[67]

3. Judicial Decisions / Federal Policy/Guidance

a. Inaction by a parent and LEA following the filing of a due process complaint does not toll the 45-day timeline. The timelines regarding due process complaints remain in effect and the hearing officer should contact the parties upon the expiration of the 30-day resolution period for a status report and/or to convene a hearing. *Letter to Worthington*, 51

[61] 34 C.F.R. § 300.532(a).
[62] *Id. See also* 34 C.F.R. § 300.532(b)(2)(ii).
[63] 34 C.F.R. § 300.532(c)(1) and (2).
[64] 34 C.F.R. § 300.532(c)(2).
[65] 34 C.F.R. § 300.532(c)(3).
[66] *Letter to Gerl*, 51 IDELR 166 (OSEP 2008).
[67] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46725 (August 14, 2006).

IDELR 281 (OSEP 2008).

b. An indefinite continuance of a due process hearing is not permissible under the IDEA. *J.D. v. Kanawha Cty. Bd. of Educ.*, 53 IDELR 225 (S.D. W. Va. 2009).

c. The failure to issue a decision within the 45-day timeline and more than a year after the due process complaint was filed, while in violation of the IDEA, was nonetheless deemed harmless. Here, the student had been withdrawn from the LEA and enrolled in a private school before his parents requested a hearing. *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 51 IDELR 9 (D.D.C. 2008).