

## AGENDA

### ISBE IDEA IMPARTIAL HEARING OFFICER TRAINING

Chicago Bar Association Building, 321 S. Plymouth Court, Chicago, IL  
Friday, January 20, 2017

8:30 a.m. – 9:00 a.m. Continental Breakfast

9:00 a.m. – 10:30 a.m. *Addressing the Needs of Pro se Parents – Deusdedi Merced*

The biggest challenge most IDEA impartial hearing officers (IHO) face in fulfilling the role and responsibilities as an IHO is addressing the needs of *pro se* or unrepresented parents during the hearing process. Mr. Merced will lead a discussion on various approaches and strategies that might be utilized throughout the various stages of the hearing process by the IHO to assist parents in navigating the hearing process.

10:30 a.m. – 10:45 a.m. *Break*

10:45 a.m. – 12:00 a.m. *Addressing the Needs of Pro se Parents (Cont.) – Deusdedi Merced*

12:00 a.m. – 12:30 a.m. *Working Lunch / Open Session – Andy Eulass and Lyn Beekman*

This open session will provide the opportunity for updates from ISBE. In addition, the IHOs will be given the opportunity to discuss problems or issues they have encountered and ask questions of the trainers.

12:30 a.m. – 2:45 a.m. *Mock Scenarios – Deusdedi Merced and Lyn Beekman*

Messrs. Merced and Beekman will present various problematic situations that might arise during the course of the hearing process. Each IHO will be selected to address one problematic situation. The selected IHO will respond to the situation as if the IHO were in a real hearing. The other IHOs and trainers will then discuss the IHO's response to the situation presented and how it might have been improved or other responses that might have been appropriate.

2:45 a.m. – 3:00 a.m. *Break*

3:00 a.m. – 4:30 a.m. *Mock Scenarios (Cont.) – Deusdedi Merced and Lyn Beekman*

**THE PRO SE PARENT:  
AN IHO GUIDE TO WORKING WITH AN UNREPRESENTED PARENT**

IDEA HEARING OFFICER TRAINING  
CHICAGO BAR ASSOCIATION BUILDING, 321 S. PLYMOUTH COURT, CHICAGO, IL  
FRIDAY, JANUARY 20, 2017

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I. INTRODUCTION

- A. The biggest challenge most IDEA impartial hearing officers (IHO) face in fulfilling the role and responsibilities as an IHO is addressing the needs of *pro se* or unrepresented parents during the hearing process. While a few parents possess the skills and emotional control to cogently and professionally present their case to an IHO, most understandably do not.
- B. The number of *pro se* parents in IDEA cases seems on the rise, probably for many reasons. First, though IDEA provides that parents must be notified of any free or low cost legal services,<sup>1</sup> in reality such services are either non-existent or the agencies providing them are overwhelmed by the demand. Second, since 1986 IDEA has provided that parents may be reimbursed for attorneys fees if found to be a prevailing party.<sup>2</sup> But, many attorneys require a substantial retainer to mitigate their risk and most parents just cannot afford it. Finally, a few parents dislike/distrust attorneys or consider representing themselves and their child kind of a do-it-yourself project.<sup>3</sup>
- C. The increase in persons representing themselves appears to be occurring not just in IDEA cases but generally, including the courts. The trend has prompted more discussion on the extent and manner in which a decision maker may or must assist an unrepresented party in an adversarial proceeding, and if so, the appropriate

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<sup>1</sup> 34 C.F.R. § 300.507(b).

<sup>2</sup> See 34 C.F.R. § 300.517.

<sup>3</sup> See Memorandum to Erlichman, et. al from Wamsley, *Judges, Administrative Law Judges, and Hearing Officers Ability, Extent, and Duty to Question Witnesses to Develop the Record with Pro Se Litigants* (July 23, 2012) (on file with The Massachusetts Bureau of Special Education Appeals) at 1.

manner to do so.<sup>4</sup> One factor in the discussion is the nature and purpose of the proceeding.

- D. If the primary goal of the IDEA hearing process is to ensure that the educational rights of a child with a disability are upheld,<sup>5</sup> then to what extent, if any, does the IHO have a responsibility to take some steps to mitigate the potential adverse effect the lack of representation may have on the process while also achieving the IDEA's primary goal? And, if the IHO has a responsibility to ensure that the educational rights of a child with a disability are upheld, is an affirmative duty to develop the record created?<sup>6</sup> Or, is the role of an IHO just to sit back and act as an umpire calling balls and strike but not overly intruding into the process of completing the record?<sup>7</sup>
- E. If an IHO agrees that the very nature of the IDEA hearing process places upon us the responsibility to take some steps, the concern often then is how to balance maintaining impartiality while participating in the completion of the record. But, the two dimensions are not mutually exclusive.<sup>8</sup> Rather, IHOs must strike the balance between them by determining the extent, if any, each step will assist and/or accommodate the unrepresented parent in making a record for the IHO to render an informed decision on the issues presented.
- F. Clearly, IHOs cannot give an unrepresented parent legal advice. But, it is also well settled that more leniency is also dictated on

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<sup>4</sup> See, e.g., Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. Nat'l Ass'n Admin. L. Judiciary 447 (2007).

<sup>5</sup> 34 C.F.R. § 300.1.

<sup>6</sup> At least one court has found that an IHO has an affirmative duty to develop the record if mandated by enabling law. See *Lizotte v. Johnson*, 777 N.Y.S.2d 580 (2004). In *Lizotte*, the court held that a New York City Administration for Children's Services ("ACS") hearing officer "should have inquired into the relevant facts to provide a more complete record, especially considering the petitioner's *pro se* appearance and her inability to speak English." The ACS regulations require hearing officers to develop a full record. Arguably, the IDEA implicitly requires an IHO to develop the record. First, an IHO's "determination of whether a child received a FAPE must be made on substantive grounds." See 34 C.F.R. § 300.513(a). Further, an IHO is given the authority to request an independent educational evaluation. See 34 C.F.R. § 300.502(d).

<sup>7</sup> But see *Logue v. Dore*, 103 F.3d 1040, 1045 (1<sup>st</sup> Cir. 1997) (stating it is "well-established that a judge is not a mere umpire"). See also *Quercia v. U.S.*, 289 U.S. 466, 469 (1933).

<sup>8</sup> Memorandum, *supra*, at 5.

procedural matters.<sup>9</sup> There are a host of accommodations and assistance that an IHO can provide a *pro se* parent.<sup>10</sup> And, there are additional measures an IHO can take to develop the record. This outline offers a variety of suggestions in both of these regards to help ensure that the process achieves its primary goal of upholding the educational rights of the child. Whether an IHO chooses to implement any of them will depend on how the IHO perceives his/her role and responsibilities as an IHO and assesses the particular circumstances in each case.

- G. Whether an IHO under IDEA has the authority to engage more fully in the hearing process appears clear. The IDEA sets forth the specific rights accorded to any party in a due process hearing.<sup>11</sup> A 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.” 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. In this regard, apart from the hearing rights set forth in IDEA, “decisions regarding the conduct of due process hearings are left to the discretion of the hearing officer,” subject to appellate review.<sup>12</sup> And, the generally applicable standard of review is abuse

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<sup>9</sup> See *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Merritt v. Faulkner*, 697 F.2d 761, 769 (7th Cir. 1983). See also *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents with Children with Disabilities*, 52 IDELR 266 (OSERS 2009) (although the comments to the regulations permit a state agency to dismiss complaints that are unsigned or do not contain the parent’s contact information, OSERS notes that the better practice might be to notify the parents of the defects in their complaints and allow the parent to remedy the deficiencies); *In re Student with Disabilities*, 112 LRP 36509 (SEA NY 2010) (stating that an IHO “should deal flexibly with, liberally to, and with understanding towards a *pro se* parent with respect to matters relating to procedures”).

<sup>10</sup> Providing a reasonable accommodation to a *pro se* parent is not necessarily an ethical violation. See, e.g., *ABA Model Code of Judicial Conduct R. 22* (2007), Comment 4 (stating that a judge can make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard).

<sup>11</sup> See, e.g., 34 C.F.R. § 300.512.

<sup>12</sup> *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995). See also *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, pages 46704-46706 (stating, in pertinent part, “the specific application of those procedures [regarding pre-hearing and decisions] to particular cases generally should be left to the discretion of hearing officers who have 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



of discretion, which typically favors the hearing officer.<sup>13</sup>

- H. A awkward situation for an IHO is presented when the parent is also an attorney, but not experienced/familiar with hearing and/or special education procedures. Again, an IHO must assess each situation presented to determine the extent an IHO should become more engaged in the process to help ensure the IDEA's goal is achieved. Again, the PHC will usually provide some insight of what to expect at the hearing and prepare for it.

## II. UPON APPOINTMENT

- A. An IHO cannot start too early in helping the parent understand that with the right to go to hearing under the IDEA comes responsibilities in exercising that right. In Illinois, the hearing officer must provide to the parties a letter of introduction that includes various other documents. (See ASP – Form 4.) This packet can accomplish several purposes, including:
  - 1. Alerting the IHO that the parent needs an interpreter to participate in future proceedings.
  - 2. Encouraging the parties to raise any concerns about a possible conflict of interest immediately to avoid possible delays.

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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.”).

<sup>13</sup> See, e.g., *O'Toole v. Olathe Unified Sch. Dist. No. 233*, 144 F.3d 692,709 (10th Cir. 1998); *D.Z. v. Bethlehem Area Sch. Dist.*, 2 A.3d 712 (Pa. Commw. Ct. 2010). Cf. *J.W. v. Fresno Unified Sch. Dist.*, 611 F. Supp. 2d 1097, 1109 (E.D. Cal. 2009) *aff'd* 626 F.3d 431 (9th Cir. 2010) (court gave “due weight to ALJ’s decision” after “ALJ questioned many witnesses, both to clarify responses as well as to elicit follow up responses”); *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942 (9th Cir. 2007) (court treated “hearing officers findings as ‘thorough and careful’ when the hearing officer participate[d] in the questioning of witnesses”); *M.M. v. Lafayette Sch. Dist.*, No. CV 09-4624, 2012 WL 398773 (N.D. Cal. Feb. 7, 2012) (court in deferring to ALJ’s fact findings noted the ALJ was “thoroughly engaged ... asking numerous follow-up and clarifying questions of the witnesses though out”); *S.A. v. Exeter Union Sch. Dist.*, No. CV F 10-347 LJO SMS, 2010 WL 4942539 (E.D. Cal. Nov. 24, 2010) (court finding that “although the ALJ actively questioned [the superintendent] for a lengthy period of time, there [was] no evidence that the ALJ inappropriately credited her responses”).

3. Providing the parent with a written understanding of the initial procedural obligations of the parties.
  4. Granting the IHO an opportunity to request a copy of the IEP, which can often be very helpful in understanding the parent's concerns/issues/proposed resolutions.
  5. Affording the IHO the opportunity to provide the parent hearing process guidelines. (See ASP – Form 5, Appendix C.)
- B. The Hearing Process Guidelines document attempts to set forth in plain language some expectations and standards of conduct that most IHOs would expect of any party, advocate and attorney. But understandably, most unrepresented parents are not acquainted with them. Too many IHOs only deal with these “ground rules” as the need for them arises. With a *pro se* parent, it would be fairer to the parent to establish the “ground rules” at the outset and give the parent notice of them, which will enable the parent to ask questions during the PHC. Moreover, as a general rule, good practice dictates that whatever an IHO tells an unrepresented parent in terms of the process should be confirmed in writing. Doing so will not only make sure that what the IHO said is clear, and on the record, but also provide the parent with a confirmation of the information or directive for future reference.
- C. Holding a PHC with an unrepresented parent can be the most helpful strategy an IHO can implement. In calling to set up the date and time for the PHC, often the parent will want to tell the IHO about his/her situation at length, not understanding such discussions are improper. The IHO should nicely cut the parent off but explain why. The conversation may go something like this:
- The purpose for this call is solely to set up the date and time for the PHC. The time for you to tell me about your view as to what has happened with your child and what you believe your child needs is at the hearing. While you probably are not aware of this [referring to the Guideline if the IHO sent it out], it is not proper or ethical for me to listen to one party without the other being present to hear it. I think you, too, would be upset if I listened to the school district or its attorney without you being present, and I assure you I won't, telling them the same thing I have told you here.
- D. Provide a written notice regarding the PHC as well as an agenda (or “Subjects to be Considered”). (See ASP – Forms 6 and 7.)

- E. The likelihood of a notice of insufficiency being filed is no doubt higher with a *pro se* parent. But, with a *pro se* parent, the complaint can be read more liberally.<sup>14</sup> Should the IHO agree that the complaint is insufficient, the IHO must notify the parties in writing of that determination and identify how the complaint is insufficient.<sup>15</sup> This provides the IHO with a very appropriate opportunity to provide the parent with information regarding how the complaint may be amended.<sup>16</sup>

### III. THE PREHEARING CONFERENCE

- A. It cannot be over emphasized that for many reasons the PHC is usually the most important strategy an IHO can use to help the unrepresented parent understand and navigate the hearing process.
- B. The IHO should hold the PHC in person, if reasonably possible and taking into consideration how quickly it can be held and the distance/difficulties in all the parties getting there. It's always better to discuss things face-to-face, particularly where the IHO is trying to provide explanations and may have difficulty in maintaining control of the discussion. Plus, the parent will likely feel more comfortable and less rushed.
- C. It may also be helpful to the parent, and the IHO, to record the PHC, possibly providing the parties with a copy of the recording.
- D. As to certain matters normally covered in a PHC (as noted in the "Subjects to be Considered" document, ASP – Form 7), the IHO

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<sup>14</sup> See *In re Student with Disabilities*, 111 LRP 61694 (SEA NY 2011) (noting that the due process notice may be reasonably read to include the issue of whether the student should be provided with compensatory education despite the fact that the *pro se* parent did not use the exact terminology); *In re: Student with Disabilities*, 111 LRP 48732 (SEA NY 2011) (similar).

<sup>15</sup> *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46698 (August 13, 2006).

<sup>16</sup> *Id.* at 46699 ("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."). See also *Sudbury Pub. Sch. v. Mass. Dept. of Elementary and Secondary Educ.*, 762 F. Supp. 2d 254 (D. Mass. 2010) (where the district's challenge to the IHO's impartiality, for among other things, suggesting that the *pro se* parent amend her complaint to request "an additional year of retroactive reimbursement" was rejected. The court found that the efforts of the IHO "reflect a commendable effort to assure that all contentions were fully developed and evaluated").

should consider the following:

1. Avoid using legal jargon, or if the IHO must, explain what it means in plain language.
2. Regarding possible representation, encourage the parent to obtain an advocate or attorney and check on whether the parent is considering such. If not, ask if the district informed the parent of any free or low cost legal services that might be available,<sup>17</sup> as well as sources to contact to obtain assistance in understanding the IDEA.<sup>18</sup> If such were not provided, or the parent lost/cannot find them, ask the district if another copy could be sent to the parent.
3. Confirm the results of the resolution meeting, if held, or any mediation, particularly any complaint issues that may have been resolved.
4. The typical due process complaint includes a myriad of concerns the parent has regarding his/her child's education. Presenting these concerns in an understandable and logical sequence can be difficult for any individual let alone an unrepresented parent.

Nonetheless, the importance of the IHO having a comprehensive understanding of the precise question(s) that s/he must answer after the record has been closed cannot be overstated. When the IHO understands what it is that is being asked of him/her, the IHO is in a better position to extract the necessary evidence that will enable him/her to decide an issue/defense and to craft an appropriate remedy, when necessary. The PHC affords the IHO an early opportunity to confirm his/her understanding of the issue(s) to be decided (i.e., the precise question(s) to be answered) and the proposed remedies being requested.

When clarification is necessary, obtaining it must be done with great care, and the IHO should first explain to both the school district and the parent how the requested information will help the IHO with understanding what s/he is being asked to do. The IHO should further explain to the school district and the parent that the PHC is not the time for the presentation of evidence.

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<sup>17</sup> 34 C.F.R. § 300.507(b).

<sup>18</sup> 34 C.F.R. § 300.503(b)(5).

If an issue is the alleged inappropriateness of the IEP or that some part of it was allegedly violated, the IHO should confirm with the parent what aspects s/he believe are inappropriate or have been violated. To assist the IHO, the IHO should consider reviewing the actual IEP with the parties during the PHC. This exercise will also assist the IHO in understanding what relief it is the parent is asking the IHO to award, should the IHO determine that the child has been denied FAPE.

5. The discussion regarding clarification of the issues has other benefits. It allows the IHO to lead a discussion on what needs to be shown/presented for the IHO to be able to determine the issue(s). This discussion is extremely important in helping to ensure a complete record and can be of assistance to the unrepresented parent in properly preparing for the hearing.
6. While in no way asking the parent (or district) to present their case, some general discussion regarding who the parties might call as witnesses and what documents they might submit offers the IHO the opportunity to explain to the parent how the submission of evidence will work and generally what the parent will need to present regarding the issues to be decided and relief requested.
7. In order to make it easier and more orderly to take the testimony of the parent one option is to suggest the parties agree that the parent's opening statement will be considered testimony with the district being able to cross-examine the parent. Another is to ask/direct the parent to write out the questions s/he will ask her/himself on cards with either someone who accompanies them or the IHO reading the parent the questions at the hearing. It not only helps the parent get their testimony organized but provides some structure to it.
8. Estimating the time it will take to hear the case is sometimes difficult but usually more so with an unrepresented parent.

Consider also the extent to which the IHO may become involved in the hearing process, e.g., taking over the questioning of certain witnesses (and other strategies noted and to be discussed in Part IV of this outline regarding the hearing below) and the format. Other than the right to

“confront and cross-examine” witnesses,<sup>19</sup> the IDEA does not set forth any requirements regarding the format of the actual hearing. For several years after the IDEA became law in 1975, hearings in many parts of the Country were held in an informal meeting-like format with the IHO leading a discussion with the witnesses and attorneys. Everyone was sworn in and parties were given the opportunity to cross-examine. This format can be very effective with an unrepresented parent. It is quicker, less acrimonious and usually provides the IHO with a far better record to decide the issues and determine appropriate relief. The IHO might suggest using this format if s/he feels comfortable in leading the discussion – and the district’s attorney is as well.

9. Go over the hearing process guidelines and determine whether the parent has questions. If the IHO did not use the guidelines, the IHO should nonetheless go over the matters it addresses that the IHO finds appropriate/necessary given the situation.
10. If the IHO cannot control a parent’s talking and the PHC’s purposes are not being achieved, the IHO should direct both parties to speak only when asked a question or permission is granted by the IHO. The parties should also be given a final opportunity at the end of the PHC to share anything that has not been addressed earlier in the PHC.
11. Typically, an unrepresented parent will have process questions after the PHC as s/he prepares for the hearing. The IHO might discuss and determine how the parent will present such questions to the IHO, e.g., by conference call (possibly recorded), letter or email, with a copy to the district.
12. The IHO will usually need to spend a good deal of time explaining the many details of the process that IHOs and attorneys all take for granted but are understandably totally foreign to most parents, e.g., the five day rule<sup>20</sup> and its importance, the possible option of telephone testimony, the right to subpoena witnesses and how and when to do it, requests regarding problems or concerns (really motions), the right to an open or closed hearing<sup>21</sup>, having the child

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<sup>19</sup> 34 C.F.R. § 300.512(a)(2).

<sup>20</sup> 34 C.F.R. § 300.512(b).

<sup>21</sup> 34 C.F.R. § 300.512(c)(2).

present<sup>22</sup>, the format of the hearing, the burden of proof (i.e., production/persuasion), the election regarding a written/electronic decision<sup>23</sup> and the need for the parties to let you know if problems arise before the hearing. All explanations should be confirmed in a PHO (possibly also providing the parties with a recording of the PHC).

#### IV. THE HEARING

- A. Whether an IHO has a court reporter and/or is recording the hearing, the IHO should explain to the parent why it is being done and how it works, e.g., what it means to be going on and off the record, speaking up to be heard by the reporter, the need to use any mic provided, and not talking over someone else so that the reporter or recording device accurately captures what is said.
- B. After the IHO's opening statement, possibly in addition to what an IHO might normally do, the IHO should take a moment to ask the parties if they have any problems or questions about going ahead with the hearing. Often the parent will want to go over the format again, have questions about a witness getting there or an exhibit, or what they can do versus their advocate, if an advocate is present.
- C. The IHO should again explain to the parent the purpose of an opening statement versus testifying. But, even when this is done, the parent will often stray into testimony.
- D. Prior to the hearing, the IHO should review the results of the PHC (and 5-day disclosures, if requested ahead of the hearing) in order to be prepared and engaged in the questioning of witnesses. Here are some strategies to consider:
  1. When a witness is called to the stand (for either party), ask of the parent/district attorney what things/points they intend to question the witness about. This gives an IHO the chance to rule on irrelevant areas and subtly inquire if other areas were going to be addressed. In short, this approach assists the parent in providing only possibly relevant testimony.
  2. The IHO should have the parent write down questions s/he would ask himself/herself (i.e., the parent) through either a friend of the family or family member or the IHO reading the questions.

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<sup>22</sup> 34C.F.R. § 300.512(c)(1).

<sup>23</sup> 34 C.F.R. § 300.512(a)(5).

3. The IHO may have the responsibility to question a witness when the unrepresented parent is struggling to conduct a meaningful examination of the witness. If a parent is struggling, the IHO may ask the parent what information s/he thinks the witness can provide (maybe dismissing the witness from the hearing room during the discussion) and suggest the form of the question(s). Or, ask the parties if the IHO might ask the question(s).<sup>24</sup> Often there will be no objection. In any event, the IHO's assistance should be directed towards accomplishing the party's own strategy, not in suggesting a different or better strategy.
4. The IHO could lead the questioning of a particular witness, giving each party a chance to ask follow up questions.
5. A problem unique to non-attorney advocates is the potential for them being called as a witness. The issue involves whether a non-attorney advocate/client privilege exists analogous to the attorney/client privilege.<sup>25</sup> If so, there is the potential the parent might waive the privilege should the advocate voluntarily take the stand or, if called to the stand, the non-attorney advocate may invoke the privilege. It is advisable that the IHO speak to the parties and get their thoughts on this matter ahead of the advocate being called to the stand.

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<sup>24</sup> See *Okon v. Rogers*, 466 N.E.2d 658 (Ill. App. 3d 1984). In *Okon*, the appellate court upheld a trial judge who stopped a *pro se* defendant's narrative testimony and directly questioned the *pro se* defendant and directed the defendant on how to properly form a question on cross examination. After the plaintiff objected several times to the *pro se* litigant's questions, the *pro se* litigant asked, "Is there any way I can accomplish that?" The trial judge advised the *pro se* litigant, "Ask him what is customary." The appellate court, in upholding the trial judge's actions, stated, "As any judge or lawyer knows, the conduct of a jury trial with a *pro se* litigant who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge.... Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides." *Id.* at 661. The dissent, while sympathetic, nonetheless disagreed, stating, in part: "To condone such actions of the trial court here is to invite *pro se* representation in difficult trials which would make a mockery of the judicial process, even though to fully inform a jury is a commendable purpose." *Id.* at 662.

<sup>25</sup> See *Woods v. New Jersey Dept. of Educ.*, 19 IDELR 1092 (D.C. NJ 1993) (stating in the context of the IDEA hearing, policy supports recognition of a lay advocate privilege).



- E. A problem that is far more likely to arise with an unrepresented parent is the lack of a record to determine the issue(s) presented. Whether, and to what extent, an IDEA IHO has the duty or obligation to develop an incomplete record was discussed above.<sup>26</sup> How the IHO does it, is as important as if the IHO does do it.

Initially, when faced with an incomplete record, the IHO should give the parties an opportunity to further develop the record by highlighting voids in the record (e.g., “You’ve requested compensatory education but I’ve not received any information regarding what you think would be appropriate should I find there has been a denial of FAPE”). If the IHO must pursue a line of questions, care should be taken that the questions are unbiased and presented in a manner that does not reveal the IHO’s concerns for a particular witness’ credibility or the merits of the case. Also, whether the IHO is considering asking a question/line of questions,<sup>27</sup> requests to review certain documents or even call a witness,<sup>28</sup> the IHO should explain why s/he thinks such is necessary/relevant and should get the party’s reaction. A party will often agree to the IHO’s request once it understands why the IHO has made the request. Should the party not agree and objects, the IHO may proceed but should explain that s/he is doing so in order to complete the record to determine an issue and not to reflect an opinion or be an advocate for a party. The IHO should also allow each party the opportunity to object to the question(s) or respond to what the IHO has done by way of cross or additional testimony.

Another possible option to complete the record in some situations is for the IHO to order an independent educational evaluation (“IEE”).<sup>29</sup> But, usually to do so presents problems in meeting the 45-day timeline even if previously extended because an IHO cannot initiate his/her own additional extension.

- F. During the course of the hearing, the IHO should be sensitive to offering the parent breaks to collect his/her thoughts and get organized. It can sometimes actually speed things up.
- G. The day before the hearing will end, the IHO should explain again to the parent the purpose of a closing statement or written argument and discuss what might work best for the parties under

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<sup>26</sup> See *supra* note 6 and accompanying text.

<sup>27</sup> See Fed. R. Evid. 614(b) (allowing a judge to examine “a witness regardless of who calls the witness”). Reference to the Federal Rules of Evidence is by way of analogy.

<sup>28</sup> *Id.* (also permitting a judge to call a witness).

<sup>29</sup> 34 C.F.R. § 300.502(d).

the circumstances. Doing so will give the parties, particularly the parent, a chance to get their thoughts organized. The IHO should be ready to ask some questions of the parent/district regarding what each thinks has or has not been shown.

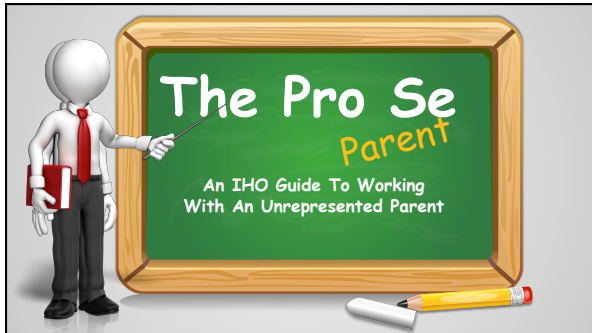
- H. If the parent in the closing statement or written argument brings up new alleged facts or issues, the IHO should not ignore the new information. Rather, the IHO should explain why s/he will not consider it and why doing so would be unfair. (If the new information is provided after the hearing is concluded, the IHO might consider addressing it with the parties via correspondence or a telephone conference call.)

## V. THE DECISION

- A. When writing a decision in a case with an unrepresented parent:
  - 1. Remember to whom you are writing, and keep the language plain and understandable.
  - 2. Avoid use of legal jargon, or if the IHO feels the need to use it, the IHO should offer an explanation in plain English.
  - 3. In fashioning an appropriate remedy, do not “split the baby” by giving each party some of the programs/services and accommodations they believe are appropriate. That approach shortchanges the child. Rather, use words to show the IHO heard and appreciated their positions/requests and note the IHO’s understanding/agreement/disagreement.

**NOTE: REDISTRIBUTION OF THIS OUTLINE WITHOUT EXPRESSED, PRIOR WRITTEN PERMISSION OF ITS AUTHOR IS PROHIBITED.**

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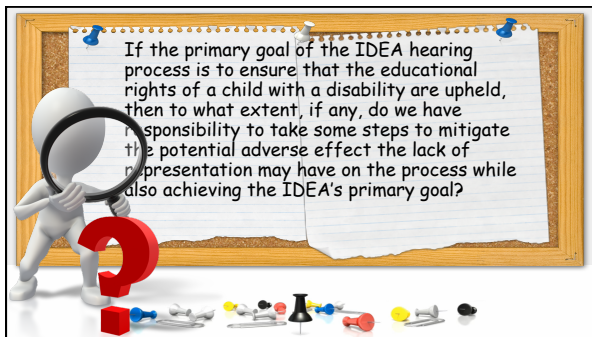
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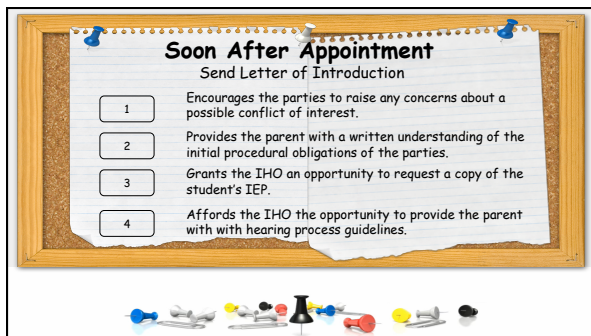
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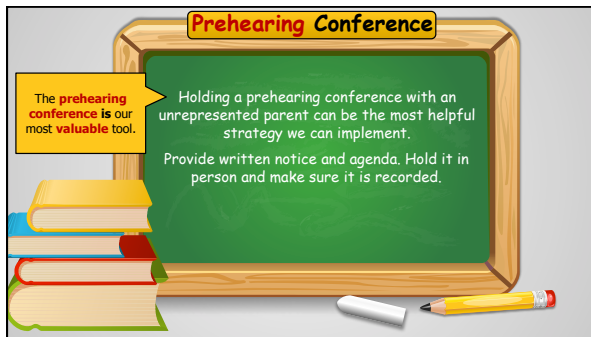
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**Prehearing Conference**



Avoid legal jargon or explain it in plain language 



Encourage the parent to obtain an advocate or attorney

Confirm what happened at the resolution meeting and discuss mediation 

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**Prehearing Conference**



Make sure the parties understand why it is you are requesting clarification of the issue(s) 

Stress to the parties that the purpose of the exercise is not to allow each side to present evidence 

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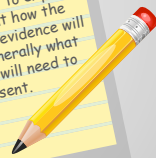
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**Prehearing Conference**



The discussion of the issues enables us to lead a discussion on what needs to be shown/presented at the hearing. It affords us an opportunity to explain to the parent how the submission of evidence will work and generally what the parent will need to present. 

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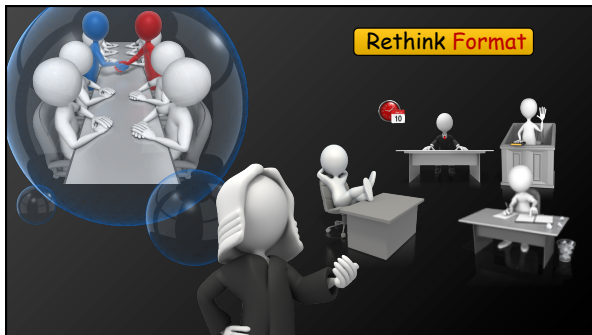
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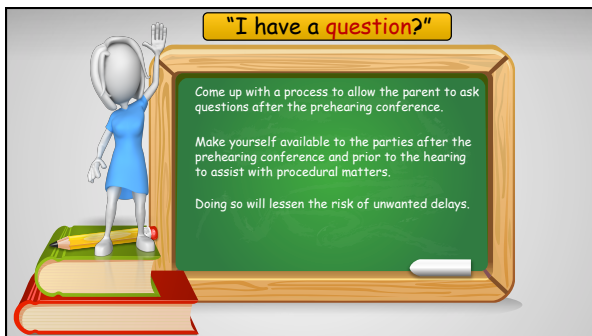
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### Explain lay of the land




Introduce the parent to the key players in the room early on in the process.



Explain to the parent why a recording is being made and set some ground rules.



Ask the parties to speak up and to use any microphones provided.



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### Soon after introductions ...



Take a moment to ask the parties if there are any problems that need to be addressed or questions.

Review the format for the hearing.

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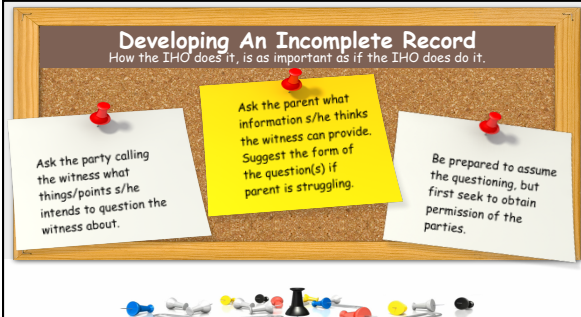
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### Developing An Incomplete Record

How the IHO does it, is as important as if the IHO does do it.



Ask the party calling the witness what things/points s/he intends to question the witness about.

Ask the parent what information s/he thinks the witness can provide. Suggest the form of the question(s) if parent is struggling.

Be prepared to assume the questioning, but first seek to obtain permission of the parties.

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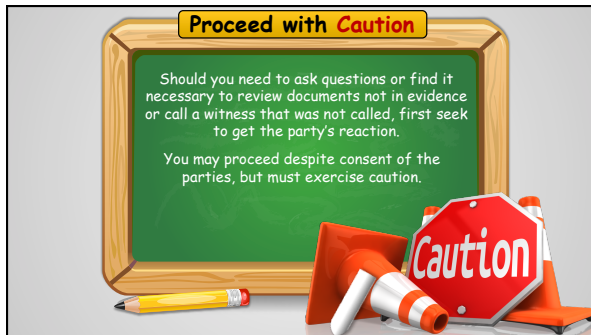
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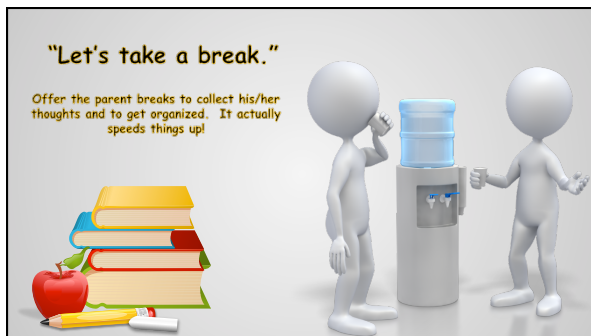
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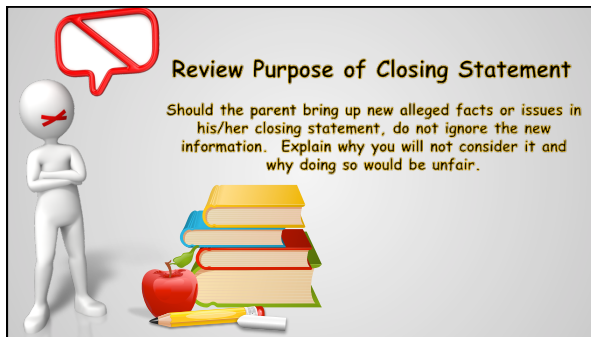
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Problem Situations: *You be the Judge*

ISBE Impartial Hearing Officer Training  
Chicago Bar Association Building, 321 S. Plymouth Court, Chicago, IL  
Friday, January 20, 2017

*Deusdedi Merced, Esq.*  
*Lyn Beekman, Esq.*

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I. GENERAL GUIDELINES TO ADDRESS PROBLEM SITUATIONS

- A. When confronted with a problem situation, there is a basic process the hearing officer should consider. The hearing officer should –
1. confirm his/her understanding of what is being requested/objected to and why.
  2. ask follow-up questions, if necessary.
  3. ask the opposing party to respond or for its position.
  4. explore with the parties possible solutions, affording each the opportunity to weigh in. The hearing officer should offer possible solutions, when appropriate.
  5. determine if s/he require any further information to rule (e.g., stipulation/findings of fact via testimony/authority via counsel) should the parties not be able to settle the dispute on their own. If additional information is needed, the hearing officer should get it.
  6. rule/decide on the spot or set a time by when the parties will be notified of his/her determination.

II. PROBLEM SITUATIONS EXERCISE

- A. Parent seeks to add issue during hearing. At the start of the hearing, you made your opening statement, including reading the issues as stated in your PHO. At the start of the second day of hearing, parent's counsel states she wants to add an issue. How do you respond?
- B. A party seeks to add an exhibit not in its 5-business day disclosure. A party during the hearing hands you a document and requests it be marked

and admitted. It appears to be a school record that was not in their 5-business day disclosure. How do you respond?

- C. Parent cannot frame questions/get to the point. The matters related to the issues listed in the prehearing order include: 1) the student's IEP should have included more speech and language therapy; 2) the teacher failed to implement various accommodations, including reading to the student any tests; 3) the teacher was not writing assignments in his school/home log. The parent is unrepresented and early on in the hearing, the parent is stumbling in trying to ask questions of her son's teacher:

Parent: You really don't know anything about my kid's problems do you?

Teacher: I know he is learning disabled.

Parent: You really don't even want him in your class do you?

Teacher: That's not true.

Parent: You just don't like him.

Teacher: I like your son.

Parent: No, you don't because you sent him to the office.

Teacher: I did but only because he wouldn't stop hitting a classmate.

Parent: You hardly help him at all.

Teacher: I give him lots of help.

Parent: You didn't like his brother either when he was in your class.

Teacher: That is not true.

Parent: And, you're so old you had his father and you didn't like him either.

- D. Parent reading newspaper/continually texting. The hearing is in the afternoon of the first day and the parent's counsel is still presenting the parent's case. Ever since the afternoon session started the parent has been reading a newspaper/continually texting and appears to be paying no

attention to the proceedings. What do you do, if anything?

- E. Counsel is sending text maybe violating sequestration order. At the PHC the parties requested, and you ordered, the witnesses be sequestered with counsel to tell the witnesses after they testify they are not to discuss their testimony with other potential witnesses. You notice, after a very important witness testifies, the counsel who called the witness is sending a text. Opposing counsel alleges his adversary is sending future witnesses a text violating the sequestration order. What do you do?
- F. Apparently irrelevant line of questioning. The only issues in the case are the alleged violations of the IEP in the delivery of speech and language services and following a BIP. During the hearing, parent's counsel starts asking a series of pointed questions regarding the building principal's many serious administrative shortcomings in dealing with staff on special education problems that you view as exacerbating the situation and not having any relevance. What do you do, if anything?
- G. Expert gives long winded answers. During the hearing an expert witness is called. He is asked about his qualifications, if he knows the student and whether he was asked to assess the student. His answer to each question is very long. He is then handed his assessment report and asked to tell you what he did and found. He is about to answer. What, if anything, do you do?
- H. Parent will want to admit assessment without psychologist. At the PHC, it appears the unrepresented parent is planning to ask you to admit a psychological assessment but tells you the psychologist will not be testifying. What do you do?
- I. Observe the student. The issues in the hearing all relate to the extent the secondary level student should participate in the general education classes. During the hearing, a party asks that you observe the child in a general education class. What do you do?
- J. Evidence for events prior to SOL period. In December 2016, the parent requested a hearing contesting certain provisions of a January 2015 IEP. Now, during the hearing, the parent seeks the admission of an IEP dated January 2014, certain provisions of which the parent contends in her hearing request were not been implemented.

The parent also seeks to admit evidence regarding a discussion she had with another parent in December 2013, shortly before the January 2014 IEP meeting. The other parent overheard the special education director telling another staff person that the parent in the hearing was the proverbial “parent from hell.” The District objects to both on the basis the events precede the SOL period on the IEP being challenged. What do you do?

- K. Joint request continuance given settlement. One day of the hearing has been held and the second day of a scheduled four-day hearing is about to start. The attorneys for both parties announce on the record they are jointly requesting a continuance to enter into settlement discussions. They ask that you leave the length of the extension open and they will keep you advised of their progress at the end of each month. What do you do?
- L. Parent fails to show for hearing. You’ve had a good prehearing conference, sent out the prehearing order and think everything is set to go at the hearing. On the hearing date, the district’s counsel, special education director, and court reporter arrive but not the parent. The parent is unrepresented. You wait 15 minutes but the parent does not arrive. What do you do?
- M. Parent attorney withdraws/seeking to withdraw. You held your prehearing conference weeks ago. The hearing is set to start in two days and everything seems okay. You then get an email from the parent’s attorney withdrawing/seeking to withdraw. What do you do?
- N. No response from district. You’re at the point in the prehearing conference where you’re going to discuss the issues. But, you have received no response to the DPC from the District. What do you do?
- O. Parent fails to present compensatory education evidence. The parent has alleged the district failed to implement the IEP in various ways and seeks compensatory education. At the prehearing conference, you spent a good deal of time explaining the purpose of compensatory education, the legal standard as to how it is to be calculated and that at the hearing you would need from both parties testimony from their witnesses as to what they believe would be the appropriate type of compensatory education for each alleged violation and how much (using examples). You further explained that the reason you need this testimony and information is to have a basis

on the hearing record to determine what compensatory education would be appropriate if a denial of FAPE is found.

Two days were set for the hearing. The district/parent went first, is about to finish putting in its case, but has not presented any evidence on compensatory education. What do you do, if anything?

P. Parents need records. You're at the point in the prehearing conference where you inquire about any problems with records or ask if there is anything else. The parent/counsel says yes and explained that they have requested all of the student's records three times but have not gotten them all and need them to prepare for the hearing. The district says it has given to the parents all the student's records at least twice. What do you do?

Q. Prioritizing, managing and scheduling matters to address. You are in a prehearing conference, have gone thru the agenda and determined the following matters will need to be addressed:

- ⇒ The current 45-day decision deadline is only 38 days away
- ⇒ The district failed to file a response to the due process complaint.
- ⇒ Dates for the hearing estimated to take three days
- ⇒ A district motion to dismiss asserting you lack jurisdiction due to the student not residing in the district
- ⇒ The district contends the parent must subpoena a teacher currently on maternity leave
- ⇒ The parent asserts the district has not maintained the "stay put" placement
- ⇒ The district moves that two claims be dismissed because the claims arose prior to the statute of limitations
- ⇒ The parent contends the district has failed to provide her various student records
- ⇒ The parent needs to get you and the district more specific information on two issues
- ⇒ The district filed a motion to disqualify you

In what order would you prioritize addressing the various matters? Why? How would you manage these matters (e.g., scheduling; rule on the spot or hold your decision in abeyance; schedule a mini-hearing). Note the calendar/business days for each action to be taken by the parties and you.

- R. Parties calling witnesses for redundant testimony and seeking to introduce voluminous exhibits. You are at that point in the prehearing conference where you want to get a basis to estimate how many days of hearing will be needed. You refer to the parties prehearing conference submissions (as to witnesses and exhibits) and ask each party about anticipated number of witnesses and exhibits. Given the issue to be determined and the parties' responses, you tentatively conclude both parties appear to be calling witnesses whose testimony may be redundant and seeking to introduce voluminous exhibits, many of which may be irrelevant. What do you do?

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## WORKSHEET

Prioritizing, managing and scheduling matters to address. You are in a prehearing conference, have gone thru the agenda and determined the matters listed below will need to be addressed.

Please:

1. Note to the left of each item in what order you would address the various matters.
2. Solely for purposes of the discussion to follow, please note why you ordered the various matters in the manner you did.
3. Again, solely for purposes of the discussion to follow, please note how you would manage these matters (e.g., scheduling; rule on the spot or hold your decision in abeyance; schedule a mini-hearing). Note the calendar/business days for each action to be taken by the parties and you.

<b>ORDER?</b>	<b>MATTER</b>	<b>WHY?</b>	<b>HOW?</b>
	The current 45-day decision deadline is only 38 days away		
	The district failed to file a response to the due process complaint		
	Dates for the hearing estimated to take three days		
	A district motion to dismiss asserting you lack jurisdiction due to the student not residing in the district		



	The district contends the parent must subpoena a teacher currently on maternity leave		
	The parent asserts the district has not maintained the “stay put” placement		
	The district moves that two claims be dismissed because the claims arose prior to the statute of limitations		
	The parent contends the district has failed to provide her various student records		
	The parent needs to get you and the district more specific information on two issues		
	The district filed a motion to disqualify you		