MEMOS, DEAR COLLEAGUE LETTERS, AND POLICY LETTERS OF IMPORT TO IDEA HEARING OFFICERS

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I. INTRODUCTION

A. U.S. Department of Education's Office of Special Education Programs (OSEP)[1] interpretations in the form of Memos, Dear Colleague Letters, and Policy Letters are entitled to "some measure of judicial deference."[2] The fact that the interpretations are expressed informally, in a letter or memo, is of no consequence.[3]

B. Though entitled to deference, OSEP's written guidance does not have the binding effect of regulations,[4] and it is properly classified as interpretive rules because it imposes no substantive obligations, but rather clarifies aspects of the IDEA and its regulations.[5]

C. The same would be true of interpretive guidance from a State educational agency (SEA).

II. DEFERENCE

A. Deference to interpretive guidance from OSEP (or an SEA) may be appropriate where the IDEA and its regulations are ambiguous.[6]

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[1] OSEP is the federal agency with principal responsibility for administering the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 *et seq*.). 20 U.S.C. § 1402(a).

[2] *Morton Community Unit Sch. Dist. No. 709 v. J.M.*, 152 F.3d 583 (7th Cir. 1998) *citing Lyng v. Payne,* 476 U.S. 926 (1986), *Skandalis v. Rowe,* 14 F.3d 173, 177 (2d Cir. 1994).

[3] *Id.; see Martin v. OSHA,* 499 U.S. 144 (1991); *Auer v. Robbins,* 117 S. Ct. 905 (1997); *Massachusetts v. FDIC,* 102 F.3d 615 (1st Cir. 1996).

[4] *See* 20 U.S.C. § 1406(e)(1).

[5] *See Michael C. v. Radnor Township Bd. of Educ.*, 202 F.3d 642 (3d Cir. 2000), *cert. denied*, 531 U.S. 813 (2001); *Metropolitan Sch. Dist. v. Davila*, 969 F.2d 485 (7th Cir. 1992).

[6] *Honig v. Doe*, 484 U.S. 305, n.8 (1988). *See also Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036 (9th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001);

B. If the IDEA or its regulations directly address(es) the precise question(s) at issue, then the hearing officer must enforce the unambiguously expressed language in the IDEA or its regulations.[7]

C. If, however, there is ambiguity, the hearing officer may defer to the interpretive guidance, provided it is persuasive. Persuasiveness is defined, in part, by how thorough the agency considered the matter, the validity of its reasoning, and the consistency of the pronouncement with the clear meaning or purpose of the statute, the regulations, or applicable legal precedents.[8]

III. KEY OSEP MEMOS, DEAR COLLEAGUE LETTERS, AND POLICY LETTERS

A. The Hearing Process

1. Generally

a. *Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act*, 61 IDELR 232 (OSEP 2013) – Question and Answer (Q & A) Memo.

The Q & A provides responses to frequently asked questions on dispute resolution procedures set forth in the Part B regulations, including mediation procedures, State complaint procedures, and due process procedures. For example, the Q & A –

(1) confirms that either the parent or school district may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of free appropriate public education (FAPE) to the child;

Mary P. v. Illinois State Bd. of Educ., 919 F. Supp. 1173, (N.D. Ill. 1996). *Cf. St. Johnsbury Academy v. D.H.*, 240 F.3d 163 (2d Cir. 2001) ("We need not decide whether OSEP's interpretation is entitled to deference, because we independently conclude that it is fully supported by the statute and regulations.").

[7] *Detsel v. Sullivan*, 895 F.2d 58 (2d Cir. 1990) *citing Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[8] *See Michael C. v. Radnor Township Bd. of Educ.*, 202 F.3d 642 (3d Cir. 2000), *cert. denied*, 531 U.S. 813 (2001); *Detsel v. Sullivan*, 895 F.2d 58 (2d Cir. 1990).

(2) explains that the hearing officer's decision on a notice of insufficiency will identify how the due process complaint notice is insufficient so that the complainant can amend the due process complaint notice;

(3) advises that the due process procedures to override a parent's refusal to consent or failure to respond to a request to provide consent are available for initial evaluations and reevaluations of children enrolled, or seeking to be enrolled, in public schools, but not when the parent fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services to his or her child;

(4) explains that State law governs the resolution of disagreements between disputing parents, both of which have legal authority to make educational decisions for the child;

(5) advises that the hearing officer must make good faith effort to accommodate the parent's scheduling request, but may also consider the school district's own scheduling needs when accommodating the parent's request and in setting a time and place for conducting the due process hearing;

(6) explains that only the hearing officer can determine whether a due process complaint constitutes a new issue compared to a previously adjudicated due process complaint between the same parties;

(7) clarifies that the State, in the absence of controlling case law, may have uniform rules relating to a hearing officer's authority or lack thereof to review and/or enforce settlement agreements reached in mediation and/or at the resolution meeting, or outside of either process;

(8) confirms that the hearing officer cannot unilaterally extend the 45-day timeline nor can the hearing officer extend the hearing decision

timeline indefinitely;

(9) confirms that once a final decision has been issued, no motion for reconsideration is permissible;

(10) confirms that the parent may challenge the sufficiency of the complaint and must send a response when the school district files the due process complaint;

(11) confirms that the school district must include the days when schools are closed due to scheduled breaks and holidays in calculating the timeline for convening a resolution meeting;

(12) advises that the 45-day timeline begins at the conclusion of the 30-day resolution period even though neither party sought the hearing officer's intervention for the failure of a party to participate in the resolution meeting;

(13) advises that a school district cannot require a parent to sign a confidentiality agreement as a precondition to conducting a resolution meeting;

(14) clarifies that the discussions during the resolution meeting are not confidential and may be introduced at a due process hearing;

(15) explains that the resolution period and the hearing timeline run concurrently in an expedited hearing;

(16) confirms that extensions of the timelines are not permissible in an expedited hearing;

(17) clarifies how the school district must calculate the timeline requirements for an expedited hearing when the due process complaint is filed when school is not in session;

(18) confirms that the sufficiency provision does not apply to an expedited hearing; and

(19) clarifies that the school district may seek directly in court a temporary injunction to remove a student from his or her current educational placement for disciplinary reasons.

b. *Letter to Cohen*, 67 IDELR 217 (OSEP 2015).

OSEP clarified that, absent an enforceable agreement to the contrary, discussions held during the resolution meeting can be introduced in a subsequent due process hearing or civil proceeding.

☞***Key Point.*** *Though resolution meeting discussions may be admissible in a due process hearing, their admission is not absolute. The hearing officer should determine whether the discussions are relevant before allowing their admission.*

c. *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995).

OSEP notes that it is the responsibility of the hearing officer to accord each party a meaningful opportunity to exercise the specific hearing rights under 34 C.F.R. § 300.512 during the course of the hearing. OSEP further notes that the hearing officer is expected to ensure that the due process hearing serves as an effective mechanism for resolving disputes between the parent and the school district.

☞***Key Point.*** *Apart from the specific hearing rights listed in 34 C.F.R. § 300.512, decisions regarding the conduct of due process hearings are left to the discretion of the hearing officer, subject to appellate review. Usually, decisions of the hearing officer on procedural and evidentiary matters will be given due deference by a reviewing court, and often the stricter standard of an "abuse of discretion" will need to be met for the hearing officer's ruling to be reversed.*

d. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46704 (August 14, 2006).

"We do not believe it is necessary to regulate further on the other pre-hearing issues and decisions mentioned by the commenters because we believe

that States should have considerable latitude in determining appropriate procedural rules for due process hearings as long as they are not inconsistent with the basic elements of due process hearings and rights of the parties set out in the Act and these regulations. The specific application of those procedures to particular cases generally should be left to the discretion of hearing officers who have the knowledge and ability to conduct hearings in accordance with standard legal practice. There is nothing in the Act or these regulations that would prohibit a hearing officer from making determinations on procedural matters not addressed in the Act so long as such determinations are made in a manner that is consistent with a parent's or a public agency's right to a timely due process hearing."

☞***Key Point.*** *Consistent with Letter to Anonymous, supra, hearing officers enjoy considerable discretion in addressing prehearing matters.*

2. Jurisdiction / Authority

a. *Letter to Wilde*, 113 LRP 11932 (OSEP 1990).

Determinations of whether particular issues are within a hearing officer's jurisdiction, or whether a party has been properly named in any hearing request, are to be made by the hearing officer who must be appointed to conduct the hearing.

b. *Letter to Inzelbuch*, 62 IDELR 122 (OSEP 2013).

The hearing officer has jurisdiction for violations resulting from the failure to provide a timely response to the due process complaint.

☞***Key Point.*** *Entering a default judgment is not an appropriate remedy under the IDEA. Sykes v. District of Columbia, 518 F. Supp. 2d 261 (D.D.C. 2007). See also Jalloh v. District of Columbia, 535 F. Supp. 2d 13 (D.D.C. 2008) (finding that the parent is not entitled to a default judgment because the school district issued a general denial of wrongdoing in response to the parent's due process complaint).*

c. *Letter to Moody*, 23 IDELR 833 (OSEP 1995).

Residency creates the duty to ensure that a FAPE is made available to eligible students with disabilities. A student is presumed to be a resident of the State in which his or her parents reside or that s/he is a ward.

In a situation where a student with a disability is placed in a residential facility by a school district in the State in which the parent resides and, subsequently, the parent moves out of the State, the new home State assumes responsibility to provide special education to the student.

☞***Key Point.*** *A hearing officer has the authority to make residency determinations. When residency is an issue, it must be determined promptly and, if fact disputes exist, the hearing office must establish a record upon which to make factual determinations (i.e., limited hearing, affidavits, and/or stipulations).*

d. *Letter to Cox*, 54 IDELR 60 (OSEP 2009); *Letter to Ward*, 56 IDELR 237 (OSEP 2010).

The hearing officer does not have jurisdiction for any disputes between parents. Either parent of the student who has legal authority to make educational decisions for the student can provide or revoke consent, and any disagreements between the parents is a State or local law matter and not the subject of a due process hearing or mediation under the IDEA.

e. *Letter to Anonymous*, 69 IDELR 189 (OSEP 2017).

A parent may file a due process complaint against a State education agency (SEA). The hearing officer, however, has the authority to determine whether the SEA is a proper party to the hearing.

f. *Letter to Ramirez*, 60 IDELR 230 (OSEP 2012).

OSEP opined that the hearing officer has discretion to determine whether a certain action by a student with a disability amounts to a violation of the school district's Student Code of Conduct. IDEA authorizes a hearing officer to decide a due process complaint on any matters relating to the identification, evaluation

or educational placement of a child with a disability, or the provision of a FAPE to the child. Further, OSEP explained that, because the hearing officer's authority extends to removing a child with a disability who violates a code of student conduct from the current placement, there may be instances where a hearing officer, in his/her discretion, would address whether a violation has occurred.

☞***Key Point.*** *It may be necessary for the hearing officer to determine whether the action by the student amounts to a violation of the Student Code of Conduct to the extent that it would inform the IDEA-centered appraisal of the student's provision of a FAPE or the appropriateness of the educational placement or whether removal from the current placement is justified. However, generally, this determination would not be necessary.*

g. *Letter to Lipsitt*, 52 IDELR 47 (OSEP 2008).

A parent or school district may file a due process complaint pertaining to an IEP that is not the most recent, provided the complaint is filed within the time limitation for filing a due process complaint. Because there is no provision in the IDEA or its implementing regulations requiring that a parent agree to an IEP, a parent may file a due process complaint regarding an IEP to which the parent previously had agreed.

☞***Key Point.*** *A parent's undue delay in appealing a previously agreed upon IEP may be considered, among other factors (e.g., school district's own obligation to reconvene an IEP meeting), in fashioning equitable relief, when warranted.*

h. *Letter to Howey*, 213 IDELR 147 (OSEP 1988).

An SEA does not have the authority to deny a parent's request for a hearing (based on the principle of *res judicata* or whatever), as the IDEA prohibits a school district and SEA from functioning as due process hearing officers.

i. *Letter to Shaw*, 50 IDELR 78 (OSEP 2007).

The authority of a hearing officer to review or enforce

a settlement agreement reached outside the IDEA's mediation or resolution processes is matter for states to decide. (Settlement agreements reached through the mediation or resolution processes are subject to review in State or federal court.)

OSEP observed that neither the IDEA nor its implementing regulations specifically address the authority of hearing officers to review or approve settlement agreements. Also, the IDEA and its regulations do not specifically address enforcement by hearing officers of settlement agreements reached by the parties. OSEP, therefore, opined that a State may have uniform rules relating to a hearing officer's authority or lack of authority to review and/or enforce settlement agreements reached outside of the mediation or resolution processes.

OSEP further noted that a State educational agency (SEA) must investigate all complaints relating to settlements when the failure to abide by the terms of the settlement results in a denial of FAPE. Therefore, a failure to implement an IEP that is based on a settlement agreement would be the basis for a complaint allegation that a school district is in violation of the IDEA.

☞***Key Point.*** *Though a hearing officer may lack the authority to review or enforce a settlement agreement reached by the parties outside the IDEA's mediation or resolution processes, a hearing officer may nonetheless have jurisdiction to hear any claims of a FAPE violation stemming from the failure to provide the services or placement called for in a settlement agreement.*

j. *Letter to Fisher*, 21 IDELR 992 (OSEP 1994).

A change in educational placement occurs when there is a substantial or material alteration to a student's education program. When there is a change in the location of the student's placement, the effect of the change in location on the factors identified by OSEP must be examined.

☞***Key Point.*** *A hearing officer may be called upon to determine whether a "change in educational*

placement" has occurred to assess whether a hearable even has occurred. When addressing the effect a change in location has on a student's educational program, the hearing officer's decision should address the four factors OSEP has outlined.

k. *Letter to Chassy*, 30 IDELR 51 (OSEP 1997); *Letter to Heldman*, 20 IDELR 621 (OSEP 1993); *Letter to Stohrer* (OSEP 1990).

OSEP advises that when a school district and a parent are unable to agree on the student's current educational placement or on another placement for the student, a hearing officer has the authority to determine the stay-put.

l. *Letter to Goldstein*, 60 IDELR 200 (OSEP 2012).

Where a school district does not dispute a student's current educational placement, it should automatically implement the student's pendency placement right away upon the parent filing the due process complaint.

The IDEA and its implementing regulations do not specify a specific timeframe or process for identifying whether the school district agrees or disagrees with what is the current educational placement. Where the current educational placement is not in dispute but the parent believes that the school district is delaying or failing to maintain(ing) the current educational placement, the parent may seek the intervention of a hearing officer.

☞***Key Point.*** *Though a school district should not wait for a formal order from a hearing officer before implementing an uncontested stay-put placement, a school district's delay in, or failure to, maintain(ing) the current educational placement may necessitate a written order from the hearing officer.*

m. *Letter to Anonymous*, 35 IDELR 35 (OSEP 2000).

Retention and promotion decisions that are separate from placement decisions are generally not subject to due process. However, FAPE issues that have a direct impact upon retention and promotion decisions can

be the basis for a hearing request.

☞***Key Point.*** *Where a student does not receive the services specified on his or her IEP that were designed to assist the student in meeting the promotion standards, the parent can challenge the lack of services as a denial of FAPE and a hearing officer may, when appropriate, award compensatory services and require a subsequent reconsideration of the retention decision.*

n. *Letter to Goetz and Reilly*, 57 IDELR 80 (OSEP 2010).

States may not prohibit – other than by setting a time limit (i.e., statute of limitation) for the filing of the due process complaint – a parent from filing a due process complaint against a school district that the student previously attended. The IDEA contemplates that a parent may remove his or her child from a school district and place the child in another school district if the parent believes the student's current school district is not provided FAPE to the student.

o. *Dear Colleague Letter*, 65 IDELR 151 (OSEP 2015).

OSEP reminded school districts to respect a parent's decision to file a State complaint instead of a due process complaint. OSEP opined that some school districts might be filing due process complaints concerning the same issue that is the subject of an ongoing State complaint, ostensibly to delay the State complaint resolution process. (The State must set aside any part of the State complaint that is being addressed in the due process hearing until the hearing officer issues a final decision or dismisses the due process complaint. The hearing officer's decision on an issue that is also raised in the State complaint is binding on that issue.)

☞***Key Point.*** *Though the IDEA permits school districts to file a due process complaint on matters that are the subject of an ongoing State complaint filed by the parent, such conduct may unreasonably deny a parent the right to use the State complaint process and force a parent to participate in, or ignore at considerable risk and cost, due process*

complaints and hearings.

The hearing officer appointed to a due process complaint filed by the school district that is also the subject of an ongoing State complaint filed by the parent, may need to determine whether the school district has standing to file the due process complaint. For example, the school district might not have standing to file a due process complaint in response to the parent's State complaint challenging the school district's own determination that the student is not eligible because the school district does not have any basis to file a due process complaint whatever to appeal its own determination. Under these limited facts, the school district's due process complaint post the filing of the parent's State complaint may be regarded as an attempt to reassign those issues that are the subject of both complaints to the school district's preferred forum.

3. Prehearing Matters

a. *Letter to Reisman*, 60 IDELR 293 (OSEP 2012).

A school official who is not directly involved in the hearing or the education of the student who is the subject of the hearing may attend the entire hearing even though the parent does not open the due process hearing to the public (i.e., a closed hearing), provided the student's confidentiality rights under the IDEA and the Family Educational Rights and Privacy Act (FERPA) are upheld.

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. 34 C.F.R. § 300.512(a)(1)-(2); 34 C.F.R. § 300.622(a)-(b)(1). 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.

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. 34 C.F.R. §§ 99.30, 99.31. 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. FERPA requires that a school district informs parents, through an annual notification of rights, whether it has a policy of disclosing personally identifiable information under § 99.31(a)(1), and, if so, a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest. 34 C.F.R. 99.7(a)(3)(iii).

☞***Key Point.*** *OSEP believes that the hearing officer is in the best position to ensure that the confidentiality of personally identifiable information is properly protected during the course of the hearing. When a parent objects to the attendance of a school employee who is not directly involved in the hearing or the education of the student who is the subject of the hearing, the hearing officer should weigh the various factors listed above.*

b. *Letter to Anonymous*, 20 FAB 17 (FPCO[9] 2016); *Letter to Anonymous*, 22 FAB 30 (FPCO 2018). FERPA requires school districts to provide parents access to their children's education records within 45 calendar days of receipt of the request. Parents have a right to inspect and review the education records but not necessarily to be provided with copies of the education records. However, if circumstances effectively prevent the parents from exercising their right to inspect and review (e.g., parent does not live within commuting distance of the school district), the school district must either provide copies or make other arrangements.

The school district is not required to create lost or

[9] FPCO is the Family Policy Compliance Office.

destroyed education records. However, the school district may not destroy education records if there is an outstanding request to inspect and review the records. Neither is a district obligated to preserve data once it is shared with the parent and destroyed in accordance with its record retention policy.

c. *Letter to Anonymous*, 22 FAB 30 (FPCO 2018).

FERPA does not require a school to keep education records in any particular file or location.

d. *Letter to Anonymous*, 22 FAB 27 (FPCO 2018).

FERPA does not generally require a school district to maintain particular education records that contain specific information such as audiotapes, videotapes, or documents of communication. FERPA's privacy protections only extend to those education records that the school selects to maintain.

FERPA does not specify a length of time that education must be kept. A school district may destroy any education record without notice to the parent, and consistent with its record retention policy, unless there is an outstanding request by the parent to inspect and review those records.

e. *Letter to Anonymous*, 20 FAB 25 (FPCO 2016); *Letter to Anonymous,* 21 FAB 23 (FPCO 2017).

FPCO reaffirmed that a school district has no obligation to make copies of records for the parent unless the parent would be effectively denied access to the records by not producing the copies.

f. *Letter to Anonymous*, 20 FAP 8 (FPCO 2016).

Providing parents access to their children's education records through the school district's internet portal is permissible practice and does not deprive the parents of their right to inspect and review education records, unless the parents do not have an ability to access the school district's internet portal.

g. *Letter to Anonymous*, 113 LRP 14615 (FPCO 2013);
Letter to Prescott, 19 FAB 16 (FPCO 2015)
Letter to Anonymous, 19 FAB 33 (FPCO 2015).

FERPA is applicable to IDEA proceedings. If an education record includes information on more than one child, the parents of those children have the right to inspect and review only the portion of the education record relating to their child or to be informed of the specific information in the education record.

Absent signed and dated written consent from the other parents, any disclosure to any of the parents would be improper. A hearing officer does not have authority to override the parental consent requirement necessary to disclose a student's educational record to a third party.

Where the joint records cannot be easily redacted, the school district may simply inform the parent about the contents of the specific record without disclosing the actual record.

☞ ***Key Point.*** *Occasionally, a party may seek to compel the production of IEPs, class profiles, or other similar information during the course of the hearing. Hearing officers must be careful not to compel the disclosure of personally identifiable information of a student or group of students to a third party.*

Keep in mind that personally identifiable information is defined to include "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with

reasonable certainty." 34 C.F.R. § 99.3. It also includes "[a] list of personal characteristics…." 34 C.F.R. § 300.32(d).

h. *Letter to Soukup*, 18 FAB 33 (FPCO 2015).

A school district may disclose to the parents of a harassment victim of the disciplinary sanction imposed on the perpetrator(s) of the harassment when that sanction relates directly to the harassment victim. Said disclosure does not violate FERPA.

i. *Letter to Anonymous,* 21 FAB 15 (FPCO 2017).

Law enforcement records created and maintained by a school district's law enforcement unit solely for a law enforcement purpose are not education records subject to inspection by a student's parents, unless the record is also maintained by a component of the educational agency (such as a principal or dean) or the record was compiled by the law enforcement unit for a non-law enforcement purpose (e.g., disciplinary action by the local educational agency (LEA)).

j. *Letter to Anonymous,* 22 FAB 23 (FPCO 2018).

A school district does not violate FERPA when it outsources services or functions to contractors, consultants, volunteers, or other third parties and discloses personally identifiable information to such third parties, provided the third party qualifies as a "school official" (which is broadly defined) with a "legitimate educational interest." (A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.)

k. *Letter to Anonymous*, 22 FAB 4 (FPCO 2017).

A school district under FERPA can disclose personally identifiable information of student to a third party psychologist hired by the school district, provided the third party psychologist needs to review the information in the educational record to fulfill his/her responsibility.

l. *FAQs on Photos and Videos under FERPA*, 118 LRP 16524 (FPCO 2018).

A photo or video of a student is an education record, subject to specific exclusions. This Q & A provides answers to, for example, when is a photo or video and education record, whether the same image can be the education record of more than one student and, if so, can the parents of one of the students view the image, whether a school district can charge to redact/segregate images, and whether FERPA permits the parents' attorney to view the images with the parents.

m. *Letter to Mamas*, 42 IDELR 10 (OSEP 2004).

There is no general entitlement under either the IDEA or its implementing regulations permitting a parent of a student with a disability, or his or her professional representative(s), to observe the student in any current classroom or proposed educational placement. However, there may be circumstances in which access may need to be provided, like when the parent invokes his or her right to an independent educational evaluation (IEE) and the evaluation requires observing the student in the educational placement. *See also Letter to Anonymous*, 72 IDELR 251 (OSEP 2018), *infra*.

☞***Key Point.*** *Though there is no general entitlement under the IDEA to observe the student in any current classroom or proposed educational placement, when hearing officer intervention is sought to permit access, the hearing officer must determine whether access should be allowed under school district or school building policy or procedures, and, if not, whether access must be provided to allow the parent to meaningfully exercise a right under the IDEA.*

n. *Letter to Savit*, 64 IDELR 250 (OSEP 2014).

IDEA allows a school district to set its own criteria for evaluations, including the timing of the evaluation and the rules governing classroom observations. A school district may not apply time limits on classroom observations to third parties conducting publicly

funded IEEs, unless it similarly restricts its own evaluators.

o. *Letter to Anonymous*, 23 IDELR 719 (OSEP 1995).

Since IDEA and its implementing regulations do not provide a specific timeline by when a school district must respond to a parent's IEE request, OSEP opined that a school district must generally respond to the request without undue delay and in a manner that does not interfere with the student's right to receive FAPE.

☞***Key Point.*** *A parent is not required to notify the school district of his or her intent to obtain an IEE. The school district may request a hearing, either before the IEE has taken place, or after the IEE has been performed, to demonstrate that its evaluation is appropriate and, as such, the parent should be denied reimbursement for the IEE.*

p. *Letter to Zirkel*, 74 IDELR 142 (OSEP 2019).

Though 34 C.F.R. § 300.502(a) says that "parents of a child with a disability" have a right to obtain an IEE at public expense if they disagree with the school district's evaluation, the parents nonetheless have a right to seek an IEE at public expense if the school district evaluated the student and determined him/her ineligible for services.

q. *Letter to Anonymous*, 72 IDELR 163 (OSERS[10] 2018).

The stay-put provision would apply when a student is determined no longer eligible for special education and either the parent challenges the determination by filing a due process complaint notice or the school district files a request for hearing to challenge a parent's request for an IEE for the reevaluation that led to the ineligibility determination. The stay-put provision is not triggered simply by a parent requesting an IEE.

r. *Letter to Zimberlin*, 34 IDELR 150 (OSEP 2000); *Letter to Lenz*, 37 IDELR 95 (OSEP 2002); *Letter to*

[10] OSERS is the Office of Special Education and Rehabilitative Services.

Dowaliby, 38 IDELR 14 (OSEP 2002).

A parent need not raise an issue first at an IEP team meeting in order to later raise it at a hearing. Any such requirement would impermissibly impose additional procedural hurdles not contemplated by the IDEA.

s. *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995).

Whether to allow a party to admit testimony by telephone at a due process hearing falls within the hearing officer's discretion.

☞***Key Point.*** *The hearing officer should consider among other factors, the relevance of the testimony and the potential delays and costs to have the witness attend. A preference to have all witnesses testify in person may be another factor to consider but should not be deemed controlling.*

t. *Letter to Kerr*, 22 IDELR 364 (OSEP 1994).

The IDEA does not mandate a specific number of days for conducting a due process hearing. This determination must be made on a case-by-case basis at the discretion of the hearing officer, and subject to State regulations or procedures. Accordingly, a hearing officer may limit the number of days of a hearing so long as the parties are afforded the opportunity to exercise their hearing rights.

A hearing officer may grant specific extensions of time beyond the 45-day timeline, but at the request of either party. A hearing officer cannot extend the timeline on his or her own initiative or pressure a party to request an extension. Upon granting an extension, the hearing officer must inform the parties of the specific date the final decision will be rendered.

☞***Key Point.*** *The prehearing conference affords the hearing officer an early opportunity to discuss with the parties the number of days needed to complete a timely hearing that would yield an adequate record. Courts will accord notable deference to the hearing officer's exercise of discretion to limit the hearing duration. See, e.g.,*

B.S. v. Anoka Hennepin Pub. Sch., IDS No. 11, 66 IDELR 61 (8th Cir. 2015); T.M. v. District of Columbia, 64 IDELR 197 (D.D.C. 2014).

Though the hearing officer cannot initiate an extension of time nor encourage either or both parties to request an extension, the hearing officer is not prohibited from offering the parties options to weigh in order to accommodate a request of the parties (e.g., submission of additional evidence or post-hearing briefs) that may lead either or both parties to request to extend the timeline.

u. *Letter to LaCrosse* (OSEP 2018) (unpublished) (on file with author).

The 45-day timeline to render a decision under IDEA is by definition calendar days and, therefore, cannot be extended to the next business day if it falls on a weekend or holiday by a state's general law of construction.

v. *Letter to Kane*, 65 IDELR 20 (OSEP 2015).

A State's "best practice" that requires hearings to be completed in three (3) days (18 total hours) absent exceptional circumstances is not inconsistent with the IDEA. The IDEA is silent on procedures related to the timing for presentation of evidence and regarding confrontation, cross-examination, and compelling the attendance of witnesses in a due process hearing. Hearing officers have authority to determine procedural matters not specifically addressed in the IDEA or its implementing regulations, provided such determinations are consistent with the hearing rights of the parties and basic due process requirements.

w. *Letter to Stadler*, 24 IDELR 973 (OSEP 1996).

Whether discovery is used in an IDEA due process hearing and the nature and extent of discovery methods used are matters left to the discretion of the hearing officer, subject to State or local rules or procedures.

☞***Key Point.*** *Though discovery is permissible at the discretion of the hearing officer, caution is*

warranted to safeguard against making the process needlessly complex, costly, and lengthy.

x. *Letter to Worthington*, 51 IDELR 281 (OSEP 2008).

Where both a parent and a school district allow a complaint to linger for more than 30 days without holding a resolution meeting, waiving the meeting, seeking dismissal under 34 CFR § 300.510(b)(4), or requesting initiation of the due process timeline pursuant to 34 CFR § 300.510(b)(5), the SEA may not extend the resolution period or grant a hearing officer the specific authority to dismiss a due process complaint. No matter what the reasons for the parties' failure to act, the 45-day timeline remains in effect.

☞***Key Point.*** *The parties' inaction does not suspend the 45-day timeline. The hearing officer should continuously monitor the 30-day resolution period timeline and contact the parties for a status report and/or convene a prehearing on the 31st day, assuming there are no adjustments to the resolution period.*

y. *Letter to Bell*, 211 IDELR 166 (OSEP 1979).

The five-business day disclosure rule requires each party to disclose the names of witnesses to be called and the general thrust of their testimony.

☞***Key Point.*** *The five-business day disclosure rule is the only discovery expressly allowed under the IDEA. Therefore, insuring the "general thrust" of listed witnesses' testimony noted on the disclosure letter is important to a party's ability to prepare for the hearing*.

z. *Letter to Steinke*, 28 IDELR 305 (OSEP 1997).

Hearing officers have the authority to compel the attendance of non-school district employees to testify.

aa. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46699 (August 14, 2006).

"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."

bb. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46704 (August 14, 2006).

"One commenter stated that the Act does not provide adequate guidance on the specific set of legal procedures that must be followed in conducting a due process hearing and recommended that the regulations include guidance regarding the following: Limiting the use of hearsay testimony; requiring all testimony to be subject to cross-examination; the order of testimony; [and] timelines.... In addition to addressing timelines, hearing rights, and statutes of limitations, the Act and these regulations also address a significant due process right relating to the impartiality and qualifications of hearing officers. Under Section 615(f)(3) of the Act and § 300.511(c), a hearing officer must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice. Hearing officers consider failure to comply with timelines and statutes of limitations on a case-by-case basis, depending on the specific circumstances in each case. We believe that the requirements for hearing officers are sufficient to ensure that proper legal procedures are used and that it is not appropriate to regulate on every applicable legal procedure that a hearing officer must follow, because those are matters of State law."

cc. *Letter to Eig*, 59 IDELR 81 (OSEP 2012); *Letter to Walker*, 59 IDELR 262 (OSEP 2012).

A school district's reasonable efforts to ensure a parent participates in a resolution meeting when the parent is not able to be physically present should include arranging for the parent to participate via telephone or video conferencing, subject to the parent's agreement.

If the school district is unable to obtain the

participation of the parent in the resolution meeting after reasonable efforts have been made (and documented), the school district may, at the conclusion of the 30-day resolution period, request that the hearing officer dismiss the parent's due process complaint.

☞***Key Point.*** *It may be inequitable to treat a parent who requests to participate by telephone or by some other means the same as a parent who is unwilling to participate at all in the resolution meeting. It would be appropriate for the hearing officer to consider the reasons for the parent's request to participate in the resolution meeting by telephone or by some other means when considering a request for dismissal of the parent's due process complaint.*

dd. *Letter to Biondi*, 29 IDELR 972 (OSEP 1997).

In situations where the parents are divorced and share joint, physical custody, state law would determine which school district is responsible to provide FAPE. Generally, the parents' residency would determine which school district is responsible for FAPE. However, where both parents reside in the same state and the student takes turns residing with both parents, the SEA must designate one school district as having ultimate responsibility for ensuring FAPE to the student and may require both school districts to share in the financial responsibility to provide FAPE.

☞***Key Point.*** *In situations where the custody of the student is ambiguous, including which parent has educational decision-making authority, it is within the discretion of the hearing officer to compel the production of relevant court orders.*

4. Hearing Matters

a. *Letter to Eig*, 68 IDELR 109 (OSEP 2016).

Parents may invite individuals who do not meet the criteria in 34 C.F.R. § 300.512(a)(1) to observe their child's hearing without opening the hearing to the public. However, this does not extend to members of

the press. Parents wishing to have press members present at the hearing must agree to open the hearing to the public.

☞***Key Point.*** *Though OSEP would allow the parents to invite to the hearing individuals who do not meet the criteria in 34 C.F.R. § 300.512(a)(1), OSEP continues to maintain that hearing officers continue to have the discretion to remove any individual who is disruptive or who otherwise interferes with the conduct of the hearing.*

b. *Letter to Stadler*, 24 IDELR 973 (OSEP 1996).

When a parent or eligible student requests a due process hearing, prior consent is not required from the parent or eligible student before the student's education records or personally identifiable information from those records is disclosed directly or redisclosed through an attorney of the school district to the assigned hearing officer.

c. *Letter to ImObersteg*, 211 IDELR 15 (OSEP 1978).

IDEA does not require sworn testimony at due process hearings. The matter is left to the discretion of the States.

d. *Letter to Steinke*, 18 IDELR 739 (OSEP 1992).

A party to a hearing may attempt to introduce evidence at any time during the hearing process, provided the disclosure of the additional evidence would satisfy the five-business day rule and the introduction of such evidence is not the sole reason for the hearing delay.

☞***Key Point.*** *The purpose of the five-business day rule is, as OSEP observed, to allow all parties the opportunity to adequately respond to the impact of the evidence presented, and to eliminate the element of surprise by one party in order to gain an advantage over the other party. Though the hearing officer may have the discretion to allow the additional evidence under the circumstances, the specific circumstances must be weighed when deciding whether to allow the additional evidence.*

For example, if the other party will not have an adequate opportunity to respond to the impact the additional evidence would have on the evidence that has already been presented, there may justifiable reason not to permit the introduction of the evidence even though the five-business day rule is met. Conversely, fairness may require that the additional evidence be allowed in even if the other party will not be able to adequately respond to the impact of the additional evidence. For example, if the additional evidence comprises of information that was specifically requested prior to the hearing by the moving party but withheld by the other party, it may be appropriate to allow the additional evidence under circumstances.

e. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46709 (August 14, 2006).

"The hearing officer, as the designated trier of fact under the Act, is in the best position to determine whether a parent was substantially justified in rejecting a settlement offer. We would expect that a hearing officer's decision will be governed by commonly applied State evidentiary standards, such as whether the testimony is relevant, reliable, and based on sufficient facts and data."

5. Decision

a. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46724 (August 14, 2006).

"We are not making changes to the regulations, regarding a hearing officer's decision-making … because a hearing officer must have the ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice and exercise his or her judgment in the context of all the factors involved in an individual case."

b. *Letter to Zimberlin*, 34 IDELR 150 (OSEP 2000).

A state law allowing a hearing officer to comment in the written decision on attorney conduct is not invalid

under the IDEA provided the comment is linked to a relevant issue (e.g., a complaint perceived to be frivolous, unreasonable, or without foundation) and does not preclude a party's ability to address such comments in court or in any application for attorneys' fees.

c. *Letter to Colleye*, 111 LRP 45430 (OSEP 2010); *Letter to Wiener*, 57 IDELR 79 (OSEP 2010).

No motion for reconsideration of the written decision is permissible once a final decision has been issued.

d. *Letter to Anonymous*, 20 IDELR 179 (OSEP 1993); *Letter to Voigt*, 64 IDELR 220 (OSEP 2014); *Letter to Zirkel*, 68 IDELR 142 (OSEP 2016).

State law may allow a school district to delay implementation of a decision in a due process hearing favorable to a parent until after the time for an appeal has expired, provided the State's timeline for the filing of the appeal is reasonable. The student would remain in the present educational placement.

OSEP would expect the final due process decision to be implemented within a reasonable period of time and without undue delay soon after the school district determines not to appeal the decision. What constitutes a reasonable period of time is a factual determination dependent on the remedial order.

e. *Analysis and Comments to the Regulations*, Federal Register, Vol. 64, No. 48, Page 12614 (Mar. 12, 1999).

"It is not necessary to regulate on whether hearing officers are allowed to amend their decisions for technical errors. This matter is left to the discretion of hearing officers and States; however, proper notice should be given to parents if State procedures allow for amendments and a reconsideration process may not delay or deny parents' right to a decision within the time periods specified for hearings and appeals."

f. *Letter to Anderson*, 48 IDELR 105 (OSEP 2006).

Prior to any public dissemination of a written decision, any personal characteristics or other

information that would make it possible to identify the student who is the subject of the written decision with reasonable certainty or make the student's identity easily traceable, must be redacted consistent with IDEA and FERPA requirements. The determination as what specific content must be redacted must be made on an individualized basis and not based on a general policy of disclosure.

☞***Key Point.*** *Consideration should be given to the size of the school district, school and grade and the prevalence and knowledge of the student's personal characteristics and other information (e.g., low-incidence disability) within the community when deciding what and how much to redact from a written decision.*

The better practice is to attach an appendix to the decision (which can be easily detached prior to publication of the decision) identifying the student, parent, and other specific names, which might make the student's identity traceable, using only generic identifiers. This practice also results in the decision being readable and understandable.

g. *Letter to Anonymous*, 67 IDELR 188 (OSEP 2016).

An SEA should not be redacting the names of the hearing officers and district and case numbers from written decisions made available to the public unless release of such information would result in the release of personally identifiable information.

h. *Letter to Anonymous*, 69 IDELR 253 (OSEP 2013).

States must retain hearing officer decisions, as well as decisions from review officers, where applicable, for five and a half years. States may adopt longer retention periods.

6. Remedies

a. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46707 (August 14, 2006).

"Although the Act and these regulations require that

hearing officers base determinations of whether a child received FAPE on substantive grounds, hearing officers also may find that a child did not receive FAPE based on the specific procedural inadequacies set out in § 300.513(a)(2), consistent with section 615(f)(3)(E)(ii) of the Act. Hearing officers continue to have the discretion to dismiss complaints and to make rulings on matters in addition to those concerning the provision of FAPE, such as the other matters mentioned in § 300.507(a)(1)."

b. *Letter to Kohn*, 17 IDELR 522 (OSEP 1991).

Based on the facts and circumstances of each individual case, a hearing officer has the authority to grant any relief s/he deems necessary, inclusive of compensatory education, to ensure that a student receives the FAPE to which s/he is entitled.

☞***Key Point.*** *Though a hearing officer's remedial authority is extensive, any remedy that is ultimately awarded must fit the scope of the violation, be supported by the record and consistent with the IDEA.*

c. *Letter to Armstrong*, 28 IDELR 303 (OSEP 1997).

An SEA must establish and implement procedural safeguards that meet the requirements concerning due process hearings. Said due process hearing system must provide a hearing officer with the authority to grant the relief necessary, under the particular facts and circumstances of each case, to ensure that the student receives FAPE.

In addition, a hearing officer has the authority to impose financial or other penalties on a school district, issue an order to the SEA who was not a party to the hearing, and invoke stay-put even though it is not raised by either party.

d. *Letter to Riffel*, 33 IDELR 188 (OSEP 2000); *Letter to Riffel*, 34 IDELR 292 (OSEP 2000).

Graduation with a regular high school diploma does not relieve a school district of its obligation to provide compensatory education to a student who has been

denied FAPE. Under the circumstances, compensatory education may nonetheless be appropriate to assist a student in participating in further education, obtaining employment, and/or living independently.

e. *Letter to Eig*, 211 IDELR 174 (OSEP 1980).

A hearing officer has the authority to decide what placement would be appropriate for a student where placement is at issue. The scope of the hearing officer's authority is not limited to accepting or rejecting the school district's proposed placement.

☞***Key Point.*** *The same would be true regarding the parent's proposed placement. The hearing officer's scope of authority is not limited to simply accepting or rejecting the parent's proposed placement even where the hearing officer has determined that the school district's proposed placement is inappropriate. The hearing officer can order an appropriate placement that neither the school district nor parent has proposed, provided the hearing officer has the record evidence to make an informed determination.*

f. *Letter to Zirkel*, 74 IDELR 171 (OSEP 2019).

For expedited due process complaints filed under 34 C.F.R. § 300.532(a), a hearing officer is not limited to the remedies listed under 34 C.F.R. § 300.532(b)(2). A hearing officer may order other remedies, such as compensatory education services, if s/he finds that the student was subject to an improper disciplinary removal.

7. Miscellaneous

a. *Letter to Maldonado*, 49 IDELR 257 (OSEP 2007).

A parent has the right to obtain a written verbatim record of the hearing or an electronic, verbatim record of the hearing, but not both. An SEA or school district is not required to provide a second verbatim record to the parent but may choose to do so either at no cost or for a reasonable fee.

b. *Letter to Connelly*, 49 IDELR 135 (OSEP 2007).

A parent has the right to obtain a verbatim record (whether written or electronically) of the hearing at no cost even though the applicable appeal period has expired. The parent may use the verbatim record to provide information at an IEP team meeting, or as evidence or information in a subsequent State complaint or due process complaint.

c. *Letter to McDowell*, 213 IDELR 162 (OSEP 1988).

An SEA's practice of placing all requests for a due process hearing where there may have been a previous hearing on the same or similar issues before the original hearing officer to determine whether the doctrine of *res judicata* or collateral estoppel is applicable is permissible.

d. *Flagstaff (AZ) Junior Academy*, 117 LRP 3118 (OCR 2016).

Charter school's limitation on parent's use of email with classroom teacher determined legitimate and non-discriminatory because parent had engaged in frequent sarcastic, inflammatory, and attacking communication with the classroom teacher.

☞***Key Point.*** *Setting limitations to curtail abusive behavior may be appropriate even when the parent is exercising a right or engaged in a protected activity. The facts and circumstances of each instance of misconduct would inform whether any limitation is appropriate.*

e. *Letter to Anonymous*, 21 FAB 8 (FPCO 2017).

When a school district makes an unauthorized disclosure of education records (like, for example, by accidently mailing the records to the wrong address), it must take immediate corrective action by, for example, letting the parents know, sending a letter to the party who received the records to facilitate recovery, and providing training to staff and introducing a system for reviewing accuracy of mailing addresses prior to the posting of sensitive materials.

☞***Key Point.*** *A similar approach may be taken by a hearing officer who inadvertently discloses education records. The hearing officer should also inform the LEA or SEA of the disclosure.*

B. Substantive Law

1. Consent

a. *Letter to Champagne*, 53 IDELR 198 (OSEP 2008).

Additional parental consent is not required to provide FAPE to a new student who was receiving special education and related services from a prior school district (within the State or from another State), unless the Student transfers from another State and the new school district determines that the an evaluation is necessary to determine whether the child is eligible for special education and related services.

2. Evaluation / Eligibility

a. *Letter to Siegel*, 72 IDELR 221 (OSEP 2018).

IDEA itself has no general information requirement to notify *all* parents regarding the availability of special education, regardless of whether their child is suspected of having a disability. IDEA only requires States to have in effect policies and procedures to ensure that all children with disabilities (including children who are suspected of having a disability) residing in the State are identified, located, and evaluated. A State may have specific public awareness requirements as part of their State policies and procedures.

b. *Letter to Unnerstall*, 68 IDELR 22 (OSEP 2016).

A school district is not required to perform a specific assessment requested by the parent. The IDEA simply mandates that the student be assessed in the areas related to the student's suspected disability. However, if the evaluation process reveals that a particular assessment is needed to ascertain whether the student has a disability or to determine the student's needs, then the school district must conduct

the necessary assessments.

c. *Letter to LoDolce*, 50 IDELR 106 (OSEP 2007).

The criteria under which IEEs are obtained must be the same criteria as those of the school district when it initiates an evaluation. Other than location of the evaluation and the qualifications of the examiner, a school district cannot impose conditions or timelines related to obtaining an IEE.

A school district may preclude an independent evaluator from making a recommendation if the same restriction is imposed on its own evaluators. The converse is also true.

d. *Letter to Anonymous*, 72 IDELR 251 (OSEP 2018).

An independent evaluator's access to a student in the classroom cannot be limited in a manner that would deny the independent evaluator's ability to conduct an evaluation in a way that meets agency criteria. Such criteria would include the amount of time that the independent evaluator spends with the student.

e. *Letter to Petska*, 35 IDELR 191 (OSEP 2001).

School district policies that prohibit IEE examiners from particular professional associations and activities and require IEE examiners to have recent and extensive experience in the public schools or to hold or be eligible to hold the same license as school district personnel regardless of the area to be evaluated, are inconsistent with a parent's right to an IEE.

A school district cannot unilaterally determine whether the cost of an IEE is justifiable if the cost exceeds the maximum allowable costs of an IEE. The school district must, without unnecessary delay, initiate a hearing to demonstrate that the IEE does not meet the school district's cost criteria. Neither can a school district have a policy that disallows reimbursement of travel costs or other related costs incurred by a parent in connection with the parent's arrangement of, or attendance at, the IEE. A school district may request a due process hearing if it

believes the requested expenses are unreasonable.

f. *Letter to Fisher*, 23 IDELR 565 (OSEP 1995).

A parent may be entitled to an IEE at public expense if the school district does not assess the student's functional capabilities as they relate to the need of assistive technology or the parent disagrees with the school district's evaluation in that area. A parent can also request that the school district conduct a reevaluation of the student's need for assistive technology.

g. *Letter to Baus*, 65 IDELR 81 (OSEP 2015); *Letter to Carroll*, 68 IDELR 279 (OSEP 2016).

A parent may request an IEE at public expense if s/he feels that the school district did not assess the student in a particular area. Upon the request for an IEE, the school district must either grant the request to fund the IEE or initiate a due process hearing. The school district cannot "cure" the issue by conducting the assessment itself.

h. *Letter to Anonymous*, 37 IDELR 126 (OSEP 2002).

The IDEA and its implementing regulations require that services for a student must be identified and provided based on the student's unique needs and not on the student's disability category.

i. *Letter to State Directors of Special Education, Preschool / 619 State Coordinators*, 70 IDELR 23 (OSEP 2017).

States are not required to use the precise definition of a disability term in the IDEA but may not narrow the definition or use criteria that results in exclusion of children who otherwise meet the disability definition. It is permissible for states to provide examples of the types of conditions that would meet the state's criteria but an SEA or LEA may not preclude eligibility teams from considering whether other conditions adversely affect the student's educational performance such that the student requires special education and related services under the IDEA.

j. *Memorandum to State Directors of Special Education*, 65 IDELR 181 (OSEP 2015); *Letter to Delisle*, 62 IDELR 240 (OSEP 2013).

A school district has an obligation to evaluate all children, regardless of cognitive skills, including "twice exceptional" students.

k. *Letter to Janssen*, 51 IDELR 253 (OSERS 2008).

IDEA does not require a specific individual to conduct a functional behavioral assessment (FBA). An individual conducting an FBA must be adequately trained to carry out the purposes of the IDEA.

l. *Letter to Anonymous*, 116 LRP 11174 (OSEP 2016).

A school district can require a physician's prescription prior to providing a related service for a student with a disability, provided the parent does not incur a cost for obtaining the prescription and there is no delay in providing the student with a related service that is required for the student to receive FAPE.

3. IEPs and Placements

a. *Analysis and Comments to the Regulations*, Federal Register, Vol. 64, No. 48, Appendix A (Mar. 12, 1999).

Appendix A to the 1999 IDEA implementing regulations provides in Q & A format detailed guidance IEP development, content, and requirements. Care must be taken to cross check Appendix A with the 2006 comments and regulations for possible revisions. Appendix A was not updated in the 2004 reauthorization of the IDEA.

b. *Letter to Anonymous*, 25 IDELR 1208 (OSEP 1997).

It is permissible for a school district to prepare a draft IEP, which includes proposed goals and objectives, other IEP components, and a preliminary assessment of appropriate services for the student. The IEP team, however, must provide each participant a bona fide opportunity to discuss all aspects of the draft IEP and to participate in its finalization.

c. *Letter to Livingston*, 23 IDELR 564 (OSEP 1995).

A school district's written notice to the parent of an IEP meeting must identify the positions of individuals who will attend the meeting but not necessarily their names. Names should be given when possible.

d. *Letter to Haller*, 74 IDELR 172 (OSEP 2019).

Absent parental consent, a person who does not have knowledge and special expertise regarding the student who is the subject of the IEP team meeting and who is not requested to be present at the meeting by either the parent or LEA would not be permitted to be a member of the IEP team or be permitted to attend the meeting as a non-contributing observer unless s/he meets one of the parental consent exceptions in 34 C.F.R. § 300.622 or 34 C.F.R. § 99.31.

☞ ***Key Point.*** *The individual with knowledge or special expertise does not necessarily have to be a person who knows the child personally. It can be an individual with expertise in, for example, an instructional method or procedure, or in the provision of a related service, that the parents or LEA believe can be of assistance in developing the student's IEP. The determination as to whether the individual has knowledge or special expertise is made by the party who is inviting the individual to the IEP team meeting.*

e. *Letter to Thomas*, 51 IDELR 224 (OSEP 2008).

A school district must schedule an IEP team meeting at a mutually agreed on time and place but it would not be unreasonable for the school district to schedule IEP team meetings only during regular school or business hours, provided the school district is flexible in scheduling IEP team meetings during other hours to accommodate reasonable requests from a parent.

☞ ***Key Point.*** *A school district must take other steps to ensure participation (e.g., individual or conference telephone calls or videoconferencing) when the school district and parent cannot accommodate their respective scheduling needs. 34*

C.F.R. § 300.328.

f. *Letter to Siegel*, 74 IDELR 23 (OSEP 2019).

Though the transfer provisions found in 34 C.F.R. §§ 300.323(e) and (f) speak to what a school district must do when a new student transfers to the school district *within the same school year*, eligible students who transfer into the school district *during the summer* must have an IEP in effect at the beginning of each school year pursuant to 34 C.F.R. § 300.323(a).

g. *Letter to Andel*, 67 IDELR 156 (OSEP 2016).

Parents have the right to bring another individual, including their attorney, to an IEP team meeting without notice to the IEP team. The school district is permitted to reschedule the meeting for another day to have its attorney present as well, provided the parents agree and the postponement does not result in a delay of FAPE.

h. *Letter to Anonymous*, 40 IDELR 70 (OSEP 2003); *Letter to Savit*, 67 IDELR 216 (OSEP 2016).

IDEA does not address whether the school district or the parent can record an IEP meeting. Generally, an SEA or school district has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings. However, if an SEA or school district adopts a policy that prohibits the use of recording devices at IEP meetings, the policy must permit exceptions to allow for recordings necessary for parents to understand the IEP or process, or to implement other parental rights under the IDEA.

Any recording of an IEP meeting that is maintained by the school district is an education record within the meaning of FERPA.

i. *Letter to Zirkel*, 118 LRP 17023 (OSEP 2018).

IDEA requires that the dissenting opinion of the district member of the IEP team in the context of eligibility determinations for students with specific

learning disabilities be documented. IDEA, however, is silent as to whether an IEP team member's dissenting opinion on any other issue is to be recorded in the IEP and, if so, how.

j. *Letter to Cohen*, 67 IDELR 217 (OSEP 2015).

An IEP can be amended during a resolution meeting without the need of having a full IEP team meeting.

k. *Letter to Anonymous*, 23 IDELR 563 (OSEP 1995).

IDEA neither prohibits nor requires a school district to replace its own evaluation or reevaluation with an IEE that the parent obtained first. It is within the discretion of the school district whether to forego all or certain parts of its own evaluation when presented with an IEE prior to its own evaluation.

The IEP team must consider an IEE in any decision made with respect to the provision of FAPE to the student. "A reasonable interpretation of 'must consider' requires the [school district] to at least review the IEE and discuss its results and any disagreement with the results in all placement and programming decisions relating to the provision of FAPE for the [student]."

l. *Letter to Faustini*, 32 IDELR 206 (OSEP 1999).

There is no requirement in the IDEA or its implementing regulations that the IEP team lists recommendations of the parents, or other team members, that were not adopted. The school district is required to provide the parent with prior written notice explaining why the school district proposes or refuses to take certain action and describing any other options that the school district considered and the reasons why those options were rejected. It is in the prior written notice that the school district would explain why any recommendations of the parents or other IEP team members were not adopted.

☞***Key Point.*** *A prior written notice could be helpful to the hearing officer in determining whether the school district considered a parent's IEE as*

required under 34 C.F.R. § 300.502(c)(1).

m. *Letter to Hayden*, 22 IDELR 501 (OSEP 1994).

There is no requirement that the IEP include separate annual goals for related services, but the annual goals must address all of the student's identified needs that the IEP team has determined warrant the provision of special education, related services, or supplementary aides and services. The annual goals must enable the IEP team to determine the effective of the services listed on the IEP (i.e., the annual goals must be measurable).

Annual goals are not required for related services such as air conditioning, transportation, or catheterization, unless instruction will be provided during the course of the related service (e.g., increasing independence or improving behavior or socialization during travel time).

n. *Q & A on Secondary Transition*, 57 IDELR 231 (OSERS 2011).

This Q & A provides OSEP's current thinking on secondary transition for students with disabilities.

o. *Letter to Pugh*, 69 IDELR 135 (OSEP 2017).

OSEP clarified that IDEA's periodic, progress reporting requirement for IEP annual goals also applies to post-secondary transition goals even though the IDEA regulations do not specifically mention post-secondary transition goals as requiring progress reporting.

p. *Letter to Trader*, 48 IDELR 47 (OSEP 2006).

IDEA does not prohibit the use of aversive behavioral interventions, and each State can decide whether to allow its IEP teams to consider the use of aversive behavioral interventions. IEP teams in States that permit the use of aversive behavioral interventions, however, are required under the IDEA to consider the use of positive behavioral interventions and supports, and other strategies, to address any behavior that impedes the student's learning or that of others.

A State may require school districts to petition the SEA for a student-specific exemption to a blanket ban on aversive behavioral interventions.

q. *Letter to Huefner*, 23 IDELR 1072 (OSEP 1995).

IDEA and its implementing regulations do not mandate the inclusion of behavior management plans in the student's IEP. The IEP team is required to consider the use of positive behavioral interventions and supports, and other strategies, to address behavior that impedes the student's learning or that of others. The IEP must include a statement of measurable annual goals and special education and related services to meet the student's unique needs, but not necessarily behavior management plans. A behavior management plan may be included in the IEP if the IEP team determines that such plan is needed to ensure the effective implementation of the student's IEP.

r. *Dear Colleague Letter*, 68 IDELR 76 (OSERS 2016).

Short-term disciplinary removals from the current placement may indicate that a student's IEP, or the implementation of the IEP, does not appropriately address the student's behavioral needs, which may result in the student not receiving meaningful educational benefit, which could constitute a denial of FAPE.

s. *Letter to Hall*, 21 IDELR 58 (OSEP 1994).

An IEP must include a statement of the student's present levels of educational performance, annual goals, and the specific special education and related services to be provided to the student, but IDEA does not expressly mandate that the particular teacher, materials to be used, or instructional methods also be included in the student's IEP.

☞***Key Point.*** *It is within the IEP team's discretion whether to include materials to be used or instructional methods if the IEP team determines that a particular set of materials or method is needed to ensure effective implementation of the student's*

IEP.

t. *Letter to Anonymous*, 49 IDELR 258 (OSEP 2007); *Letter to Wilson*, 37 IDELR 96 (OSEP 2002); *Analysis and Comments to the Regulations,* Federal Register, Vol. 64, No. 48, p.12552 (Mar. 12, 1999).

An IEP and individualized family service plan (IFSP) must include the frequency, intensity, and method of delivering identified services. "Method" means how a service is provided and could include a "methodology."

Whether to include a specific methodology in the IEP or IFSP is an IEP/IFSP team decision and depends on the individualized needs of the student. A State cannot exclude from the IEP/IFSP team's consideration services that meet the needs of the student, including specific methodologies. The IEP/IFSP team may consider a particular methodology or instructional approach and list it on the IEP or IFSP if the specific methodology is integral to the design of an individualized program of services for the student.

u. *Letter to Howard*, 38 IDELR 100 (OSEP 2002).

A State may establish guidelines to assist teams in developing IFSPs, but the guidelines may not be implemented in a manner that restricts an IFSP team's authority and responsibility to make individualized determinations regarding the specific services it deems appropriate to meet the student's unique needs. Any review process by a panel of individuals that does not include the parent and other IFSP participants and provides an appeal process as the only recourse to an adverse decision by the panel, is inconsistent with Part C of the IDEA.

v. *Letter to Anonymous*, 116 LRP 11174 (OSEP 2016).

A State may allow its boards of education (Board) to approve a student's IEP that is developed by the IEP team, provided the Board is not permitted to unilaterally change the IEP and/or placement and the Board's actions do not delay or deny the provision of FAPE to the student. The IEP team can be required to

consider, but not accept, the Board's objections or concerns and to make revisions, if needed.

w. *Letter to Williams*, 33 IDELR 249 (OSEP 2000).

An IEP can include training and/or other support for school personnel tasked with implementing the IEP in order to ensure the student is provided with a FAPE.

x. *Letter to Anonymous*, 25 IDELR 529 (OSEP 1996).

A district is only responsible for implementing recommendations, whether written or verbal, which reflect the decision of the multidisciplinary or IEP team as a whole – not the individual members of such groups. IDEA does not address whether it is permissible for any member of the multidisciplinary team to file a dissenting opinion as part of the child's evaluation report or placement determination. State or local rules or procedures may allow such practice.

y. *Letter to Bachus*, 22 IDELR 629 (OSEP 1994).

A school district is not required to purchase a personal device like eyeglasses or a hearing aid that the student would require regardless of whether s/he is attending school, unless the IEP team determines that the student requires the personal device in order to receive a FAPE. A student who requires a personal device in order to receive a FAPE, must be provided with the device at no cost to either the student or the parent, but the school district may seek funds from another agency with responsibilities to cover such costs.

Any assessment by the school district to determine whether the student requires a personal device in order to receive a FAPE must be at no cost to the student or the parent.

z. *Letter to Estavan*, 25 IDELR 1211 (OSEP 1997).

There is no requirement in the IDEA that a student first fails in the regular classroom before a more restrictive placement can be considered. However, before a more restrictive placement can be considered, the IEP team must consider placement of

the student in the regular classroom with appropriate supplementary aids and services. An individualized inquiry into the full range of supplementary aids and services must occur for each student, regardless of the nature or severity of the student's disability.

aa. *Letter to Trigg*, 50 IDELR 48 (OSEP 2007).

When two or more equally appropriate locations are available, the school district has some flexibility to assign the student to the school or classroom of its choosing, provided the determination is consistent with the decision of the group determining placement.

Here, the student's home school did not provided the required services, and the student would be required to travel past two or more schools to obtain the same services because of staffing availability at these other schools. The school district asked OSEP if it was required to correct the staffing deficiency in one of the other schools closest to the home school or would it be sufficient to assign the student to a school that is able to provide the services even though it would require the student to travel past two or more schools to obtain the same services. Without answering the question directly, OSEP notes that the student should be educated in a school as close to the student's home as possible, unless the services identified in the student's individualized education program (IEP) require a different location. OSEP also reiterates that, although the IDEA does not require that each school building in a school district be able to provide the full continuum of alternative placement options and, therefore, a school district can place the student in a particular school or classroom based on the availability of special education services, a school district cannot allow the lack of available special education services to dictate the student's placement on the least restrictive environment (LRE) continuum.

☞***Key Point.*** *When weighing the appropriateness of a particular school or classroom other than the student's home school, a hearing officer must determine whether the school comports with the IEP and the placement determination in the LRE.*

bb. *Letter to Watson*, 48 IDELR 284 (OSEP 2007); *Letter to Cohen*, 67 IDELR 217 (OSEP 2015).

If the pendency of a hearing spans into the next annual review of a student's IEP, the IEP team must review and, if appropriate, revise the student's IEP. There is nothing in the IDEA or its implementing regulations that relieves a school district of the responsibility to convene an IEP team meeting not less than annually to review and possibly revise an IEP, even if the stay put is in effect. If the new IEP varies from the stay put, the stay put is to be maintained unless the parent and school district agree otherwise.

4. FAPE

a. *Questions and Answers on Endrew F. v. Douglas County School District RE-1*, 71 IDELR 68 (OSEP 2017).

This Q & A provides guidance to SEAs and LEAs on best practices to implement the U.S. Supreme Court's *Endrew F.* decision.

b. *Letter to Goldman*, 53 IDELR 97 (OSEP 2009).

When a student with a disability is withdrawn from the public school setting for home schooling or attendance in a private school for any period of time and then returns to the public school setting, the school district must treat the student as an eligible student unless an exemption applies. The student's eligibility remains until either, the student exceeds the age of eligibility for FAPE under State law, the student graduates with a regular diploma, the student is determined to no longer be a student with a disability (after an evaluation), or the student moves to another State.

Upon the student's return to the public school setting, the school district must convene an IEP team meeting and develop an appropriate IEP for the student. A reevaluation may be necessary depending on the length of time the student was out of the public school system (i.e., over three years) or if the needs of the student warrant a reevaluation or the parent or

student's teacher requests one.

☞***Key Point.*** *The school district has an obligation to conduct a reevaluation of the student every three years while the student is attending the private school.*

c. *Letter to Wayne*, 73 IDELR 263 (OSEP 2019).

The school district is not required to make FAPE available through an IEP when a parent makes clear his/her intent to keep his/her child with a disability in a private school.

5. Other Programs and Related Services

a. *Letter to Millman*, 211 IDELR 104 (OSEP 1979).

Though psychotherapy is not listed as a related service under the IDEA, the list of related services is not exhaustive and may include other supportive services like psychotherapy if the service is required to assist the student to benefit from special education and it is not considered a medical service in the State in which the student resides.

6. Discipline

a. *Q & A on Discipline Procedures*, 52 IDELR 231 (OSERS 2009).

This Q & A provides OSEP's current thinking on discipline procedures for students with disabilities.

b. *Letter to Cox*, 59 IDELR 140 (OSEP 2012).

The timeline for an expedited due process hearing is determined by school days. 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.

c. *Letter to Fletcher*, 72 IDELR 275 (OSEP 2018).

The disciplinary hearing/decision timeline may carry over into the next school year when an expedited due process hearing is requested with fewer than 20

school days remaining in the school year or made during the summer.

☞***Key Point.*** Because a school day is defined as any day, including a partial day, in which children attend school for instructional purposes, for purposes of the disciplinary hearing/decision timeline, a hearing officer must count the school days in which a school district operates summer school for all children. Days expended only in providing extended school year services are not considered school days.

d. *Letter to Snyder*, 67 IDELR 96 (OSEP 2015).

The hearing officer lacks authority to extend the timelines in an expedited hearing even at the request of either party. The hearing officer may, at his or her discretion, decide to bifurcate a hearing in which the due process complaint includes discipline and removal issues, as well as other non-discipline/removal issues.

e. *Letter to Zirkel*, 68 IDELR 142 (OSEP 2016).

Parties to an expedited due process hearing may not mutually waived the expedited timeline.

f. *Letter to Yudien*, 39 IDELR 242 (OSEP 2003).

Neither the IDEA nor its implementing regulations limit(s) a manifestation determination review (MDR) to only the disability that served as the basis for the eligibility determination. The MDR team can consider a previously unidentified disability of the student.

The IDEA and its implementing regulations do not provide for reopening of the MDR where a subsequent evaluation reveals that the student has an additional disability that is related to the behavior that gave rise to the violation of the school code of conduct.

g. *Letter to Mason*, 72 IDELR 192 (OSEP 2018).

Administratively shortening a student's school day to address behavioral problems may rise to a disciplinary

removal.

h. *Letter to Nathan*, 73 IDELR 240 (OSEP 2019).

A school district is required to hold an MDR meeting within 10 school days of any decision to initiate a disciplinary change in placement. This holds true as well for students who have not yet been determined eligible but a special education evaluation has been requested. For these students, the MDR team would need to consider existing information, including information provided as a basis for the evaluation, and the concerns of the parent and school personnel.

The MDR meeting and eligibility meeting can occur at the same time, provided the combined meeting occurs within the required MDR meeting 10-school day timeline.

Parents must be provided with a printed copy of the IDEA's procedural safeguards. A school district cannot simply direct the parent to its website where a copy of the procedural safeguards is posted.

i. *Letter to Zirkel*, 74 IDELR 171 (OSEP 2019).

An SEA has the authority to resolve disputes regarding manifestation determinations and disciplinary changes of placement via the state complaint procedures notwithstanding the IDEA expressly authorizing hearing officers to hear appeals of decisions on such matters.

☛ ***Key Point.*** *Either party may use mediation or file a due process complaint if any of the findings of the State complaint investigator are still in dispute. See Q & A on Dispute Resolution Procedures* 61 IDELR 232 (OSEP 2013), Question B-32.

C. Miscellaneous

1. *Letter to Williams*, 21 IDELR 73 (OSEP 1994).

OSEP makes clear that the provisions of a collective bargaining agreement cannot authorize a school district's failure to provide a student with disabilities and his or her parent the rights and protections guaranteed under the

IDEA.

☞***Key Point.*** *Though collective bargaining agreements should be considered and weighed when addressing arguments of the school district as to why it proposes or refuses to take certain action, the student and parent's rights and protections under the IDEA can be the basis for why the hearing officer is requiring the school district to act contrary to the collective bargaining agreement.*

2. *Letter to Yudien*, 38 IDELR 245 (OSEP 2003).

   A State's department of social and rehabilitation services cannot make educational decisions for a student with a disability who is under State custody or act in the role of parent even though its commissioner has authority under State law to make educational decisions for children under his or her custody. The term "parent" specifically excludes the State if the student is a ward of the State. 34 C.F.R. § 300.30(a)(3).

3. *Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools Under the Individuals with Disabilities Education Act*, 69 IDELR 78 (OSERS 2016).

   This detailed Q & A provides guidance regarding the application of the IDEA to students with disabilities attending public charter schools. The guidance reinforces that all IDEA rights apply to students with disabilities and students suspected of having a disability who attend public charter schools. Public charter schools are required to provide a continuum of services and cannot limit needed IEP services. In addition, the SEA and LEA must ensure that public charter school students with IEPs continue to receive FAPE even when the school closes its doors permanently.

4. *Dear Colleague Letter*, 68 IDELR 108 (OSEP 2016).

   OSEP advises that certain critical requirements of the IDEA apply to virtual schools, including child find and the responsibility of the SEA to monitor virtual schools' compliance with the IDEA.

5. *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, 67 IDELR 189 (OCR 2015).

This Memo supersedes and earlier Q & A reported at 114 LRP 45980. The Q & A provides responses to frequently asked questions about Section 504 and aligns the guidance to the changes made by the ADA Amendments Act of 2008 (e.g., the ameliorating effects of mitigating measures).

6. *Dear Colleague Letter*, 116 LRP 31313 (OSEP 2016).

General notice of Section 504 due process procedures (e.g., in a student handbook or website) does not relieve the school district of its responsibility to give timely notice of due process rights when an event (e.g., refusal to evaluate) occurs for which parents may wish to avail themselves of the due process procedures (e.g., to challenge the refusal to evaluate).

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