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Empowered Parents: Educated, Engaged, Effective!

Parent Guide to Preparing for a Due Process Hearing



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HOW TO ANALYZE A CASE

The Law

In order to identify possible violations of the law, you must know the substantive provisions of the law (what the law requires and/or prohibits), and how the provisions have been interpreted by regulations (developed by the agency with the responsibility and authority to enforce the law), administrative policy memoranda, and/or court decisions.

The Facts

In reaching a decision in a case, the decision-maker(s) (in the special education process, the Administrative Law Judge) must then apply the law to the relevant facts of the case. The "facts" must be determined through a review of all the evidence, including an analysis of the value of the evidence. In measuring the value or persuasiveness of evidence, decision-makers ask:

- ❑ Is the evidence substantiated?
- ❑ Are there agreed-upon facts?
- ❑ If facts are in dispute, which witnesses or documents have the greater credibility?
- ❑ Does any witness have reason to be untruthful? Is any witness potentially biased? Or has any witness been found to be untruthful through the presentation of other evidence?
- ❑ If there is contradictory expert testimony, does one expert have greater experience or knowledge, or is one expert's testimony supported by or more consistent with other testimony or documents?

Application of Law to Facts

Step 1: What are the aspects of the law that are alleged to have been violated? Does the law in fact say what the complainant alleges it says? If the facts are as the complainant alleges, will that be sufficient to find a violation of the law? If yes, move to Step 2.

Step 2. What are your findings of fact (ie, given all the testimony, what do you believe occurred)? What happened? Who did or didn't do what when? These findings of fact can relate to process issues (what happened when?) as well as substantive issues (for example, are the services in the IEP tied to the Core Curriculum Content Standards for all students? does the IEP call for services to be delivered in the least restrictive environment?). Remember: the school system **always** has the burden of proving that it complied with the law - substantive and procedural - in all respects.

Step 3. Apply the legal framework (what the law requires and/or prohibits) to the facts with regard both to processes (ie, were the appropriate processes followed in a timely manner?) and substantive issues (ie, is the IEP appropriate? are services provided in the least restrictive environment? are the services on the IEP being provided?). Then ask, are there any acceptable reasons for noncompliance? For example, did the parents request that the evaluation be delayed because they were going out of town for several weeks?

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Example: The law requires that the evaluation, eligibility determination, IEP meeting to develop the IEP, and implementation of the IEP occur within 90 days of consent for evaluation. The facts show that the evaluations have not been completed even though it has been 95 days from referral. The family did not request nor agree to a delay, nor are there extenuating circumstances that justify a delay. Therefore, the law has been violated.

Step 4. Develop any necessary corrective action or orders. Are there any steps that should or could be taken to solve the problem? Are there any actions that are necessary to make up for the violation of the law, the failure to provide appropriate services, etc.?

Possible corrective actions include: an order to complete the evaluation within an expedited time frame; new evaluation; hold another IEP meeting; revise the IEP in a particular way, such as adding a service, extending a service, revising a service, changing where a service is delivered or who delivers it; reimbursement to a family for expenses incurred in paying for services that should have been provided at no charge to the family; ordering that services be commenced immediately; etc.

COMPONENTS AND CONDUCT OF A HEARING

In advance of the hearing

- Exchange of documents (such as medical records of the child, evaluation and assessment results, etc.) & witness lists (identifying likely witnesses by name and expertise) at least 5 days before hearing between the two parties to the hearing; facilitated by the NJ Department of Education Office of Special Education Programs, UNLESS it is an emergent relief hearing

Pre-Hearing Phase of Hearing/Pre-Hearing Conference

- Discussion of whether settlement is possible facilitated by Administrative Law Judge (ALJ)
- Off-the-record mediation of dispute &/or settlement discussions with ALJ
- Introductions of the parties to the ALJ
- Explanation of the hearing process by ALJ
- The family determines whether or not the child who is the subject of the hearing attends
- The family determines whether or not the hearing shall be closed to the public
- Parties are reminded that all witnesses who are not testifying will be "sequestered," or asked to wait outside of the hearing room so that they do not hear the testimony of other witnesses (except for family)

Opening Statements

Each party has an opportunity to summarize the issues, what they believe the facts are, and what violations of law or compliance with law these facts demonstrate. This helps define the issues that brought the parties to the hearing for the impartial hearing. There is no rule regarding how long opening statements can or should be, but 5-10 minutes is usually sufficient. Hearing officers can allow significant flexibility in opening statements, but each party should be informed that they should only address those issues for which they intend to present evidence (documentary or witness testimony), or for which they believe the party that has the burden of proof will not be able to prove. (Under IDEA, the government agency or service provider has the burden of proving any fact and their compliance with legal requirements). In addition, each party should be informed that their opening statements should focus on issues that are directly relevant to the case. Remember: opening statements are not testimony or evidence; they cannot be used to prove the facts in any case.

Presentation of Evidence-Documentary and Witness Testimony

One party will be the first to present its case, both *witness testimony* and *documentary evidence*. The ALJ has the authority to decide who goes first: the family members, who have requested a hearing, or the school system, which has the burden of demonstrating that their actions were appropriate and compliant with the law.

Before each witness presents testimony, they *affirm that they will tell the truth*. The ALJ will ask: *Do you affirm that the testimony that you are going to give will be the truth and nothing*

but the truth? All other witnesses should be excluded from the hearing, except for the parents/guardian. The first side questions its witnesses and introduces any documentary evidence. When they are asking questions of their witnesses, it is called **direct examination**.

The other side can **object** to the questions asked of any witness, because the questions are **not relevant**, are **leading**, are **confusing**, **misleading**, **ambiguous**, **vague** or **repetitive**, involve **hearsay**, are **prejudicial**, or other reason.

In administrative hearings, the rules of evidence are relaxed. Hearing officers have a lot of flexibility to decide what to allow to be introduced into evidence or not. However, the law is clear: information not provided five days in advance of the hearing cannot be introduced into evidence unless both parties and the hearing officer panelists all agree.

The other side can also **object** to the introduction of documents, because they were **not provided five days in advance of the hearing**, they are **not relevant**, they are **prejudicial** (and the prejudicial impact outweighs their value to fact-finding), they have **not been properly authenticated**, or other reasons. Except if information has not been provided in advance of the hearing, the hearing officers may review the documentary evidence before ruling on whether or not it will be admitted. Once documents are admitted, they should be numbered in order of introduction and to note which party submitted the documents. Thus, the first document entered into evidence by the petitioner would be numbered P-1; the first document entered into evidence by the respondent would be R-1.

The other side may also question each of its opponent's witnesses, which is called **cross-examination**. In formal hearings, what one party can ask in cross-examination is limited by what was raised by that witness in direct examination. However, the ALJ has significant flexibility to allow other questions and issues to be raised. In addition, the hearing officers may question witnesses at any time on any issue they find relevant and not sufficiently addressed in direct or cross-examination.

When the first side finishes presenting all the evidence, then it is the other side's turn to present its witness testimony and documentary evidence. After direct examination of each of its witnesses, cross-examination occurs. Again, hearing officers may question any witnesses on any issues.

Closing Statements

When both sides have had the opportunity to present their witness testimony and documentary evidence, cross-examination has been completed, and the ALJ has asked all the questions s/he wants, it is time for **closing statements**. The closing statement is the opportunity for each side to summarize what they have proven, or what the other side has not proven. The closing statement is not evidence, and the ALJ must be careful not to consider what is said in closing statements as fact or evidence. Hearing officers have considerable flexibility in determining how long closing statements should be.

Concluding Remarks

At the conclusion of the hearing, the ALJ will inform the parties that no decisions will be reached that day - unless the hearing is an emergency hearing, and the panel determines that an emergency order is required. The panel informs the parties that a written decision will be rendered within 45 days of the Department of Education's receipt of the request for hearing.

NOTE: The parties may enter into a "stipulation," or written agreement resolving the issues in dispute, at any time prior to the issuance of a decision by the ALJ. The ALJ may then issue a consent order (ordering the implementation of the agreement between the parties). This order has the full force and effect and must be implemented in the same manner as an order/decision issued by the ALJ.

After the hearing

After the hearing (unless it's an emergent relief hearing), the ALJ:

(1) Carefully review all submitted documents

(2) Discuss, while the testimony is still fresh in his/her mind, ***which witnesses were the most credible, what each witness said, and any undisputed facts or admissions*** (ie, statements by one party admitting an allegation or charge of the other party). Credibility means believability; a witness is credible if their testimony and demeanor was believable.

(3) Decide the facts of the case, remembering that the school system has the burden of demonstrating that it complied with the law and regulations. This burden of proof is not "beyond a reasonable doubt," but "by a preponderance of the evidence." In other words, the school system must provide at least some more evidence that their actions complied with the law than the contrary evidence submitted by the family.

(4) Apply the law to the facts, identifying any violations of the law that have occurred.

(5) If a violation of the law has been determined, decide on the ***correction actions*** that must be taken or what other ***relief*** will be provided. Relief that can be granted includes but is not limited to: an order to complete the evaluation/assessment within an expedited time frame; new evaluation/assessment; hold another IEP meeting; revise the IEP in a particular way, such as adding a service, extending a service, revising a service, changing where a service is delivered or who delivers it; reimbursement to a family for expenses incurred in paying for services that should have been provided at no charge to the family. It is the responsibility of the Director of the Office of Special Education Programs, NJ Department of Education, to follow up to ensure that the decision is implemented.

The ALJ may order only the corrective action requested by the parents/guardians, requested corrective action as well as additional corrective action/relief, or corrective action/relief other than that requested by the parents/guardians, if necessary to ensure that the student receives the services to which s/he is entitled.

(6) If the ALJ determines that additional information is necessary to make a determination, s/he may ***order the hearing reopened*** to hear additional evidence.

(7) Once a determination has been reached, the ALJ must write the ***decision, containing its findings of fact, findings of law, and any relief ordered***. This must occur within 45 days from the date the hearing request was received. If the hearing is reopened, or if there are other circumstances that make it impossible to conclude the hearing and render a decision within 45 days from the date of hearing request, the ALJ may extend the timeline for a reasonable period of time.

(8) Once the decision is written, agreed upon, and signed, the final decision is sent to all parties.

STRUCTURE OF A HEARING DECISION: WHAT WILL A HEARING DECISION CONTAIN?

The hearing decision will contain a:

Summary of Issue(s) Involved in the Hearing

Allegations & relief requested ("Allegations" are the charges that allegedly demonstrate that a violation of the law, regulations, or New Jersey guidelines have taken place; allegations may be made about a variety of issues, from identification and evaluation through IEP development and provision of services).

Description of the history of the issues leading up to the hearing

Findings of fact; summary of evidentiary findings (i.e., what does the ALJ find occurred? These findings are based on the evidence presented as well as the credibility of various witnesses, etc.)

Summary of relevant governing law

Findings of law/application of law to facts: What are the relevant legal principles (requirements or prohibitions), and how do they relate to the facts found by the ALJ?

Relief/corrective action to be ordered, if any

Timeline for relief/corrective action to be implemented, and responsible party

Any retention of jurisdiction pending implementation of relief/corrective action (in other words, does the ALJ want to hear back from the parties within a certain amount of time to be sure that the corrective actions have been implemented, or for some other reason?)

Statement of rights of parties that disagree with decision

List of witnesses (names, on whose behalf they testified, and roles, expertise, etc.)

List of documentary evidence, listed in order of submission and by which party introduced the evidence.

Note: The names of children and families are referred to by the first initial of the last name to protect confidentiality in written decisions.