EDUCATIONAL PLACEMENTS: DECODED

HEARING OFFICER TRAINING – D.C.
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I. OVERVIEW

A. Once an Individualized Education Program ("IEP"), or its contents, is determined, a multidisciplinary team ("MDT") is tasked with identifying an appropriate educational placement where the IEP can be implemented.[1]

B. Neither the Individuals with Disabilities Education Act[2] ("IDEA"), nor its implementing regulations, however, define the term "educational placement."[3]

C. Too often parties use the term "educational placement" without precisely identifying its significance in the context that it is being used. Some, for example, liberally substitute the term "placement" with "location." Clarifying the difference between the two is essential to managing the issues presented in a due process complaint.

D. Managing the issues presented is critical to 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

[1] 34 C.F.R. § 300.116.
[2] In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. *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. *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.'").
[3] *See*, *generally*, 20 U.S.C. § 1400 *et seq*.; 34 C.F.R. § 300 *et seq*.

over the specific issues.[4]

II. PLACEMENT DECISIONS – GENERALLY

A. A placement decision is a determination of where the local educational agency ("LEA") will implement the student's IEP in the least restrictive environment ("LRE").[5]

B. In determining the educational placement of a child with a disability, 20 U.S.C. § 1412(a)(5) and 34 C.F.R. § 300.116 require of the LEA that –

1. The placement decision –

a. Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options;[6] and

b. Is made in conformity with IDEA's LRE provisions, including 34 C.F.R. §§ 300.114 through 300.118;[7]

2. The child's placement –

a. Is determined at least annually;

b. Is based on the child's IEP[8]; and

c. Is as close as possible to the child's home;[9]

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[4] *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.").
[5] An LEA must ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(2)(i).
[6] 34 C.F.R. § 300.116(a)(1).
[7] 34 C.F.R. § 300.116(a)(2).
[8] Placement decisions can only be made after the development of the IEP. *Spielberg v. Henrico County Public School*, 853 F.2d 256, 441 IDELR 178 (4th Cir. 1988). Only after the IEP has been developed does the MDT have a basis for determining where the student's needs can be served. Should the process be reversed, the child's IEP would be written to conform with a predetermined setting, possibly denying the child a free and appropriate public education ("FAPE").
[9] 34 C.F.R. § 300.116(b).

3. Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that s/he would attend if nondisabled;[10]

4. In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that s/he needs; and[11]

5. A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.[12]

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[10] 34 C.F.R. § 300.116(c). There is not an absolute requirement that a child with disability be placed in his or her neighborhood school. *See*, *e.g.*, *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 39 IDELR 182 (5th Cir. 2003)(the LEA's policy of providing cued speech transliterators at centralized locations rather than in neighborhood schools did not violate IDEA because there is no right to a neighborhood school assignment under the IDEA); *McLaughlin v. Holt Public Sch. Bd. of Educ.*, 320 F.3d 663, 38 IDELR 152 (6th Cir. 2003)(holding that the LRE mandate and regulations do not mandate placement in the neighborhood school); *Kevin G. v. Cranston Sch. Comm.*, 130 F.3d 481, 27 IDELR 32 (1st Cir. 1997)("[W]hile it may be preferable for Kevin G. to attend a school located minutes from his home, placement [where a full-time nurse is located] satisfies the [IDEA]. …The school district has an obligation to provide a school placement which includes a nurse on duty full-time, but it is not required to change the district's placement of nurses when, as in this case, care is readily available at another easily accessible school."); *Hudson v. Bloomfield Hills Public Sch.*, 108 F.3d 112, 25 IDELR 607)(upholding the lower court's opinion that concluded that neither the IDEA nor its regulations required a neighborhood placement); *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 24 IDELR 465 (10th Cir. 1996)(IDEA does not entitle the student to transition services delivered at his neighborhood school); *Schuldt v. Mankato Indep. Sch. Dist. No. 77*, 937 F.2d 1357, 18 IDELR 16 (8th Cir. 1991)(LEA not required to modify a neighborhood school for a student with spina bifida); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 17 IDELR 350 (4th Cir. 1991)(LEA complied with IDEA by providing a deaf student with a cued speech program in a centralized school approximately five miles farther than the neighborhood school), *cert. denied*, 502 U.S. 859 (1991); *Wilson v. Marana Unified Sch. Dist. of Pima County*, 735 F.2d 1178, 556 IDELR 101 (9th Cir. 1984)(LEA may assign child to a school 30 minutes away because teacher certified in the child's disability was assigned there, rather than move the service to the neighborhood school).

Rather, the neighborhood school requirement is one of a number of relevant factors to be considered when making the placement decision and, at most, IDEA creates a "preference" for education in the neighborhood school. *Murray v. Montrose County Sch. Dist. Re-1J*, 51 F.3d 921, 22 IDELR 558 (10th Cir. 1995); *Accord Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 24 IDELR 673 (5th Cir. 1996).

[11] 34 C.F.R. § 300.116(d).

[12] 34 C.F.R. § 300.116(e).

C. Placement Decision Need Not Be Made by IEP Team. Note that 34 C.F.R. § 300.116(a)(1) does not require the IEP Team to make the placement decision.[13] Because IDEA does not assign any particular name to the placement team, MDT is common nomenclature.

D. Continuum of Alternative Placements. Each LEA must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.[14] In general, the continuum must include the alternative placements listed in the definition of special education under 34 C.F.R. § 300.39[15] and make provision for supplementary services[16] to be provided in conjunction with regular class placement.[17]

E. No Right To Veto. The proposed IDEA regulations in 2005 included language in 34 C.F.R. §§ 300.116(b)(3) and (c) intended to clarify that a parent may send a child to a charter, magnet, or other specialized school without violating the LRE mandate. Specifically, proposed IDEA regulation 34 C.F.R. § 300.116(b)(3) said that the placement must be as close as possible to the child's home, "unless the parent agrees otherwise." 34 C.F.R. § 300.116(c) had the same proviso (i.e., it provided that unless the IEP requires another arrangement, the child must be educated in the school the child would attend if not disabled, "unless the parent agrees otherwise").

The 2006 IDEA Part B regulations removed the "unless the parent agrees otherwise" qualification from the dual requirements[18] because the phrase was "unnecessary, confusing," and could have been understood to mean that parents have a right to veto the placement decision made by the MDT.[19]

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[13] Generally, in D.C., the IEP Team also functions as the placement team but IDEA does not mandate it. *See* D.C. Mun. Reg. tit. 5-E § 3001.1 (definition of "IEP team"). *But see* Briggs, Ph.D., Kerri L. Memo to Chancellor, *et. al*, Policies and Procedures for Placement Review, Revised, Office of the State Superintendent of Education, 5 Jan. 2010 (advising LEAs that when an LEA anticipates that it may not be able to meet its obligations to provide a full continuum of placements in the LRE, it must notify the OSSE, Department of Special Education ("DSE"). The OSSE DSE will assume an "advisory role" to the IEP Team and will provide "technical assistance to support efforts related to LRE objectives. *Id.* at 2.

[14] 34 C.F.R. § 300.115(a).

[15] Specifically, the alternative placements are instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.39(a)(1)(i); 34 C.F.R. § 300.115(b)(1).

[16] For example, resource room or itinerant instruction. 34 C.F.R. § 300.115(b)(1).

[17] 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.115.

[18] *See* 34 C.F.R. §§ 300.116(b)(3) and (c).

[19] *See Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46588 (August 14, 2006).

F. Extent of Participation. Parents do have the right to participate in decisions about their children's placements. However, the IDEA does not give parents the right to control or veto placement decisions.[20]

1. Parents are an essential part of the placement team.[21] However, parents are not necessarily denied a meaningful opportunity to participate in the placement decision when the LEA engages in preparatory activities in advance of the IEP / placement meeting. The IEP Team or MDT may meet in advance of the placement meeting to discuss potential placements for the child.[22] Nonetheless, the LEA must keep an open mind and must give meaningful consideration to the parents' input on the child's placement.[23] Failure to give meaningful consideration to the parents' input may be a denial of a FAPE.[24]

2. A placement decision may be made without the involvement of the parent, provided the LEA is unable to obtain the parent's participation in the decision.[25] As with the IEP process, however, the LEA must document its attempts to ensure parental involvement before the placement team makes the placement decision without the parent's participation.[26] Failure by the LEA to make meaningful attempts to ensure parental involvement in the placement decision may be a denial of FAPE.[27]

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[20] *See* Section II. D., *supra*. *See also White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 39 IDELR 182 (5th Cir. 2003)(noting that, while the IDEA requires the LEA to provide services to allow the child the requisite basic floor of opportunity, it does not require the LEA to make special accommodations at the parent's request, particularly where the request is not related to helping the child achieve academic potential).

[21] 20 U.S.C. § 1414(e); 34 C.F.R. § 300.116(a)(1); 34 C.F.R. § 300.116(c); *See Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46585 (August 14, 2006).

[22] *See*, *e.g.*, *T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 51 IDELR 176 (2d Cir. 2009)(noting that the school staff can discuss potential services and placements in advance of the IEP / placement meeting, so long as the school staff arrives at the meeting with an open mind).

[23] *H.B. by Penny B. v. Las Virgenes Unified Sch. Dist.*, No. 04-cv-08572-FMC, 52 IDELR 163 (C.D. Cal. 2008) *aff'd*, 370 F. App'x 843, 54 IDELR 73 (9th Cir. 2010)(holding that the superintendent's pronouncement at the start of the meeting that the IEP Team would discuss the student's transition to public school showed that the LEA predetermined the child's placement).

[24] *See, e.g., H.B. by Penny B. v. Las Virgenes Unified Sch. Dist.*, No. 04-cv-08572-FMC, 52 IDELR 163 (C.D. Cal. 2008) *aff'd*, 370 F. App'x 843, 54 IDELR 73 (9th Cir. 2010).

[25] 34 C.F.R. § 300.501(c)(4).

[26] *Id.*

[27] *See*, *e.g.*, *Drobnicki v. Poway Unified Sch. Dist.*, 358 F. App'x 788, 53 IDELR 210 (9th Cir. 2009)(unpublished)(holding that a California LEA should have attempted to schedule an IEP meeting at a mutually agreeable time and place rather than offering to allow the parent to participate by teleconference).

3. Meaningful opportunity to participate in the placement decision is achieved when, for example, parents help to develop the IEP itself and are afforded the chance to share with the other members of the MDT their (the parents) educational preferences.[28]

4. IDEA, however, does not permit a placement decision to be based solely on parental preference. 34 C.F.R. § 300.116(b)(2) requires that the educational placement for each child be based on his or her IEP.[29] However, although parental preference cannot be the sole or predominant factor in a placement decision, parental choice is not inconsistent with the IDEA, provided the chosen placement is consistent with 34 C.F.R. § 300.116 and meets the LRE requirements found at 34 C.F.R. § 300.114 through § 300.118.[30]

G. Designation of Specific Site, Classroom or Teacher. IDEA does not require a placement decision to identify the particular site, classroom or teacher in which a child's IEP must be implemented.[31] The MDT, however, may make such decisions.[32]

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[28] *Paolella v. District of Columbia*, 210 F. App'x 1, 46 IDELR 271 (D.C. Cir. 2006)(unpublished). *See also Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 49 IDELR 71 (D.D.C. 2007); *T.T. v. District of Columbia*, No. 06-0207-JDB, 48 IDELR 127 (D.D.C. 2007).

[29] *See also Letter to Burton*, 17 IDELR 1182 (OSERS 1991)(OSEP found Indiana's "parent option" provision to be inconsistent with IDEA because the State law permitted the LEA to base a placement decision solely on "parent option" or "parent preference") *But see Board of Educ. Of Community Consol. Sch. Dist. No. 21, Cook County v. Illinois State Bd. Of Educ.*, 938 F.2d 712, 18 IDELR 43 (7th Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992)("a child whose parents oppose an IEP so vehemently and vocally as to 'doom' its prospects should not be enrolled in the placement merely to enable educational agencies and federal courts to 'discipline' parents").

[30] *Letter to Bina*, 18 IDELR 582 (OSERS 1991).

[31] *Letter to Wessels*, 16 IDELR 735 (OSEP 1990). *But see A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 47 IDELR 245 (4th Cir. 2007), *cert. denied*, 552 U.S. 1170, 110 LRP 19412 (2008)(holding that the IEP must identify a particular school to offer a FAPE when the parents express doubt concerning the existence of said school).

[32] *Id*.

The assignment of a child to a specific site, classroom or teacher can be an administrative determination that need not be made by the placement team, provided that the particular site, classroom or teacher is consistent with the placement decision, including the LRE aspect.[33]

H. Relevant Factors. Although IDEA does not require that each school building in an LEA be able to provide all the special education and related services for all types and severities of disabilities, the LEA has an obligation to make available a full continuum of alternative placement options that maximize opportunities for its children with disabilities to be educated with nondisabled peers to the extent appropriate.[34]

Placement decisions must be determined individually based on each child's abilities, unique needs, and IEP, and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience.[35]

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[33] *See White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 39 IDELR 182 (5th Cir. 2003)("Schools have significant authority to determine the school site for providing IDEA services."). *See also Letter to* Veazey, 37 IDELR 10 (OSEP 2001)(advising that if an LEA has two or more equally appropriate locations that meet the child's special education and related services needs, the assignment of a particular school may be an administrative determination, provided that the determination is consistent with the placement team's decision); *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994)(advising that it is permissible for a student with a disability to be transferred to a school other than the school closest to home if the transfer school continues to be appropriate to meet the individuals needs of the student); *Letter to Wessels*, 16 IDELR 735 (OSEP 1990)(advising that OSEP does not interpret the educational placement regulations as requiring a placement decision to identify the particular classroom or teacher in which a child's IEP must be implemented, if more than one of these is available and would be consistent with the placement decision).

[34] *See Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46588 (August 14, 2006).

[35] *See Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46588 (August 14, 2006). *See also Letter to Anonymous*, 21 IDELR 674 (OSEP 1994)(clarifying that the LEA does not have a "main goal" which it must achieve when making a placement decision and that what is pertinent in making the placement decision will vary based upon the child's unique and individual needs).

III. EDUCATIONAL PLACEMENT DEFINED

A. Definition. The term "educational placement" refers only to the general type of educational program in which the child is placed.[36] Stated differently, "educational placement" is the "overall instructional setting in which the student receives his education."[37]

B. Location. IDEA defines IEP to include, *inter alia*, "the anticipated frequency, *location*, and duration of those services."[38] The term "location," however, as used in IDEA, refers to the type of environment that is the appropriate place for the delivery of services, and not a *particular* school or facility, classroom or teacher.[39]

The Comments to the IDEA regulations discuss the difference between placement and location. "Placement" refers to the points along the continuum of placement options available for a child with a disability, and "location" refers to the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services.[40] When an LEA has two or more equally appropriate locations that meet

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[36] *Concerned Parents v. New York City Bd. of Educ.*, 629 F.2d 751, 552 IDELR 147, (2d Cir. 1980), *cert. denied*, 449 U.S. 1078, 110 LRP 34494 (1981). *See also White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 39 IDELR 182 (5th Cir. 2003)(placement does not mean a "particular school," and instead means "a setting"); *Hale v. Poplar Bluff R-1 Sch. Dist.*, 280 F.3d 831, 36 IDELR 61 (8th Cir. 2002)(change from home to school was a change in placement); *Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook County, Ill. v. Ill. State Bd. of Educ.*, 103 F.3d 545, 25 IDELR 132 (7th Cir. 1996)(finding that expulsion was a change in educational placement but when fiscal concerns cause a transfer of the student, the focus is on the student's general educational program); *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 556 IDELR 270 (D.C. Cir. 1984)(adopting the *Concerned Parents* definition of the term "educational placement"); *DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149, 556 IDELR 260 (3d Cir. 1984)(noting that parents are not entitled to a due process hearing when a "minor" decision alters the school day of their children and finding that a change in transportation services was not a change in placement); *Tilton v. Jefferson County Bd. of Educ.*, 705 F.2d 800, 554 IDELR 513 (6th Cir. 1983)(distinguishing *Concerned Parents* in finding that a change in placement did occur when students were transferred from a year-round school to a 180-day program).

[37] *N.D. v. State of Hawaii Dept. of Educ.*, 600 F.3d 1104, 54 IDELR 111 (9th Cir. 2010) *citing A.W. v. Fairfax County Sch. Bd.*, 372 F.3d 674, 41 IDELR 119 (4th Cir. 2004).

[38] 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (emphasis added).

[39] *T.Y. v. New York City Dept. of Educ.*, 584 F.3d 412, 53 IDELR 69 (2d Cir. 2009), *cert. denied*, No. 09-1066, 110 LRP 28696 (U.S. May 17, 2010). *See also* Section II. G., *supra*.

[40] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46588 (August 14, 2006).

the child's special education and related services needs, the MDT has the flexibility to assign the child to a particular school or classroom.[41]

C. Change in Educational Placement. An LEA, in the traditional exercise of its discretions, can implement minor changes to the educational program as it may determine to be necessary within the educational programs provided for its students.[42] Said adjustments do not constitute a change in the educational placement sufficient to trigger the prior written notice provisions.[43] In order for the change to qualify as a change in educational placement, a fundamental change in, or elimination of a basic element of the education program, must be identified.[44] [T]he 'touchstone' is whether the modification 'is likely to affect in some significant way the child's learning experience.'"[45]

A case-by-case analysis must be conducted to determine whether a change in placement materially or substantially alters a student's program. In making such a determination, the effect of the change in location on the following factors must be examined: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements.[46]

If this inquiry leads to the conclusion that a substantial or material change in the child's educational program has occurred, the public agency must provide prior written notice.[47]

IV. THE PLACEMENT OFFER

A. The placement offer must be in writing, and must meet certain procedural and substantive requirements.[48] The requirement of a formal, written offer –

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[41] *Id.*
[42] *Concerned Parents v. New York City Bd. of Educ.*, 629 F.2d 751, 552 IDELR 147, (2d Cir. 1980), *cert. denied*, 449 U.S. 1078, 110 LRP 34494 (1981).
[43] *See id.*
[44] *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 556 IDELR 270 (D.C. Cir. 1984). *Compare Knight v. District of Columbia*, 877 F.2d 1025, 441 IDELR 505 (D.C. Cir. 1989)(a change from a private school placement to a public school placement, when that is the only significant difference between programs offered, does not constitute a change in educational placement) *with McKenzie v. Smith*, 771 F.2d 1527, 557 IDELR 119 (D.C. Cir. 1985)(moving a learning disabled child from a full-time special education program to a part-time regular education program did result in a change in educational placement).
[45] *J.R. v. Mars Area Sch. Dist.*, 318 F. App'x 113, 52 IDELR 91 (3d Cir. 2009) *citing DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149, 556 IDELR 260 (3d Cir. 1984).
[46] *Letter to Fisher*, 21 IDELR 992 (OSEP 1994).
[47] *Id.*
[48] 20 U.S.C. §§ 1415(b)(3) and (4), 1415(c)(1); 34 C.F.R. § 300.503.

> creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in 'present[ing] complaints with respect to any matter relating to the…educational placement of the child.'[49]

B. The LEA's failure to make a formal, written offer of placement may give rise to a per se denial of a FAPE.[50]

C. The failure to provide specificity in the formal, written offer, or in the IEP[51], may amount to a denial of a FAPE.[52] However, identifying a particular location at which the

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[49] *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 20 IDELR 987 (9th Cir. 1994), *cert. denied*, 513 U.S. 965, 109 LRP 36508 (1994). *See also Letter to Lieberman*, 52 IDELR 18 (OSEP 2008)(advising that prior written notice would be required even when the LEA and the parent agreed to a change in the child's services because it would allow the parent the time to fully consider the change and determine if s/he has additional suggestions, concerns, questions, and so forth).

[50] *See*, *e.g.*, Redding *Elementary Sch. Dist. v. Goyne*, No. Civ. S-00-1174 WBS, 34 IDELR 118 (E.D. Ca. 2001)(relying on *Smith* that the requirement of a formal, written offer "should be enforced rigorously," the district court concluded that, for purposes of determining a parent's right to reimbursement for the unilateral placement of a child in private school, an LEA's failure to make a formal offer of placement constitutes a per se denial of a FAPE). *But see T.Y. v. New York City Dept. of Educ.*, 584 F.3d 412, 53 IDELR 69 (2d Cir. 2009)(in denying reimbursement to the parents, the Second Circuit explained that an IEP's failure to identify a specific location does not constitute a per se procedural violation of the IDEA), *cert. denied*, No. 09-1066, 110 LRP 28696 (U.S. May 17, 2010).

[51] An LEA can use the IEP as part of the prior written notice so long as the document(s) the parent receives meets all the requirements in 34 C.F.R. § 300.503. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46691 (August 14, 2006); *Letter to Lieberman*, 52 IDELR 18 (OSEP 2008).

[52] *See*, *e.g.*, *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 47 IDELR 245 (4th Cir. 2007), *cert. denied*, 552 U.S. 1170, 110 LRP 19412 (2008)(holding that, because the parents expressed doubt concerning the existence of a particular school that can satisfactorily provide the level of services that the IEP described, the failure of the LEA to identify a particular location on the IEP denied the student a FAPE). *See also Mill Valley Elem. Sch. Dist. v. Eastin*, No. 98-03812 CW, 32 IDELR 140 (N.D. Ca. 1999)(an LEA's mere skeletal outline of a proposed plan that informed the parents that the LEA was "looking at" three schools did not constitute the formal, written offer of placement required by IDEA and resulted in a reimbursement award to the parents).

special education services are expected to be provided is not always required, and a fact specific inquiry is necessary to determine whether a FAPE has been offered.[53]

[53] *Compare A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 47 IDELR 245 (4th Cir. 2007), *cert. denied*, 552 U.S. 1170, 110 LRP 19412 (2008) *with T.Y. v. New York City Dept. of Educ.*, 584 F.3d 412, 53 IDELR 69 (2d Cir. 2009), *cert. denied*, No. 09-1066, 110 LRP 28696, (U.S. May 17, 2010).

V. MANAGING EDUCATIONAL PLACEMENT ISSUES

A. Authority. Hearing Officers have expansive discretionary authority when handling pre-hearing procedural matters. IDEA and its implementing regulations delineate the specific rights accorded to any party to a due process hearing.[54] The hearing officer is charged with the specific responsibility "to accord each party a meaningful opportunity to exercise these rights during the course of the hearing."[55] It is further expected that the hearing officer "ensure that the due process hearing serves as an effective mechanism for resolving disputes between parents" and the school district.[56] In this regard, apart from the hearing rights set forth in IDEA and the regulations, "decisions regarding the conduct of [IDEA] due process hearings are left to the discretion of the hearing officer," subject to appellate review.[57]

Such discretionary authority also extends to various pre-hearing procedural matters, provided that any decision made by the hearing officer is consistent with basic elements of due process hearings and the rights of the parties set out in the statute and the regulations.[58] In this regard, the Comments to the Regulations are informative.[59]

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[54] *See* 34 C.F.R. § 300.512.
[55] *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995).
[56] *Id*.
[57] *Id*.
[58] *See Letter to Steinke*, 18 IDELR 739 (OSEP 1992)(regarding the applicability of the five-day rule and the discretion of the hearing officer to grant continuances); *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).
[59] Specifically, the Comments say, in part –

> We do not believe it is necessary to regulate further on the other pre-hearing issues and decisions mentioned by the commenters because we believe that States should have considerable latitude in determining appropriate procedural rules for due process hearings as long as they are not inconsistent with the basic elements of due process hearings and rights of the parties set out in the Act and these regulations. The specific application of those procedures to particular cases generally should be left to the discretion of hearing officers who have the knowledge and ability to conduct hearings in accordance with standard legal practice. There is nothing in the Act or these regulations that would prohibit a hearing officer from making determinations on procedural matters not addressed in the Act so long as such determinations are made in a manner that is consistent with a parent's or a public agency's right to a timely due process hearing.
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> The Act does not address whether the non-complaining party may raise other

IDEA and its regulations do not comprehensively specify what particular remedies, including penalties and sanctions, are available to due process hearing officers.[60] Ultimately, the state educational agencies have the responsibility to ensure that hearing officers are given the authority required to grant whatever relief is necessary to effectively and efficiently resolve due process complaints.[61] Nonetheless, a hearing officer has the authority to grant whatever relief he deems necessary, under the particular facts and circumstances of each case, to ensure that a child receives the FAPE to which the child is entitled.[62] The due process hearing system established by a State must provide for such authority.[63]

B. Specification of the Issues. Said authority extends to requiring specification of the issues raised in the due process complaint, even in the absence of a sufficiency

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> issues at the hearing that were not raised in the due process complaint, and we believe that such matters should be left to the discretion of hearing officers in light of the particular facts and circumstances of a case. The Act also does not address whether hearing officers may raise and resolve issues concerning noncompliance even if the party requesting the hearing does not raise the issues. Such decisions are best left to individual State's procedures for conducting due process hearings.

See Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, Pages 46704, 46706 (August 14, 2006).

[60] Unlike the specific rights accorded to any party to a due process hearing that are listed, primarily, at 34 C.F.R. § 300.512, the few remedies, penalties and sanctions specified in IDEA and its regulations are infused throughout various provisions. For example, when the school district is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented, the school district can request that a hearing officer dismiss the parent's due process complaint. 34 C.F.R. § 300.510(b)(4).

[61] *Letter to Armstrong*, 28 IDELR 303 (OSEP 1997). Equally important, the state educational agencies are also charged with the responsibility to ensure that a hearing officer's orders are implemented, and that whatever actions are necessary to enforce those orders are taken. *Id*.

[62] *See Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985)(IDEA empowers courts [and hearing officers] to grant the relief that the court determines to be appropriate); *Cocores v. Portsmouth Sch. Dist.*, 18 IDELR 461 (D.N.H. 1991)(finding that a hearing officer's ability to award relief must be coextensive with that of the court); *Letter to Kohn*, 17 EHLR 522 (OSEP 1991). *See also Letter to Riffel*, 34 IDELR 292 (OSEP 2000)(discussing a hearing officer's authority to grant compensatory education services); *Letter to Armstrong*, 28 IDELR 303 (OSEP 1997)(relating to a hearing officer's authority to impose financial or other penalties on local school districts, issue an order to the state educational agency who was not a party to the hearing, and invoke stay put when the issue is not raised by the parties).

[63] *Letter to Armstrong*, 28 IDELR 303 (OSEP 1997).

challenge.[64] OSEP, too, suggests that hearing officers have a role to play in managing the issues presented. Specifically, the Comments to the Regulations states:

> 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, 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.
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> …
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> 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. Addressing the Issue at the Pre-Hearing Conference. An objective of the due process complaint – and, specifically the requirement that the complaint includes a description of the nature of the problem – is to serve as the basis for discussion at the resolution meeting. Secondarily, however, effective management of the issue(s) presented allows for the fair and timely conduct of the hearing in an efficient and effective manner. To assist the parties in identifying the issues with precision, the hearing officer should –

> 1. Review the due process complaint and the response to said complaint in advance of the pre-hearing conference to get acquainted with the problem identified in the complaint and to further consider the questions to ask of the parties to enable the hearing officer to narrow down the issue(s);
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> 2. Get specifics by reviewing the IEP and/or placement offer in question (even if line-by-line) and the parties' relative position on each issue in dispute;

[64] *See Ford v. Long Beach Unified School District*, 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).

3. Ask clarifying questions (What do you mean by educational placement? Are you taking issue with the setting, school site, or particular classroom? How was the parent denied meaningful participation in the placement decision?);

4. Consider starting from the end, when the complaining party is a pro se parent who has difficulty identifying the issue(s). Ask the parent to identify the remedy.

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.

VI. DISCUSSION – HYPOTHETICALS

THIS OUTLINE IS INTENDED TO PROVIDE WORKSHOP PARTICIPANTS WITH A SUMMARY OF SELECTED STATUTORY PROVISIONS AND SELECTED JUDICIAL INTERPRETATIONS OF THE LAW. THE PRESENTER IS NOT, IN USING THIS OUTLINE, RENDERING LEGAL ADVICE TO THE PARTICIPANTS.