COVID-19 CONSIDERATIONS FOR STATE EDUCATIONAL AGENCIES AND IDEA DUE PROCESS HEARING OFFICERS

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I. INTRODUCTION

A. The challenges presented in complying with the Individuals with Disabilities Education Act (IDEA)[1] during the COVID-19 national emergency are many. Adhering to IDEA's hearing process requirements, inclusive of the timelines, is one.

B. The U.S. Department of Education has issued limited guidance addressing the hearing process,[2] leaving it to the individual states to fill in the gaps. This outline identifies some of the common issues that have come up during the COVID-19 outbreak and offers, where appropriate, some hearing process considerations for state educational agencies (SEA) and hearing officers to weigh.[3]

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[1] In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. 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.'").

[2] *See Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, 120 LRP 10623 (OSERS/OCR March 21, 2020) (hereinafter, "Supplemental Fact Sheet").

[3] The discussion herein is limited to common issues affecting the hearing process during the COVID-19 pandemic. This outline does not speak to substantive issues relating to the identification, evaluation or educational placement of a child with a disability or the provision of a free appropriate public education ("FAPE") to the child that may arise while children with disabilities are engaging in distance/remote learning. In addition, hearing officers must consult and adhere to state- and SEA-specific guidelines and policies in effect during this time. This outline serves only to inform the dialogue and not to substitute what has been issued by particular states and SEAs.

II. TIMELINES, IN GENERAL

A. When the parent files a non-disciplinary due process complaint, the IDEA and its implementing regulations[4] require that a final decision be reached and mailed to each of the parties not later than 45 calendar days after the expiration of the 30-day resolution period, or the adjusted time periods described in 34 C.F.R. § 300.510(c).[5]

B. Prior to the opportunity for an impartial due process hearing, the local educational agency (LEA) must convene a resolution meeting with the parents and the relevant member(s) of the IEP team who have specific knowledge of the facts identified in the due process complaint within 15 calendar days of receiving notice of the due process complaint where the parents discuss their due process complaint, and the facts that form the basis of the complaint, and the LEA is provided the opportunity to resolve the complaint.[6]

C. Though the IDEA does not expressly provide a mechanism to extend the 30-day resolution period, nor authorize hearing officers to grant an extension of the 30-day resolution period, the U.S. Department of Education has indicated that nothing in IDEA "prevent[s] the parties from mutually agreeing to extend the timeline because of unavoidable delays caused by the COVID-19 pandemic."[7]

D. Whether to allow extensions of the 30-day resolution period to address the delays resulting from COVID-19 is an SEA determination. Each SEA should consider whether there is any benefit to permitting the parties to mutually agreeing to suspend the start of the hearing timeline rather than

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[4] Implementing regulations followed the reauthorized IDEA in August 2006. *See* 34 C.F.R. Part 300 (August 14, 2006). In December 2008, the regulations were clarified and strengthened in the areas of parental consent for continued special education and related services and non-attorney representation in due process hearings. *See* 34 C.F.R. Part 300 (December 1, 2008). In June 2017, the regulations were further amended to conform to changes made to the IDEA by the Every Student Succeeds Act (ESSA).

[5] 34 C.F.R. § 300.515(a).

[6] 20 U.S.C. § 1415(f)(1)(B)(i); 34 C.F.R. § 300.510(a). The resolution meeting is not required when the parents and the LEA agree in writing to waive the meeting, or agree to use the mediation process in lieu of the resolution process. *Id.* There is no provision requiring a resolution meeting when an LEA is the complaining party. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46700 (August 14, 2006). Since the resolution process is not required when the LEA files a complaint, the 45-day timeline for issuing a written decision begins the day after the parent and the SEA receive the LEA's complaint. *Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Act*, 61 IDELR 232, Question D-2 (OSEP 2013).

[7] Supplemental Fact Sheet at 4.

requiring the parties to seek an extension of the 45-day timeline. The former will require the SEA to adopt new monitoring mechanisms while the latter continues to vest authority in hearing officers to determine on a case-by-case basis whether good cause exists to delay the proceedings and for how long.

E. The exceptional circumstances resulting from the COVID-19 pandemic may provide a basis for extending the 45-day timeline.

F. A hearing officer may grant specific extensions of time beyond the 45-day period at the request of either party.[8] The IDEA does not prescribe a standard for extending the 45-day timeline. Many states, however, enforce a good cause standard, which is subject to the discretion of the hearing officer and any state law/regulation/policy. Good cause" is defined as "having adequate or substantial grounds upon which to do something (e.g. make a ruling) or not to do something."[9]

G. Many of the challenges resulting from the COVID-19 outbreak may provide the good cause basis to extend the 45-day timeline, when appropriate. These include mandated quarantines and shelter-in-place / stay-at-home orders that restrict travel; school closures; lack of access to tele/video conference, needed records/evidence, etc.; and sick necessary parties/witnesses/representatives.

III. TIMELINES, DISCIPLINE

A. Expedited hearings pursuant to 34 C.F.R. § 300.532 present unique circumstances in the midst of the COVID-19 crisis.

B. In the disciplinary context, extensions of the applicable timelines are not an option. A hearing officer has no authority to extend the timelines of an expedited hearing at the request of either party.[10] Neither can the parties mutually waive the expedited timelines.[11] Nor can the parties agree to treat the hearing as a regular hearing.[12] Guidance from the U.S.

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[8] 34 C.F.R. § 300.515(c).

[9] "Black's Law Dictionary 2nd Ed. *See*, *e.g.*, *P.J. v. Pomona Unified Sch. Dist.*, 107 LRP 47645 (9th Cir. 2007) (unpublished); *J.D. v. Kanawha County Bd. of Educ.*, 53 IDELR 225 (S.D. W.Va. 2009); *J.R. ex rel. W.R. v. Sylvan Union Sch. Dist.*, 49 IDELR 253 (E.D. Cal. 2008); *Lessard v. Wilton-Lyndborough Cooperative Sch. Dist.*, 47 IDELR 299 (D.N.H. 2007); *O'Neil v. Shamokin Area Sch. Dist.*, 41 IDELR 154 (Pa. Commw. Ct. 2004).

[10] 34 C.F.R. § 300.532(c). *See also Letter to Snyder*, 67 IDELR 96 (OSEP 2015).

[11] *Letter to Zirkel*, 68 IDELR 142 (OSEP 2016).

[12] *See Letter to Snyder*, 67 IDELR 96 (OSEP 2015).

Department of Education has not altered these limitations.[13]

C. The timelines – the hearing must occur within 20 school days of the date the complaint is filed[14] and the decision must be made and provided to the parties within 10 school days after the hearing[15] – therefore, continue to be in effect.

D. Short of the parties reaching a settlement agreement in the disciplinary case or the complainant withdrawing the expedited claim(s),[16] an expedited hearing must move forward within the applicable timelines. This said, a hearing officer has discretion to hear only those issues identified by IDEA as proper for expedited hearings under the expedited timelines,[17] leaving all other issues to be heard under the timelines governing non-expedited hearings and subject to extensions at the request of either party.

E. The timeline for an expedited due process hearing is determined by school days.[18] The IDEA defines school day as any day, including a partial day, that students (both students with and without disabilities) are in attendance at school for instructional purposes.[19]

F. Instruction that is provided to all students during school closures through distance/remote learning would be considered school days if students are required through state/local ordinances to be *in attendance* for instructional purposes. Since there is no federal flexibility at the moment, these school days must be considered when calculating the timelines. However, teacher planning days may be excluded from the calculation if students are not required to be in attendance for instructional purposes. Whether these teacher planning days are considered school days is a local consideration depending on their construct.

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[13] *See* Supplemental Fact Sheet at 2 ("The Department understands, that, during this declared national emergency, there may be additional questions about meeting the requirements of federal civil rights law; where we can offer flexibility, we will. OSERS has provided the attached list with information on those IDEA timeframes that may be extended.").

[14] 34 C.F.R. §§ 300.532(c)(1), (2).

[15] 34 C.F.R. § 300.532(c)(2).

[16] In withdrawing the expedited claim(s), if the parties are amenable, they could agree in writing (or the HO could document in an order or a recorded conference call) that the complainant will withdraw the complaint and refile it by an agreed upon date, unless extended by written agreement, without prejudice to the rights or position of either party.

[17] *Letter to Snyder*, 67 IDELR 96 (OSEP 2015).

[18] *Letter to Cox*, 59 IDELR 140 (OSEP 2012).

[19] 34 C.F.R. § 300.11(c).

IV. DUE PROCESS COMPLAINT NOTICES

A. A parent or an LEA may file a due process complaint on *any* of the matters relating to the identification, evaluation or educational placement of a child with a disability or the provision of a FAPE to the child.[20]

B. The due process complaint notice is generally considered "filed" when the LEA receives the notice.[21] School closures and shelter-in-place / stay-at-home orders that restrict travel make it difficult for an LEA to receive mail or in-person deliveries in a timeline manner. These limitations, however, does not excuse an SEA from requiring its LEAs from having alternate procedures in place during the COVID-19 crisis to allow parents, or their representatives, to file a due process complaint notice and to forward a copy of the complaint to the SEA by means other than postal mailings and in-person deliveries.[22]

C. It is with the discretion of a state to establish procedures permitting a due process complaint to be filed electronically.[23] Allowing such will mitigate against delays caused from postal mail that sits unopened in mailing rooms or P.O. Boxes or that cannot be delivered because of school closures.

D. Not every parent, however, can file his/her due process complaint notice electronically for a variety of reasons, including, limited access to email/internet service, difficulty using email, an inability to write, etc. For these reasons, the SEA should provide mechanisms to assist parents in filing due process complaints in a manner other than electronically during the COVID-19 crisis. This may include establishing a due process complaint hotline that allows an SEA representative to take required information pursuant to 34 C.F.R. § 300.508(b) via teleconference.

E. Whatever the alternate procedures the SEA implements, the SEA should post information on its website and require same of each LEA and consider distributing via email and postal mail, as appropriate.

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

[21] *See* 34 C.F.R. § 300.510(a)(1). *See also Q & A on Dispute Resolution Procedures* 61 IDELR 232 (OSEP 2013), Question C-7 (indicating that States must have procedures, which may be determined by state law, to determine when due process complaints are received, whether filed in hard copy or electronically).

[22] *See* 34 C.F.R. § 300.508(a)(1).

[23] *See Q & A on Dispute Resolution Procedures* 61 IDELR 232 (OSEP 2013), Question C-6.

V. DUE PROCESS HEARINGS

A. Because school districts continue to have obligations to comply with due process hearing timelines, and extensions of the hearing timelines are not a forgone conclusion or always practical or possible, hearing officers and parties may need to avail themselves of alternate means of meeting, particularly telephone-/video-conferencing.

B. Consistent with requirements governing due process hearings under IDEA, and subject to state law and guidance, the following suggestions are offered to SEAs and independent hearing officers for their consideration in handling the hearing process during this period of school closures and shelter-in-place / stay-at-home orders that restrict travel.

C. As a starting point, hearing officers must continue to adhere to IDEA and state legal requirements, including appropriate/best, standard legal practices, during the current crisis. Though the current crisis will make meeting legal requirements, including timelines, difficult, the mere existence of the crisis, in and of itself, does not excuse the handling of the hearing process.

D. Given the potential, logistical problems the crisis presents, hearing officers should immediately schedule a status or prehearing conference (PHC) with the parties and/or their representatives as soon as possible in all pending cases that have not yet been heard, or as new cases are filed, to discuss any anticipated difficulties in proceeding as scheduled and/or within the timelines.

E. The fact that school buildings are closed does not automatically preclude holding a hearing in an alternative location (e.g., school district offices; attorney conference rooms). As shelter-in-place / stay-at-home orders are lifted and/or modified, the hearing officer should explore all options with the parties and/or their representatives during the status or prehearing conference, being sensitive to the concerns of all involved. Any site location should allow for social distancing recommendations and should allow for telephone or video conferencing for those individuals who cannot participate in person.

F. The handling/sharing of documents and exhibits during any in-person hearing may be of concern to parties, attorneys, and witnesses. A hearing officer may require that multiple copies of documents and exhibits be made available for use and that no witness be required to directly handle the documents and exhibits; the document/exhibit can simply be placed before the witness for viewing, with the offering party/attorney turning pages, as needed.

G. Hearing officers should not assume that problems exist, or if they do exist, that they cannot be addressed in a way that is both safe for all hearing participants and consistent with legal requirements and best practice. The hearing officer should confirm his/her understanding of any noted concerns; ask any follow-up questions, if necessary; allow both sides the opportunity to weigh-in on a path forward; and determine how the matter will proceed.

H. Inevitably, the parties and/or their representatives may bring up extending the timeline during the status / prehearing conference. An extension of the timeline may be considered by the hearing officer, but only at the request of either party or both parties. The hearing officer, as noted *supra*, cannot solicit the extension.

I. Telephone or video conferencing may be considered by the hearing officer as alternatives to in-person participation. Whether to allow telephonic or video conferencing participation is within the discretion of the hearing officer. (Though difficult, a hearing may be conducted entirely via telephone or video conferencing. The hearing officer, however, should consult the parties and/or their representatives before deciding to proceed in this manner.)

Various factors should be considered, including whether participants have access to necessary and compatible computer, mobile, or tablet devices; whether participants have reliable internet service; whether a participant's own disability impairments would make online participation inaccessible; and, whether a participant's tech savviness is limited, effectively preventing the individual from fully and reliably engaging in the process.

J. Any hearing officer who is ill or not able to carry out his/her functions should immediately, if able, notify the SEA/LEA, as appropriate, to discuss how to move forward, including whether to be temporarily removed from the rotational appointment list. Should any hearing officer have concerns about his/her own safety, considerations should be given to alternative participation, such as the telephonic/video conferencing option or, after consulting with the SEA, if feasible, recusal.

VI. VIRTUAL MEETING ROOMS

A. Should a hearing officer opt, after consulting with the parties, for a virtual hearing, there are a number of virtual meeting platform options available to the hearing officer, some at a cost and others, during the pandemic, at no cost. These options include Zoom, GoToMeeting, Microsoft Teams, and Webex. There are many others.

B. Which virtual meeting platform to select is a personal decision, though many of the common options share similar features and have the look and

feel as in-person meetings. There are some potential risks, particularly in preserving personal and confidential information, but many of these platforms provide for protective measures to mitigate these risks. The user should become acquainted with, and utilize, the available features that help protect personal and confidential information. An SEA's confidentiality policies should also be consulted to determine whether a particular platform meets state/local requirements.

C. Potential risks and solutions include:

1. uninvited third-party joining meeting and having access to confidential information. Under the IDEA, the parent has the right to open the hearing to the public.[24] Unless the parent exercises this right, any virtual hearing must prevent uninvited guests from accessing the virtual conference room and becoming privy to confidential information. To mitigate this risk, the hearing officer should select the option that generates an automatic meeting ID for each meeting rather than setting up and continuously using a standing personal ID. Each hearing day should have its own meeting ID. Each participant should also be required to register anew for each hearing day. Though this may require a bit more of leg work by the hearing officer, it would certainly reduce the likelihood of having an unwanted guest join the meeting should the meeting link be inadvertently shared with others.

   The hearing officer should also require users to access the meeting with a password, particularly if they are joining a meeting manually without the meeting link. Invited guests should be placed in a waiting room, when available, and should not be allowed to join the meeting before the host (i.e., the hearing officer). Upon starting the meeting, the hearing officer should grant access to invited guests to enter the virtual meeting and close the meeting after all invited guests have joined.

2. inappropriate content or documents not in evidence are shared. Virtual meeting rooms are intended to allow participants to share their screens or particular content sitting on their desktops. This said, with some platforms, the host is able to change the settings to only allow the host to share his/her screen or allow select others to share their screen but only with permission from the host. Hearing officers should consider whether there is a need for any participants to share their screen and, if so, who will be permitted. It may be appropriate, for example, for the attorneys to have access to share their screens from the start rather than on an ad hoc basis.

[24] 34 C.F.R. § 300.512(c).

(Typically, permission can be withdrawn at any time by the host.)

3. unauthorize video/audio recording. Some platforms allow each participant to record the video or audio from the meeting at his/her own discretion if the host enables the feature. Platforms with a recording feature do not allow the host to select who has recording capability over others. Hearing officers, therefore, should not grant access to individual participants to record the hearing, particularly where third-party witnesses can also do so.

4. noise pollution or disruptive participants. Some participants join virtual meetings with headsets, which, depending on how good the microphone is, ambient noise is filtered out, and the desired source (i.e., the speaker's mouth) is amplified. Others simply rely on the speakers and microphone built into their computer or tablet, which increases the likelihood for noise pollution. Whatever the circumstances, if access to a headset is not an option, the hearing officer should require all participants to mute themselves and remain muted when not speaking. This will enhance the virtual experience for all participants and allow for a better record.

   The option to mute all participants or a particular participant who is disruptive is an option typically available to the host.

D. There are other matters that hearing officers should consider when using virtual meeting rooms, including –

1. Making sure that participants are familiar with how the virtual conference room platform works.[25] It is important that the hearing officer helps the participants with navigating the features, including how to engage the camera, mute the microphone, set viewing options (i.e., grid view versus speaker view), and share their screens when necessary.

2. Informing participants of the limitations of the software, including that crosstalk typically results in the person who is the loudest dominating attention, which can be perceived by the more soft-spoken participant as their being a power imbalance. The hearing officer, therefore, should establish ground rules on how to engage in the virtual conference room and should be mindful of the software limitations and check-in with other participants, as appropriate, before moving on to next items.

[25] To the extent practicable, the hearing officer may also want to consider holding a practice run with the parties and their representatives prior to the hearing, particularly if any participant has expressed concern with using virtual conference meeting software.

3. Enabling breakout rooms initially, when available. Breakout rooms allow the host to split the meeting into separate sessions with individual participants being assigned by the host to other virtual conference rooms. This may be of use when, for example, when the hearing officer would like to confer with the attorneys privately, as needed, outside of earshot of parties and/or witnesses, or an attorney would like to confer with his/her client privately during the hearing.

4. Disabling the private chat feature to prevent communication between attorneys and witnesses during the course of testimony.

5. Consulting with the court reporter as to how to best accommodate his/her needs.

VII. ASSESSING CREDIBILITY

A. Skeptics of virtual hearings often raise concerns about the ability of the hearing officer to assess credibility. Credibility can be judged in other ways than direct observation of witnesses. In fact, in many IDEA hearings, hearing officers rely on telephonic testimony.

B. Credibility is best judged, among other ways, by the strength of a witness's memory; the ability of the witness to describe an event from firsthand knowledge; the basis for the witness's opinion or observation; and the clarity by which a witness recalls and event.[26] Neither of these requires the direct observation of a witness.

C. Though tone of voice, shades of expression, and gestures are customarily considered, these are not as reliable as those listed in subparagraph B, particularly because those in subparagraph B lend themselves to corroboration by other witnesses and the documentary evidence. Studies have shown that many of the suspicious behaviors that we equate to not telling the truth – pauses, shifting positions, lack of eye contact, fidgeting – do not differ from those who are telling the truth.[27]

D. Concern for assessing credibility, therefore, should not be the reason for not moving forward with a virtual hearing.

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[26] *See* Barbara A. Spellman & Elizabeth R. Tenney, *Credible Testimony In and Out of Court*, Psychonomic Bulletin & Review (2010), 17(2), 168-173.

[27] *See id.*

VIII. HANDLING EXHIBITS

A. Hearing officers will need detailed procedures for handling documents.

B. Lack of access to school buildings and records may present a challenge to LEAs. Any difficulty should be discussed during the prehearing conference. It may be that an LEA will need to seek an extension of the timeline as it will not be able to move forward without necessary documents. This said, the hearing officer will need to consider and address any potential prejudice to the student caused by a delay of the hearing.

C. It may not be practical for all witnesses to have a physical copy of the exhibit books. Electronic copies should be considered, provided that sharing same would not violate any confidentiality requirements under IDEA and the Family Educational Rights and Privacy Act (FERPA).

School district personnel are generally privy to personally identifiable information of a student, particularly where their testimony is needed.[28] Under the IDEA, parental consent is required unless the school official is authorized to attend the hearing under 34 C.F.R. § 300.512(a)(1)-(2), such disclosure is necessary to meet a requirement of part 300 with respect to the child who is the subject of the hearing, or such disclosure is authorized without parental consent under 34 C.F.R. part 99.[29] Parental consent must meet the requirements in 34 C.F.R. § 300.9 and must be sufficient to indicate that the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought.[30]

Under FERPA, written consent is required of the parent or eligible student unless the school official has a "legitimate educational interest" in the student's education records.[31] Generally speaking, a "legitimate educational interest" is an interest in the student or in the management and administration of education in the district as a more general matter. A school official has a "legitimate educational interest" if the employee/official needs to review an education record in order to fulfill his or her professional responsibility.[32] Providing testimony at a hearing may confer "legitimate educational interest."

D. A bit more complex to answer is the ability to share personally identifiable information with a third-party witnesses not associated with the LEA.

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[28] *Letter to Reisman*, 60 IDELR 293 (OSEP 2012).

[29] 34 C.F.R. § 300.512(a)(1)-(2); 34 C.F.R. § 300.622(a)-(b)(1). *Letter to Reisman*, 60 IDELR 293 (OSEP 2012).

[30] *Letter to Reisman*, 60 IDELR 293 (OSEP 2012).

[31] 34 C.F.R. §§ 99.30, 99.31. *Letter to Reisman*, 60 IDELR 293 (OSEP 2012).

[32] *Letter to Reisman*, 60 IDELR 293 (OSEP 2012).

These are typically, however, individuals called by the parents as witnesses. Under these circumstances, it is within the parents' discretion whether to share personally identifiable information with their third-party witnesses and to what extent.

E. If sharing an electronic copy of the exhibit books presents as an issue as it relates to third-party witnesses, then the option exists to display through screen sharing only those necessary exhibits with the witness as s/he testify.

IX. STAY-PUT

A. The IDEA stay-put provision requires a school district to maintain a student in the then-current educational placement until litigation concludes. Its primary purpose is to maintain the student's "status quo" while a dispute over the student's services or placement is pending. Specifically, during the pendency of special education proceedings brought pursuant to the IDEA, unless the State or local agency and the parents of the child otherwise agree, federal law requires that the child remain in his or her then-current educational placement.[33] The application of the stay-put provision to matters concerning expedited hearings in the disciplinary context is governed by a different set of rules under the IDEA.[34]

B. Clearly, though stay-put is not location specific,[35] maintaining a student in his/her then-current educational placement may be impractical, if not impossible, during mandated school closures resulting from the COVID-19 crisis. Should the parties not be able to reach agreement on what is the stay-put, or providing for the stay-put is impractical or impossible, the

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[33] *See* 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a).

[34] *See* 34 C.F.R. § 300.533.

[35] Courts have explained that a child's educational placement "falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP." *Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Ill. State Bd. of Educ.*, 103 F.3d 545, 25 IDELR 132 (7th Cir. 1996). The term "then-current educational placement" enjoys varying, but related, interpretations among the circuits. *See Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176 (9th Cir. 2002); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618 (6th Cir. 1990). It has been interpreted to mean typically the placement described in the student's most recently implemented IEP (Ninth Circuit paraphrasing the Sixth Circuit; Second Circuit) and the operative placement actually functioning at the time when the dispute arises (i.e., when the hearing complaint is filed) (Sixth Circuit, and adopted by the Third Circuit; Second Circuit). *Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176 (9th Cir. 2002); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 17 IDELR 113 (6th Cir. 1990); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996). *Cf. Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist.*, 386 F.3d 158, 42 IDELR 2 (2d Cir. 2004).

hearing officer can consider addressing stay-put in one of two ways:

1. By requiring the LEA, just as in the disciplinary context, to provide educational, remote services that enable the student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student's Individualized Education Program (IEP).[36]

2. Alternatively, the hearing officer can consider the matter similar to instances where the program/school is no longer available (e.g., school shuts down; student asked to leave). Under unavailability of current placement case law, courts have required the LEA to place the student in a program that is materially and substantially similar to the former program.[37] Under this circumstance, the LEA would have present to the hearing officer a viable, comparable remote program.

NOTE: THIS DOCUMENT IS INTENDED TO PROVIDE READERS WITH A SUMMARY OF SELECTED STATUTORY PROVISIONS AND/OR SELECTED JUDICIAL INTERPRETATIONS OF THE LAW. IN SHARING THIS DOCUMENT, ITS AUTHOR IS NOT RENDERING LEGAL ADVICE TO READERS.

[36] *See* 34 C.F.R. § 300.530 (d)(1)(i).

[37] *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 39 IDELR 154 (9th Cir. 2003); *John M. v. Bd. of Educ.*, 502 F.3d 708, 48 IDELR 177 (7th Cir. 2007); *Knight v. Dist. of Columbia*, 877 F.2d 1025, 441 IDELR 505 (D.C. Cir. 1989). *See also Tindell v. Evansville-Vanderburgh Sch. Corp.*, 54 IDELR 7 (S.D. Ind. 2010) (holding that a college internship program was comparable to the residential facility which was about to close); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994).