

Tackling the Issues – Why Do It and How?

D.C. IDEA Hearing Officer Training
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Deusdedi Merced, Esq.

I. INTRODUCTION

- A. IDEA hearing officers do, and must, wisely exercise broad authority to do all things that are reasonably necessary for the proper administration of the due process hearing. Said authority extends to requiring specification of the issues raised in the due process complaint, even in the absence of a sufficiency challenge.¹
- B. OSEP, too, suggests that hearing officers have a role to play in managing the issues presented. Specifically, the Comments to the Regulations state:

To assist parents in filing a due process complaint, § 300.509 and section 615(b)(8) of the Act require each State to develop a model due process complaint form. While there is no requirement that States assist parents in completing the due process complaint form, resolution of a complaint is more likely when both parties to the complaint have a clear understanding of the nature of the complaint. Therefore, the Department encourages States, to the extent possible, to assist a parent in completing the due process complaint so that it meets the standards for sufficiency. However,

¹ See *Ford v. Long Beach Unified School District*, 291 F.3d 1096, 37 IDELR 1, (9th Cir. 2002) (holding that the parents due process rights were not violated when the hearing officer, in her written decision, formulated the issues presented in words different from the words in the due process complaint); *J.W. v. Fresno Unified Sch. Dist.*, 611 F. Supp. 2d 1097, 52 IDELR 194 (E.D. Cal. 2009) *aff'd* 626 F.3d 431, 55 IDELR 153 (9th Cir. 2010) (finding that the ALJ's slight reorganization of the issues by consolidating the assessments claims into a single issue was inconsequential to the student); *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 39 IDELR 1 (5th Cir. 2003) (holding that the hearing officer's restatement and reorganization of the issues still addressed the merits of the parent's issues).

consistent with section 615(c)(2)(D) of the Act, the final decision regarding the sufficiency of a due process complaint is left to the discretion of the hearing officer.

...

With regard to parents who file a due process complaint without the assistance of an attorney or for minor deficiencies or omissions in complaints, we would expect that hearing officers would exercise appropriate discretion in considering requests for amendments.

Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, Page 46699 (August 14, 2006).

- C. Managing the issues presented is critical to the effective and efficient management of the hearing process. When the issues in the due process complaint are clear, the responding party is able to prepare for the hearing, the hearing is focused, there is meaningful opportunity for resolving the complaint during the resolution meeting or thereafter, and the hearing officer is able to better determine whether s/he has jurisdiction over the specific issues.²
- D. The parties should plan to have a thorough discussion regarding the issue(s) presented in the due process complaint during the pre-hearing conference. Precisely defining the issues during the pre-hearing conference, when necessary, leads to a more productive, meaningful and focused hearing process that ultimately results in a good decision.

II. RESISTANCE IS FUTILE

- A. Buy In. The first requisite for writing a good decision is to have the issues defined. The pre-hearing conference affords the parties an early opportunity to identify with specificity the questions (i.e., the issues) the hearing officer is being asked to answer. Unfortunately, for various reasons – whether because the lawyer/party has an inability to do so or misguidedly believes s/he will be disadvantaged – it can be difficult to make the lawyer/party precisely define the issue(s) to be determined.

The lawyer/party, however, must be made to precisely define the

² See *Letter to Wilde* (OSEP 1990) (unpublished) (“Determinations of whether particular issues are within the hearing officer’s jurisdiction ... are the exclusive province of the impartial due process hearing officer who must be appointed to conduct the hearing.”).

issue(s) during the pre-hearing conference so the hearing officer knows what question(s) s/he ultimately must decide. And the hearing officer must embrace the notion that it is at the pre-hearing conference that s/he begins to work on writing a good decision. Understanding this is essential to how the hearing officer approaches the pre-hearing conference and to how the attorney/party responds during the pre-hearing conference.

B. The Pre-Hearing Conference

1. Utility – Necessity – Authority. IDEA and its regulations do not require a pre-hearing conference, but state statutes, regulations or procedures may require the conduct of a pre-hearing conference.³ Whether the pre-hearing conference is mandated, or a matter left to the discretion of the hearing officer (who has elected to exercise such discretion), how the conference is structured and the tone set by the hearing officer leading up to the pre-hearing conference is pivotal to the hearing officer taking control of the hearing process and the management of its participants.
2. Setting Expectations. Immediately after being appointed, the hearing officer should determine whether any of the events described in 34 C.F.R. § 300.510(c) require the hearing officer to adjust the timeline.⁴ Soon after determining that the timeline should be readjusted, the hearing officer should schedule with the parties and/or their representatives the pre-hearing conference. The pre-hearing conference should be held early on in the 45-day time

³ In D.C., a pre-hearing conference is mandated in every case. *See* Appropriate Standard Practice 7(A)(1). Additional pre-hearing conferences are within the discretion of the assigned hearing officer. *See* Appropriate Standard Practice 7(A)(2).

⁴ Pursuant to 34 C.F.R. § 300.515 (a), a decision in a due process hearing must be reached and mailed to each of the parties not later than 45 days after the expiration of the 30-day resolution period under 34 C.F.R. § 300.510 (b), or the adjusted time periods described in 34 C.F.R. § 300.510 (c). Under 34 C.F.R. § 300.510 (c), the 45-day timeline for the due process hearing starts the day after one of the following events: (1) both parties agree in writing to waive the resolution meeting; (2) after either 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 (3) if both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

period,⁵ and consideration should be given to the five-day rule,⁶ the ten-day attorneys' fee rule,⁷ and the time the parties will need to prepare for the hearing.

Just as important, the hearing officer should provide the parties and/or their representatives with notice of the topics to be discussed during the pre-hearing conference, which should include as a topic for discussion the issue(s) raised in the due process complaint.⁸ The parties and/or their representatives should be further instructed to take whatever steps before the pre-hearing conference as may be necessary in order to meaningfully respond to, or otherwise address, the topics listed on the agenda.⁹

III. 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.¹⁰ The word “any” has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’¹¹
- B. Content of Complaint – The due process complaint must include –
 - 1. the name of the child;

⁵ Some hearing officers prefer to hold a pre-hearing conference during the resolution period. While there may be occasion for the hearing officer to intervene during the resolution period (e.g., addressing a dispute about stay put), the hearing officer should schedule the pre-hearing conference for after the end of the resolution period in a non-discipline case. In a non-discipline case, hearing officers are tasked with scheduling the pre-hearing conference within one week of the termination of the resolution period. In an expedited, discipline hearing, hearing officers are mandated to schedule the pre-hearing conference as soon as possible after the filing of the due process complaint. See Appropriate Standard Practice 7(A)(1).

⁶ See 34 C.F.R. § 300.512(a)(2) and (b)(1).

⁷ See 34 C.F.R. § 300.517(c)(2)(i)(A).

⁸ See Appropriate Standard Practice 7(B)(1) and accompanying Appendix A, Forms 4 and 5.

⁹ See, e.g., Appendix A, Form 4.

¹⁰ 20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.507(a).

¹¹ *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).

2. the address of the residence of the child¹²;
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.¹³

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.¹⁴

- C. Four Corners. Hearing Officers can consider only those issues that are raised in the due process complaint.¹⁵

IV. 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.¹⁶
- 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

¹² 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).

¹³ 20 U.S.C. § 1415(b)(7)(A)(ii); 34 C.F.R. § 300.508(b).

¹⁴ 20 U.S.C. § 1415(b)(7)(B); 34 C.F.R. § 300.508(c).

¹⁵ *Saki v. State of Hawaii, Dep't of Educ.*, 50 IDELR 103 (D. Haw. 2008).

¹⁶ 20 U.S.C. § 1415(c)(2)(B)(i)(I); 34 C.F.R. § 300.508(e). 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).

proposed or refused actions; and

4. A description of the factors that are relevant to the LEA's proposal or refusal.¹⁷
- 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.¹⁸
- D. Other Party Response. Parents, too, are required to file a response when the LEA has initiated the due process hearing.¹⁹

V. 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.²⁰
- 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

¹⁷ 20 U.S.C. § 1415(c)(2)(B)(i)(I)(aa) – (dd); 34 C.F.R. § 300.508(e)(1)(i) – (iv). 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).

¹⁸ 20 U.S.C. § 1415(c)(2)(B)(i)(II); 34 C.F.R. § 300.508(e)(2).

¹⁹ See 20 U.S.C. § 1415(c)(2)(B)(ii); 34 C.F.R. § 300.508(f).

²⁰ 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d). 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). Nonetheless, and in contrast to the Comments, one 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).

five (5) calendar days before a due process hearing occurs.²¹

- C. Timeline Recommences. When an amended due process complaint is filed, the timelines restart anew, including the resolution meeting timeline.²²

VI. EFFECTIVE PRACTICES TO MANAGING THE ISSUES PRESENTED

- A. Preparing for the Pre-Hearing Conference. Just like the parties and/or their representatives are expected to prepare for the pre-hearing conference, the hearing officer too must prepare for the pre-hearing conference. An initial step is for the hearing officer to carefully review the due process complaint and any response or pre-hearing statements provided. When doing so, the hearing officer should tentatively identify questions intended to help clarify the issue(s) and/or the relief sought included in the due process complaint. To the extent possible, the hearing officer should draft a rough outline of the issue(s), as well as the standard(s) (and the elements within each standard) to be applied in deciding each issue.

This simple exercise allows the hearing officer to generally identify the evidence needed to decide each issue and determine relief, should the hearing officer find a denial of a free and appropriate public education.

- B. At the Pre-Hearing Conference. The following are illustrative examples of what the hearing officer can do to effectively manage the issue(s) presented and assist the parties and/or their representatives in identifying the issue(s) with precision during the pre-hearing conference, when necessary.

1. Ask clarifying questions.
 - a. If classification is in dispute ...
 - i. Why do you disagree with the classification?
 - ii. What classification do you believe would be appropriate?
 - iii. How would the student's IEP be different if the classification was changed?
 - b. If an evaluation is being challenged ...

²¹ 20 U.S.C. § 1415(c)(2)(E)(i); 34 C.F.R. § 300.508(d)(3).

²² 20 U.S.C. § 1415(c)(2)(E)(ii); 34 C.F.R. § 300.508(d)(4).

- i. What aspects of the evaluation do you believe are inappropriate and why?
 - ii. How is it discriminatory?
 - iii. In what way was it inappropriately administered?
 - c. If placement/location of services is at issue ...
 - i. Why is the placement inappropriate?
 - ii. What aspects of the IEP is school X not able to implement and why?
 - iii. What do you believe to be the appropriate placement?
2. Get specifics by reviewing the IEP in question (even if line-by-line) and the parties' relative position on each issue in dispute.
3. Consider starting from the end, when the complaining party is a pro se parent who has difficulty identifying the issues. Ask the parent to identify the remedy.
4. Simplify and organize the issue(s).
 - a. Consolidate multiple issues into one issue when there is duplicity (e.g., an LRE issue is presented as five different issues).
 - b. Subdivide single issues that should be appropriately addressed separately (e.g., educational placement versus location of services).
 - c. Restate the issue(s) in question format.
 - d. Multiple issues should be presented in logical sequence, and the hearing officer should discuss with the parties and/or their representatives whether some of the issues should be tabled until after the parties have had an opportunity to return to an IEP team post the hearing officer having decided preliminary issues. For example, take a "shotgun" due process complaint regarding a child suspected of having a disability that alleges a failure to identify, evaluate, develop an appropriate IEP, and make an appropriate placement recommendation. And, it also seeks compensatory education. The hearing officer should ask the complainant what it is s/he really wants the hearing

officer to decide at the hearing. Is it simply eligibility or is the complainant also prepared to present evidence for the hearing officer to develop an IEP, and then more evidence to determine a placement as well?

5. Consider issuing an order listing specific questions that would need to be answered by the complaining party when more time is needed to respond. A schedule should be set identifying by when the complaining party should submit the answers and by when the responding party should submit his relative position on each identified issue.
- C. Document Issues Not in Dispute. Identifying issues not in dispute will focus settlement discussions and, should a hearing be necessary, the hearing.
- D. Eliminate Non-Hearable Issues. Issues that are not the appropriate subject of an IDEA due process hearing, or that are no longer viable, should be disposed of early on to avoid unnecessary preparation for, and prolonging, the hearing.²³ The hearing officer has authority to determine whether an issue is within his jurisdiction.²⁴
- E. Be Flexible. Other than the parents' right to inspect and review any education records relating to their children prior to an IEP meeting, resolution meeting or hearing, or the right to a response to reasonable requests for explanations and interpretations of the records,²⁵ IDEA does not provide for discovery. Naturally, some discovery takes place during the hearing process and hearing officers should weigh allowing new issues to be added during the hearing (or post the filing of the complaint) when it can be done fairly and without undue delay.²⁶ The alternative might be a second hearing, resulting in the additional expenses of time and money.²⁷

²³ For example, matters that are beyond the two-year statute of limitations, absent an exception, or previously litigated and determined (i.e., *res judicata* and/or collateral estoppel) might warrant dismissing the issues (or the case) prior to the actual hearing.

²⁴ *Letter to Wilde* (OSEP 1990) (unpublished).

²⁵ 34 C.F.R. § 300.613(a) and (b)(1).

²⁶ Be mindful of the language in 34 C.F.R. § 300.508(c), requiring notice before a hearing. Note, however, the use of the permissive word, "may."

²⁷ Prohibiting the complaining party from raising new issues at the time of the hearing could result in additional complaints or protracted conflict and litigation. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46747 (August 14, 2006).

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