

2022 Administrative Law Judges Special Education Training

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Special Education Hearings: Overview on Fundamental Substantive Issues and Best Practices in Hearing Procedures

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Agenda

- **Fundamental substantive issues**
 - FAPE
 - LRE
 - Parental Participation
- **Critical procedural issues**
 - Burden of proof
 - Federal and State time frames
- **Best Practices**
- **Q & A**

Free Appropriate Public Education FAPE

Substantive Compliance

FAPE requires an educational program reasonably calculated to enable a child to **make progress appropriate in light of the child's circumstances.**

Endrew F. v. Douglas County School District RE-1, 137 S.Ct. 988 (2017)

See Q&A on U.S. Supreme Court Case Decision *Endrew F. v. Douglas County School District Re-1*. U.S. Dept. of Ed., December 7, 2017

FAPE, cont.

Procedural Compliance

When does procedural error amount to a denial of FAPE?

In matters alleging a procedural violation, a hearing officer may find that a child **did not receive FAPE** only if the procedural inadequacies:

- Impeded the **child's right to FAPE**;
- Significantly impeded the **parents' opportunity to participate** in the decision-making process regarding the provision of FAPE to the child; or
- Caused a **deprivation of educational benefits**.

[34 CFR 300.513\(a\)\(2\)](#)

Least Restrictive Environment

LRE

- The IDEA requires that each public agency must ensure:
 - To the maximum extent appropriate, children with disabilities... are educated with children who are nondisabled; and
 - Special classes, separate schooling, or other removals of children with disabilities from the regular educational environment occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

[34 CFR 300.114\(a\)](#)

The relationship between LRE and FAPE:

- The school's **primary** obligation is to provide the student with disabilities with a **FAPE**.
- The **LRE** principle, although important, is **secondary**.

State Education Agency Protocols

- What are your SEA's protocols for special education due process hearings?
 - Structure of hearings
 - Hearing officer's authority and responsibilities
 - Templates and forms
 - Communications with parties
 - Orders and decisions

See, e.g., [Appropriate Standard Practices for Illinois Special Education Due Process Proceedings](#)

See List of Resources

Tennessee Due Process Cases

See [TN Code 49-10-606](#)

- e. Final orders in special education cases shall include **detailed findings of fact and conclusions of law.** The findings of fact shall include a determination by the administrative law judge regarding **meaningful participation by the parent** in the development of the individualized education plan (IEP) for the student.
- f. Final orders include a **determination of prevailing party status on an issue by issue basis.**

Initial Contact with Parties

- Notification of assignment
- Explanation of communication protocols
- Setting initial status conference

Parties' Communication with Hearing Officer

- Explanation of rule against *ex parte* communications
- Telephone, Zoom meeting
- Means of transmittal of written communication
 - U.S. Mail
 - Email
 - Facsimile transmission

Unrepresented Parent

- Check your SEA's protocols
 - For example, in Illinois:
 - Hearing Officers must ask any parent appearing without an attorney whether s/he has received, and is aware of, sources s/he could contact to obtain assistance in understanding the IDEA, including her/his rights regarding due process hearings, and to possibly obtain legal representation.

Unrepresented Parent, cont.

- Illinois Protocols, cont.
 - Hearing Officers must advise the parent of the “[Parent’s Rights Manual](#),” ... and other information regarding due process hearings and mediation.
 - Hearing Officers must provide any unrepresented party with a copy of the document entitled: “Hearing Process Guidelines,” ... ([Appropriate Standard Practices](#), pp. 43-44)

[Appropriate Standard Practices for Illinois Special Education Due Process Proceedings](#)

Pre-hearing Proceedings

Status Conference (Optional)

- Timelines – Setting Dates
 - Due process complaint answer
 - Resolution meeting
 - Are the parties participating in mediation?
 - Pre-hearing conference
 - Hearing date(s)

Setting Up the Pre-hearing Conference (PHC)

- Create the agenda for the PHC
- Determine how it will be conducted
 - In-person
 - Zoom meeting
 - Telephone conference

Notification of PHC

- Date, time, and location of PHC
- Provide an agenda for the PHC
- Disclosures each party must make at the PHC:
 - Whether it is represented by **legal counsel**;
 - Clarify **matters** it believes to be **in dispute**; and the specific **relief** being sought;
 - Any **additional evaluations** to be used at the hearing;
 - List of **documents**, including date and brief description;
 - Names of all **witnesses**.

Notification of PHC, cont.

- Inform the parties of what information must be furnished in advance of the PHC
 - List of witnesses, list of documents
 - How should this information be provided, when, and to whom?

HO's 'Working' PHC Agenda

- All issues in dispute as articulated by the parties, and the parties' positions on each issue
 - Parent's issues
 - Nature of dispute
 - Remedy/relief sought
 - District's issues
 - E.g., have the parents requested an IEE at District expense? Defense of District evaluation?

HO's "Working" PHC Agenda, cont.

- Determine order of presentation – who goes first?
 - Burden of proof rests with party seeking relief (*Schaffer v. Weast*)
 - But see state statute (addressing burden), or agreement of parties (order of presentation)
- Anticipated witnesses for each side, length of testimony
- Order of witnesses

HO's "Working" PHC Agenda, cont.

- Hearing 'housekeeping' issues
 - Location of hearing
 - Start and end times; lunch and breaks
 - Court reporter arrangements

5-day Disclosure Requirement

- The parties must disclose their witness lists and submit their evidence to the other party no later than **5 business days before** the hearing.
- Consequences for noncompliance?
 - The noncomplying party is **barred from introducing any evidence or calling any witness** not disclosed 5 days prior to the hearing.

Practical Tip

- Set the 5-day disclosure requirement for a **date certain**
 - Avoid the ambiguity of counting calendar days, business days, weekends, holidays, etc.
- Clarify how, when, and to whom documents must be delivered

The Due Process Hearing

Preliminary Matters*

- Will the hearing be open to the public?
 - “Parents involved in hearings must be given the right to open the hearing to the public” [34 CFR 300.512\(c\)\(2\)](#)
- Exclusion of witnesses? (Witnesses may be present in the hearing room only when they are testifying)
- Who is each party’s representative for the purpose of being present during the entire hearing?
 - What if the representative will also be testifying as a witness?

*May also be addressed in PHC

Preliminary Matters, cont.

- Introduction/use of documents and exhibits
 - Stipulations
 - Joint Exhibits
- What will the HO consider as part of the record for purposes of making findings and rendering a decision?
 - Witness testimony
 - Documents and evidence introduced through witness testimony

Preliminary Matters, cont.

- How to handle witnesses who are on both parties' witness lists?
- How to handle witnesses with limited availability?
- Remote witness testimony – use of exhibits

Opening / Closing

- Opening Statement
 - Both parties at beginning, or will party going second reserve for case in chief?
- Closing
 - Permit post-hearing briefs?
 - Allow submission of written statement? Require submission of hard copies of cases cited?

Effective Management and Control of Hearing

- Legal considerations (Statutory limitations)
- Objections
- Control over witness testimony (e.g., redundant, repetitive testimony)
- Setting tone; maintaining decorum

Legal Considerations HO Must be Prepared to Address

- 5-day disclosure rule - **evidence**
 - Any party has the right to “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” [34 CFR 300.512\(a\)\(3\)](#)

Legal Considerations HO Must be Prepared to Address, cont.

- 5-day disclosure rule - **evaluations**
 - “At least five business days prior to a hearing, each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party’s evaluations that the party intends to use at the hearing.
 - (2) A hearing officer may bar any party that fails to comply from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.” [34 CFR 300.512\(b\)](#)

Legal Considerations HO Must be Prepared to Address, cont.

- Issues limited to those raised in due process complaint
 - The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint, unless the other party agrees otherwise. [34 CFR 300.511\(d\)](#)
 - “Description of the nature of the problem”
 - “Proposed resolution of the problem”

Legal Considerations HO Must be Prepared to Address, cont.

- 2-year ‘statute of limitations’
 - A parent or agency must request an impartial hearing on their due process complaint 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 due process complaint. [34 CFR 300.511\(e\)](#)

How to Handle These Issues?

- If no party objects, does the HO have an obligation to raise the issue?

How to Handle These Issues? (cont.)

- If a party objects:
 - 5-day rule (evidence, evaluations)
 - Outside scope of due process complaint
 - Outside 2-year statute of limitations
 - Within discretion of HO – may allow for historical or foundational purposes, but not for substantive consideration (not as part of FAPE claim or remedy)

Objections

- Do the rules of evidence apply?
- What about ‘hearsay’?
- Laying a foundation
 - Non-school records and documents (e.g., private evaluations)
 - Expert witnesses – qualification of expert

Control over Witness Testimony

- Scope of direct and cross
 - Re-direct and re-cross permitted?
- When can/should witness testimony be barred?
- Can you/should you limit testimony of a witness?
- Should the HO ask questions of the witness?
- Will a party be allowed to call rebuttal witnesses?

Establishing Proper Decorum and Tone

- How should parties address HO, witnesses and each other?
- Establish a climate of courtesy, civility and respect
- Be clear, firm, and patient in your rulings and directions to the parties
- Establish protocols and be consistent in enforcing them
- Be impartial in your demeanor (keep your reactions, opinions and impressions to yourself)

Dealing with the Unrepresented Parent

- The HO should make sure the parent understands the process and conduct of the hearing
- The HO should not act as the parent's advocate
- The HO should not give advice on legal questions, strategy, or what to do in presenting the parent's case

Dealing with the Unrepresented Parent, cont.

- How to handle the unrepresented parent's testimony
 - Parent ask himself/herself a question and answer it
 - Have some other person ask parent prepared questions
 - With agreement from the district, parent may be allowed to give a narrative

Summing Up:

- Be familiar with your State Education Agency's protocols regarding special education due process hearings
- Be familiar with the key issues and relief sought in the case (and the relevant controlling law)
- Have an organized, detailed working agenda and framework for pre-hearing conferences and for the hearing

Summing Up, cont.

- Keep the hearing moving!
- Anticipate problems, challenges, difficulties, complications and determine ahead of time a strategy to address
- Be prepared to deal with ‘the unexpected’
- Be fair and impartial, respectful, firm, and consistent

Questions



Resources

IDEA Federal Regulations

Subpart E – Procedural Safeguards Due Process Procedures for Parents and Children

34 CFR Sec. 300.500 *et seq.*

<https://sites.ed.gov/idea/regs/b/e>

Model Form: Part B Procedural Safeguards Notice

U.S. Department of Education, 2009

https://sites.ed.gov/idea/files/modelform_Procedural_Safeguards_June_2009.pdf

OSEP Memo 13-08: Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act (Part B)

U.S. Department of Education, Office of Special Education and Rehabilitative Services
(July 23, 2013)

The Due Process Hearing, in Detail

Center for Parent Information & Resources

<https://www.parentcenterhub.org/details-dueprocess/>

Resources, cont.

Tennessee

Statutes

Tennessee special education statutes, [Tenn. Code Ann. §§ 49-10-101 et seq.](#)
Lexis Law [link](#)

[2021 Tennessee Code, Title 49 – Education, Chapter 10 – Special Education, Part 6 – Rights of Children and Parents](#)

<https://law.justia.com/codes/tennessee/2021/title-49/chapter-10/part-6/>

[TN Code § 49-10-606. Conducting Special Education Due Process Cases](#)

Resources, cont.

Tennessee

Rules and Regulations

[Rules of the State Board of Education: Chapter 0520-01-09 – Special Education Programs and Services](#) June, 2022 (Revised)

[Chapter 0520-01-09 Special Education Programs and Services](#)

Resources, cont.

Tennessee Department of Education

[The Individuals with Disabilities Education Act \(IDEA\) webpage](#)

Tennessee Department of Education

[Notice of Procedural Safeguards – Individuals with Disabilities Education Act](#)

Tennessee Department of Education

[Special Education Legal Services: Dispute Resolution Processes](#)

Tennessee Department of Education

[Quick Guide to Special Education Dispute Resolution Processes in Tennessee](#)

Tennessee Department of Education

Resources, cont.

Tennessee Department of Education, cont.

[Quick Guide to Parent Rights and Responsibilities in Special Education](#)

Tennessee Department of Education

[Guide to Special Education Administrative Complaints \(August 1, 2015\)](#)

Tennessee Department of Education

[Timelines in Special Education in Tennessee](#)

Tennessee Department of Education

[Important Legal Timelines in Special Education](#)

Tennessee Department of Education

Resources, cont.

Tennessee - Miscellaneous

[IDEA Dispute Resolution Data Summary for Tennessee 2010-11 to 2020-21](#)

CADRE (The Center for Appropriate Dispute Resolution in Special Education)