



**Arkansas Department of Education**

**Division of Elementary and Secondary  
Education**

**Office of Special Education**

**Independent Hearing Officer  
Procedural Guide**

This guide has been developed to acquaint Hearing Officers and the public with the general overview and format of the Arkansas Department of Education's special education administrative process. This guide does not provide a thorough analysis of all the issues that might confront a Hearing Officer, nor should it be taken to replace or modify any federal or state law or regulation. The Arkansas Department of Education reserves the right to modify this guide at any time.

To ensure that our process is the most effective, ADE looked to other states to provide guidance. We would like to acknowledge the work of New Hampshire and CADRE whose materials helped us in improving our practice.

## **DEFINITIONS**

1. "**ADE**" means Arkansas Department of Education.
2. "**DESE-OSE**" means the Division of Elementary and Secondary Education, Office of Special Education.
3. "**Day**" means calendar day unless otherwise specified.
4. "**IDEA**" means the Individuals with Disabilities Education Act of 2004.
5. "**Parent**" means a biological parent, adoptive parent, foster parent, legal guardian, or other person with lawful control of the child, including an individual standing in loco parentis.
6. "**Writing**" means in written form, including e-mail.

## **GENERAL**

### **Qualifications**

To be qualified to be an independent Hearing Officer for the Arkansas Department of Education (ADE), the applicant must be a licensed attorney in good standing with the Arkansas Bar. A Hearing Officer may not be an employee of ADE or an employee of any public school district or cooperative in the State of Arkansas, including open-enrollment charter schools.

IDEA also sets forth minimum qualifications for Hearing Officer's that conduct special education Due Process hearings. Under IDEA, a Hearing Officer must: (1) possess knowledge of, and the ability to understand, the provisions of the IDEA, Federal and State regulations pertaining to the IDEA, and legal interpretations of the IDEA by Federal and State courts; (2) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and (3) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice. 20 U.S.C. § 1415(f)(3)(A).

### **Contract Term**

Each Hearing Officer must sign a Professional Consultant Services Contract. The contract will specify the term of the agreement between the Hearing Officer and the Arkansas Department of Education.

### **Termination or Suspension of Hearing Officers**

A Hearing Officer's contract may be suspended or terminated if the Hearing Officer does not meet the services, objectives, and/or scope set forth in the Contract, does not meet performance standards agreed upon during the annual performance evaluation, or otherwise violates the professional consultant services contract. A Hearing Officer's contract may also be terminated at-will by ADE by following the cancellation clauses in the contract.

### **Invoicing**

Hearing Officers may seek reimbursement for travel, administrative costs, and services rendered in their role as a Hearing Officer from ADE. To seek reimbursement, the Hearing Officer should fill out the ADE Hearing Officer Invoice Form and return it to the designated ADE contact. It is not appropriate for Hearing Officers to accept payment from parents, school districts, schools, cooperatives, etc. The rate of pay is determined by the amount specified in the Hearing Officer's contract.

A Hearing Officer may not bill more than fourteen (14) hours per day and must bill at a lesser rate if research or work is performed by a law clerk or paralegal. Administrative costs include typing, copying, certified mail, etc., and may not exceed \$400.00 per hearing case. Lodging will be reimbursed according to the state travel reimbursement schedule. Additional reimbursement for rates exceeding the state schedule may be requested by submitting a written justification to the designated ADE contact prior to travel. Meals are only reimbursable for overnight travel, using the same reimbursement schedule. Mileage will be reimbursed from city to city. The invoice should be completed and returned to ADE with the hearing decision. If there is not a hearing decision due to withdrawal, dismissal, etc. the invoice should be submitted within one week of the closing of the case.

### **Training**

IDEA does not provide for training requirements, but each State is required to ensure that Hearing Officers are sufficiently trained and is tasked with determining the required training and frequency of the training.

Each Hearing Officer may attend one out-of-state conference annually to be paid for by ADE. Approval must be granted prior to attending the conference. Additional in-state trainings may be eligible for reimbursement upon written request and justification from the Hearing Officer and approval from ADE. Hearing Officers are responsible for attending trainings to ensure that they are knowledgeable about changes in federal or state law that might have an impact on their decisions.

### **On-Boarding**

Each new independent Hearing Officer must attend training required by ADE prior to being assigned his or her first case. Prior to being assigned his or her first case, new Hearing Officers must shadow an experienced Hearing Officer through at least one hearing.

### **Evaluations and Annual Observation**

Once annually, ADE will conduct an observation of each Hearing Officer. The observation will include review of decisions, compliance with this guide, and performance in a due process hearing. Following the annual observation, ADE will issue a written evaluation to the Hearing Officer.

## **Ethics**

Hearing Officers are prohibited from having a personal or professional interest that conflicts with his or her ability to be objective in a hearing. A Hearing Officer must disqualify him or herself in any proceeding in which his or her impartiality might be reasonably questioned.

## **Immunity**

Hearing Officers have the same absolute immunity as judges.

## **DISPUTE RESOLUTION GENERALLY**

### **Mediation**

Hearing Officers are not mediators and do not act as an enforcer of mediated agreements. ADE is not responsible for enforcement of any settlement agreement, including mediated agreements. Agreements are enforceable in a court of competent jurisdiction.

### **State Complaint**

An organization or an individual may file a written, signed State complaint with the DESE-OSE. The complaint must include a statement that a public agency has violated a requirement of Part B of IDEA or its implementing regulations, or a requirement of State regulations, the specific facts on which the statement is based, contact information for the complainant, a proposed resolution, and other relevant information. The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with 34 CFR 300.151.

Complaints received are referred to the DESE-OSE for subsequent investigation and resolution within 60 calendar days. An extension of time may be granted if it is determined by the Office of Special Education Director that exceptional circumstances exist. At the close of the investigation, the relevant information is reviewed by the investigative team and the team makes an independent determination regarding the allegations against the agency as to whether the public agency is violating a requirement of Part B of IDEA or of 34 CFR 300.151-300.153. The results of the investigation are included in a written report.

If a written complaint is received that is also the subject of a due process hearing under 34 CFR 300.507 or 300.530-532, or contains multiple issues of which one or more are part of a due process hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. Any issue in the complaint that is not part of a due process action must be resolved using the timeline and procedures set out in the State regulations.

If an issue is raised in a State Complaint that has previously been decided in a due process hearing involving the same parties, the due process hearing decision is binding on that issue and ADE must inform the complainant to that effect. If an issue is raised in a due process hearing that has previously been decided in a State Complaint involving the same parties, the State Complaint is not binding on the Hearing Officer.

## **Goals of the Administrative Process**

The administrative process has been designed to be more expeditious than a formal judicial proceeding. Due Process Hearings should be less formal than a formal judicial proceeding, but be consistent with the fundamentals of fairness, impartiality, and thoroughness. It is important to remember that in special education due process hearings, the parties must continue to interact and work with each other after the hearing. Because of the continued relationship between the parties, the Due Process Hearing should attempt to preserve the relationship between the family and the school to the maximum extent possible.

The due process hearing should provide a legal resolution to the dispute. The Hearing Officer's primary responsibilities are to ensure implementation of IDEA and its regulations, and Arkansas special education laws and regulations to ensure that the child receives the services and individualized programming that the law requires, and to accord each party a meaningful opportunity to exercise their rights during the course of a hearing.

## **Hearing Officer Jurisdiction**

The extent of the Hearing Officer's jurisdiction is to claims arising under the Individuals with Disabilities in Education Act and its regulations, and the Arkansas Code Subchapter 41, Special Education. Hearing Officers do not have jurisdiction over pending State Complaints; those must be resolved by ADE. Hearing Officers have no jurisdiction over claims arising out of Section 504 of the Rehabilitation Act of 1973, or claims arising out of the Americans with Disabilities Act. Generally, Hearing Officers do not have jurisdiction over issues for students enrolled in private schools, except for issues related to Child Find, since the local school district is not relieved from its Child Find obligations when a child is enrolled in a private school. In some instances, Hearing Officers also have jurisdiction when the complaint is against the public school district, but the child is currently enrolled in a private school.

## **Statute of Limitations**

The due process complaint must allege a violation that occurred not more than two (2) years before the date the parent or district knew or should have known about the alleged action that forms the basis of the due process complaint. This timeline does not apply to a parent if the parent was prevented from filing a due process complaint due to specific misrepresentations by the district that it had resolved the problem by forming the basis of the due process complaint, or the district's withholding of information from the parent that was required to be provided.

## **Types of Relief that Can be Granted**

IDEA and its regulations do not comprehensively specify the remedial authority of due process Hearing Officers. Hearing Officers have the authority to grant compensatory education, services, placements, and evaluations. Hearing Officers may not award monetary damages or relief, or attorneys fees.

## **PLEADINGS**

### **Pleading Standards**

IDEA's due process requirements only impose minimal pleading standards. The complaining party is not required to include all of the facts relating to the nature of the problem in the written complaint, nor does he or she have to set forth all applicable legal arguments.

The due process complaint must be deemed sufficient unless the party receiving the due process complaint notifies the Hearing Officer and the other party in writing, with reference to the particular deficiency as described in Section 10.01.7 of the Arkansas Department of Education Special Education and Related Services Rule, within fifteen (15) days of receipt of the due process complaint that the party believes the complaint is insufficient.

### **Amendments**

A party may amend its complaint only if the other party consents or if the Hearing Officer grants permission and the non-complaining party is given the opportunity to convene a resolution meeting. Should the Hearing Officer determine that the due process complaint is insufficient, the Hearing Officer should grant the complaining party the opportunity to amend the complaint. In such a case, the Hearing Officer's decision must identify how the complaint is insufficient. Leave to amend may not be granted by the Hearing Officer five (5) days before the hearing, however, if the non-complaining party agrees, a complaint may be amended until the hearing begins. If leave to amend is granted, the timelines for the resolution meeting and the decision begin again.

### **Counter and Cross Claims**

Cross claims and counter claims are inappropriate. If the non-complaining party has claims it wishes to make against the complaining party, the non-complaining party should file a new due process complaint. ADE will notify the Hearing Officer of the new filing and the Hearing Officer will have the option of consolidating the cases.

*See also Consolidating Cases*

## **ASSIGNMENT**

Upon the filing of a Due Process Complaint, the DESE-OSE, will process the complaint and assign the case to a Hearing Officer. The Hearing Officer will be assigned on a rotating basis, unless the Hearing Officer that is next in line has a conflict, is unavailable, or assignment would result in an inequitable distribution of cases among the Hearing Officers. Expedited due process complaints are not assigned on a rotating basis. Parties may not request a specific Hearing Officer. Additionally, complaints that are voluntarily dismissed and refiled within ninety (90) days will be assigned to the same Hearing Officer. Complaints filed with the same parties as a previous complaint, but containing new issues, will be assigned to the Hearing Officer that was assigned to the first complaint.

*See also Consolidating Cases*

### **Requests for Hearing Officer Recusal**

Any challenge to the impartiality of an assigned Hearing Officer must be made in writing, and submitted to ADE, within seven (7) days after notification to the parties of the assignment of a Hearing Officer.

Any objection to the assigned Hearing Officer, on grounds other than impartiality, should be made to the Hearing Officer at the scheduling conference, however, objections will be considered timely provided they are made in writing not less than five (5) days prior to the date of the hearing. The Hearing Officer should issue a written ruling in a timely manner, not later than two (2) days prior to the date of the hearing. *See Arkansas Department of Education Special Education and Related Services Rule, Section 10.01.23.2.*

The Hearing Officer has the responsibility to recuse himself or herself from real and/or perceived conflicts of interest. A Hearing Officer should not participate in a hearing where a party is a member of his or her household, a close relative, the employer of a family member, or someone with whom he or she has a business relationship. If the Hearing Officer does not recuse himself or herself, he or she must still disclose any relationship to the parties. If a party disagrees with the decision not to recuse, the party may make a written objection.

## **COMMUNICATING WITH PARTIES**

### **Ex parte Communication**

Ex parte communication with the Hearing Officer is prohibited. All contact with the Hearing Officer should be in writing and a copy must be sent to the other party. If a party wants to initiate phone or video conversation, a request should be made in writing to the Hearing Officer. The Hearing Officer is prohibited from responding to ex parte communications, except in the case of emergency discussions regarding new dates.

To cure an ex parte communication, the Hearing Officer must immediately make a record of what was communicated, disclose the communication to the other parties, and give the other parties an opportunity to respond or to lodge a challenge against the Hearing Officer.

### **Pro Se Complainants**

Pro se parties frequently forget the necessity to copy opposing parties when sending communication to the Hearing Officer. The Hearing Officer should be diligent to ensure that each communication received has been copied to the opposing parties as well.

### **Parties Represented by Counsel**

A party represented by an attorney who attempts to contact the Hearing Officer directly should be advised to contact their attorney and have the attorney contact the Hearing Officer. The Hearing Officer should also advise the party's attorney and the opposing party of the attempted contact.

## **DISCOVERY**

IDEA does not provide for discovery. Pre-hearing discovery is limited to the production of documentary evidence and the disclosure of names, addresses, and telephone numbers of witnesses. The Hearing Officer cannot grant any request for depositions or interrogatories by the parties. *See Arkansas Department of Education Special Education and Related Services Rule, Section 10.01.27.*

### **Five Business Day Rule**

IDEA provides that, not less than five (5) business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date, and recommendations on the offering party's evaluations, that the party intends to use at the hearing. 20 USC § 1415(f). Parties must also disclose all exhibits not less than five (5) business days prior to a hearing. Districts should be mindful that this rule is separate from the parent's right to access educational records under FERPA.

Unlike the right of a party to prohibit any evidence that has not been disclosed within five business days of the hearing, however, the Hearing Officer has the discretion to bar any party that fails to comply from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party. 20 USC §1415(f).

### **Witness Lists**

At the pre-hearing conference, parties should discuss potential witnesses to be called. Prior to the hearing, a list of witnesses must be exchanged and include general information as to the witnesses' testimony.

## **ACCOMMODATIONS**

### **Requests for Accommodations**

If a hearing participant, party, or witness, requires an accommodation, he or she, or his or her attorney, should notify the Hearing Officer in writing, during the scheduling or pre-hearing conference. The Hearing Officer should immediately notify the DESE-OSE to arrange for accommodations. The cost of the accommodation will be covered by ADE.

### **Request by Party for Security**

In extreme circumstances, a party has the right to request security at the due process hearing and it is within the Hearing Officer's discretion whether to grant the request. Such a request should be made in writing, during the scheduling or pre-hearing conference and the other party should be given an opportunity to respond. If the Hearing Officer receives a request to provide security for a hearing because a party believes they may need it at the proceeding, the Hearing Officer should review the request and any response.

If the school district is unable to provide security, a request may be made that ADE provide it.

### **Use of Interpreters**

If a party or a witness requires the use of a sign language or foreign language interpreter, or accommodations, a request should be made in writing to the Hearing Officer. The Hearing Officer should immediately notify the DESE-OSE to arrange for the scheduling of the interpreter. The cost of the interpreter will be covered by ADE.

If testimony will be given through an interpreter, the interpreter must be sworn to accurately perform their task.

## **SCHEDULING**

### **Scheduling Conference**

Once a due process complaint is filed, the DESE-OSE will assign the case to a Hearing Officer and notify the parties of the case assignment status. After a Hearing Officer is assigned a new case, he or she should reach out to the parties to set up the scheduling conference.

At the scheduling conference, the parties and the Hearing Officer should, at a minimum: (1) review whether either party has a concern or objection to the assignment of the Hearing Officer; (2) if either party is unrepresented, clarify their intent to proceed without representation; (3) set expectations for the parties and their representatives for their conduct throughout the proceedings; (4) clarify the resolution timeline; (5) discuss if either party will need accommodations at the hearing; and (6) set the hearing dates.

At the scheduling conference, the Hearing Officer should inform the parties how he or she expects the parties to proceed, including but not limited to, how exhibits should be marked, if the Hearing Officer requires written briefs, and how each party will access records.

The scheduling conference is not required to be recorded or conducted in the presence of a court reporter, however, the Hearing Officer must issue a written order establishing the hearing dates. The order should include the topics to be discussed during the prehearing conference. Parties should be properly prepared to discuss those topics at the prehearing conference and should take whatever steps necessary to be able to meaningfully participate in the conference and respond to the topics listed.

### **Prehearing Conference**

A prehearing conference must be held in every case in person or by phone or similar technology. The Hearing Officer should review the due process complaint and any other documentation prior to the prehearing conference.

The prehearing conference should be conducted in the presence of a court reporter. How the conference is structured is at the discretion of the Hearing Officer, but the following issues should be reviewed: (1) discussing the potential evidence to be entered into the record; (2) identifying witnesses expected to provide testimony (3) narrowing and clarifying the issues; (4) identifying any prior decisions or settlement agreements relevant; and (5) reviewing the hearing procedures.

Following the prehearing conference, the Hearing Officer should issue an order within three business days if necessary to reflect changes from the scheduling conference.

### **Hearing Dates**

The hearing dates must be set at the scheduling conference. Each hearing should be initially set for three (3) consecutive days. In general, a hearing should last no longer than three (3) days. The Hearing Officer may limit the number of days for the hearing, provided that the parties are afforded a meaningful opportunity to exercise their hearing rights. The hearing must be conducted at a time and place that is reasonably convenient to the parent(s) and child involved.

If the hearing goes beyond the scheduled days, the Hearing Officer has the discretion to schedule additional days if necessary. The Hearing Officer should schedule those days, on the record, before the hearing is adjourned on the last scheduled day and attempt to schedule the days as soon as possible to avoid unnecessary delay.

### **Continuances and Extensions**

The 45-day timeline is mandatory and cannot be waived by either party or the Hearing Officer. While not all hearings can be concluded within the timeline, hearings are to be conducted expeditiously. The Hearing Officer can, at the request of a party and for good cause, grant continuances that may extend the timeline.

Hearing Officers are encouraged to limit the amount of extensions and continuances and should only grant extensions and continuances for good cause. Scheduling issues should be resolved at the scheduling conference and should not generally constitute good cause for purposes of granting an extension or a continuance.

No party is entitled to an automatic continuance and each case must be evaluated by the Hearing Officer on a case-by-case basis. Except in exceptional circumstances, parties seeking a continuance must submit a written request to the Hearing Officer at least five business days prior to the scheduled hearing date. It is preferable, although not required, that both parties agree to the continuance prior to the Hearing Officer granting it.

After a request for a continuance, the Hearing Officer must issue a written order that contains information related to which party requested the continuance, the reasons for the continuance, whether the Hearing Officer grants the continuance, and if the matter is continued, the new hearing dates and hearing schedule. Prior to setting new hearing dates, the Hearing Officer should confer with both parties to avoid rescheduling at a time when a party has a conflict. If the request for the continuance

is made orally during hearing, the Hearing Officer may forgo a written decision if the decision is noted on the record during the hearing.

If there is a change in the scheduled proceedings, the Hearing Officer is responsible for keeping all participants informed of the change in schedule, including the court reporter and any interpreters.

### **Transferring Cases**

If a Hearing Officer assigned to a case is made unavailable due to an emergency or a conflict, the Hearing Officer should immediately notify the DESE-OSE. The DESE-OSE will immediately reassign the case to the next available Hearing Officer in the rotation, and notify the parties of the reassignment. Once the case is reassigned, the newly assigned Hearing Officer should contact all parties to discuss any unresolved issues, the Hearing Officer's preferences, scheduling, and any other issues.

### **Consolidating Cases**

If a new due process complaint is filed involving the same district and student, while a complaint is already pending before a Hearing Officer, ADE will notify the Hearing Officer and assign the case to the same Hearing Officer. The Hearing Officer has the ability to consolidate the cases into a single case, or to keep the two cases separate.

### **Shared Calendar**

Hearing Officers must keep the DESE-OSE's shared calendar to date of the status of their open cases to prevent scheduling conflicts with other Hearing Officers. Hearing Officers should review the calendar before scheduling hearing dates to avoid scheduling dates where the same attorney, party, or district have another hearing scheduled.

## **RESOLUTION AND SETTLEMENT**

Prior to the hearing, there are two methods of resolution that may lead to settlement of the case without the need to proceed to a hearing.

### **Resolution Conference**

If the parent files for due process, the district must commence a resolution meeting within fifteen (15) days. The meeting must include the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint. A representative of the district who has decision making authority must attend the meeting. The district's attorney may not attend the meeting unless the parent is accompanied by an attorney. The purpose of the resolution meeting is to discuss the facts that form the basis of the due process complaint so the district has the opportunity to resolve the dispute prior to a hearing.

The district has a total of thirty (30) days to resolve the due process complaint to the parents' satisfaction. In the event that the issues in the due process complaint are not resolved, the Hearing Officer has forty-five (45) days to hold the hearing and issue a written decision, subject to the authority of the Hearing Officer to grant specific extensions of time beyond the forty-five (45) day period, at the request of either party.

There is no provision that permits a Hearing Officer to grant an extension of time for the parties to conduct a resolution session. If the school district and the parents agree, the resolution meeting can be waived.

The resolution meeting need not be held if the parents and the district agree to use the mediation process.

Unless the resolution meeting is waived, both parties must participate. If the parent fails to participate in the meeting, the timelines for conducting the hearing will be delayed until the meeting is held. If the parent refuses to participate after reasonable efforts have been made, the district may request that the Hearing Officer dismiss the due process complaint at the expiration for the thirty-day resolution period. See *Arkansas Department of Education Special Education and Related Services Rule, Section 10.01.12.2.*

If the district fails to hold or participate in the resolution meeting within fifteen (15) days of receiving the parent's due process hearing request, the parent may seek intervention of the Hearing Officer to begin the forty-five (45) calendar day due process hearing timeline.

If a party fails to participate in the resolution meeting and neither party seeks intervention of the Hearing Officer to adjust the thirty (30) day resolution period, the 45 day timeline begins at the end of the 30 day resolution period.

If an agreement is reached, the parties will execute a legally binding agreement that is signed by both the parent and a representative of the district who has the authority to bind the district. If the parties execute an agreement, a party may void the agreement within three (3) business days of the agreement's execution.

The Hearing Officer should not request a copy of the agreement. The agreement is only enforceable in state court with jurisdiction or federal court. If the agreement is reached, the party that filed the hearing request should request that the Hearing Officer dismiss the matter.

### **Mediation**

ADE has established procedures to allow parties involved in a due process complaint to resolve the dispute through a mediation process. When a due process complaint is filed, the district must inform the parent of the availability of mediation described in 34 CFR 300.506.

The purposes of the pre-hearing mediation conference are: (1) to resolve, if possible, all disagreements, thus eliminating the need for a hearing; (2) to narrow the range of disagreement to a specific issue or issues if total resolution is not possible; (3) to provide an atmosphere that is conducive to relevant discussions and mutual agreement; and (4) to acquaint the parties with the due process hearing procedures.

The mediation process is voluntary and both parties must agree to participate. Mediation cannot be used to deny or delay a parent's right to a due process hearing, or any other rights afforded under Part B of IDEA and relevant Arkansas law. Prior to participation in the mediation process, the parties must sign a confidentiality agreement.

Mediation must be conducted by a qualified and impartial mediator who is trained in effective mediation techniques. Qualified mediators are available through the Arkansas Special Education Mediation Project and will be selected on a random, rotational, or other impartial basis. ADE bears the cost of the mediation process.

Attorneys for the parties are not permitted to attend the pre-hearing mediation sessions, however, each party is permitted to communicate with its attorney to seek advice regarding the terms of a settlement proposal.

An agreement reached by the parties must be set forth in a written mediation agreement that is legally binding and that: (1) states that all discussions that occur

during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and (2) is signed by both the parent and the representative of the district who has the authority to bind the district.

A written, signed mediation agreement is enforceable in any State court of competent jurisdiction or in a district court of the United States.

### **State Complaint Set-Aside**

12.07.1 Complaints filed under this section, and due process hearings under 34 CFR 300.507 and 300.530 - 300.532 and §10.00 of these regulations -

12.7.1.1 If a written complaint is received that is also the subject of a due process hearing under 34 CFR 300.507 or 300.530 - 300.532 and §10.00 of these regulations, or contains multiple issues, of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing, until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved using the time line and procedures set out in these regulations.

The Hearing Officer shall be notified by the administrator for dispute resolution, that an assigned hearing has a pending state complaint that is in set-aside status. The Hearing Officer shall notify the Dispute Resolution Office for any change of status in the hearing so the complaint investigation may resume if the case is dismissed. If the Hearing Officer issues a final order, that order will be binding and the state complaint will be closed.

### **Enforcement**

The Hearing Officer has no authority to enforce a private settlement agreement or a mediated agreement.

## **MOTIONS**

IDEA does not expressly provide for any type of motions, however, due to the broad authority of Hearing Officers to manage the hearing, they may entertain and rule on motions.

If a Hearing Officer entertains motions, they should be made in writing, unless made during the hearing. After receipt of a written motion, the opposing party should be given an opportunity to respond. The Hearing Officer has the discretion to set time frames on response.

The Hearing Officer should rule on all motions promptly, preferably in writing. If a motion is made during the hearing, the Hearing Officer should take steps to be very clear in his or her ruling for purposes of the record.

## **RIGHTS AND RESPONSIBILITIES OF PARTIES**

### **Responsibilities of the Public Educational Agency**

As a party to a due process hearing, the district must:

- (1) Complete the Due Process Hearing Form;
- (2) Provide access to all education records, reports, and files regarding the child to the parents/guardians and their representative for review and inspection;
- (3) Provide the parents with an opportunity to inspect and copy the educational records at a reasonable cost;
- (4) Make the arrangements for an independent educational evaluation for the child by an outside evaluator when deemed necessary by agreement with the parents or by order of the Hearing Officer;
- (5) Compel appropriate educational personnel to provide testimony at the hearing as determined by the district and/or as requested by the parents/guardians;
- (6) Provide a meeting room for the due process hearing;
- (7) Provide evidence and testimony at the hearing to show that the proposed course of action is necessary and appropriate;
- (8) Inform parents of any free or low-cost legal and other relevant services available in the area if the parent requests the information or if the parent or district initiates a hearing; and
- (9) Supply information to the Hearing Officer and the ADE-SEU concerning the assignment and appointment of the child's surrogate parent, if applicable.

## **Responsibilities of Parents**

The parents as a party to a due process hearing must:

- (1) Comply with any directive by an assigned impartial due process hearing officer for the provision and disclosure of requested information, materials, documents, etc. in a timely manner;
- (2) Continue sending the child to his or her current placement unless other arrangements are agreed to by both the public agency and the parent; and
- (3) Continue to send the child to school in compliance with State compulsory school attendance laws.

## **Rights of Both Parties**

Any party to a hearing has the following rights:

- (1) To be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
- (2) To present evidence and confront, cross-examine, and compel the attendance of witnesses;
- (3) To prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;
- (4) To obtain a written or, at the option of the parents, an electronic verbatim record of the hearing; and
- (5) To obtain written or, at the option of the parents, an electronic finding of fact and decision. 20 USC § 1415.

Both parties also have the right to an impartial Hearing Officer not involved in the education of the child or having a personal or professional interest conflicting with his or her objectivity. Both parties have the right to appeal the decision within the prescribed timeline either to State or Federal court. 34 CFR § 300.507.

## **Right of Parents/Legal Guardians**

The parent has additional hearing rights:

- (1) The right to have the child who is the subject of the hearing present;
- (2) The right to open the hearing to the public; and
- (3) The right to have the record of the hearing and the findings of fact and decisions provided to the parent at no cost. 34 CFR § 300.512.

The parents have the right to inspect and review all educational records relating to their child prior to a resolution meeting or a due process hearing. The parents also have the right to a response to reasonable requests for explanations and interpretations of the records.

## **Pro Se Parties**

In order to facilitate the proceedings, the Hearing Officer may assist a pro se complainant in understanding how to question a witness, introduce an exhibit, or other procedural matters. The Hearing Officer is encouraged to explain the substantive legal standards and burdens of proof that apply to the case and assist as appropriate. Lack of legal counsel should not be a barrier to accessing a complainant's due process rights.

*See also Ex Parte Communication.*

## **Attorney Fees**

If the parents prevail in the due process hearing, or upon appeal, a court may award some or all of the attorney fees they have paid in conjunction with the due process hearing. The Hearing Officer has no authority to award attorney fees. Under some circumstances, the district can be awarded attorney fees from the parent or their attorney.

Factors that a court may consider when awarding attorney fees include whether the district or the parent prolonged the process, whether the fees charged are more than the hourly rate usually charged or charged in the area, and whether either party engaged in misconduct. In determining the amount of the reimbursement of attorney fees, the court must follow federal law.

## **THE HEARING**

### **Duties and Powers of the Hearing Officer**

Hearing Officers have broad authority to do all things reasonably necessary for the proper administration of the due process hearing. This authority should be used to ensure that the hearing is timely, efficient, and effective.

Hearing Officers should exercise discretion for minor deficiencies or omissions with regard to parents who file a due process complaint without the assistance of an attorney or advocate.

### **No-Shows and Failure to Appear**

Hearing Officers have the authority to move forward with the hearing in the absence of a party, provided that the absent party has been given proper notice of the hearing and a meaningful opportunity to participate in the hearing. Best practice would be to check with the party or the party's attorney before moving forward to make sure there has not been an emergency or misunderstanding. The Hearing Officer also has the discretion to recess the hearing if a party is absent, but should consider the prejudice to the other party. In either circumstance, the reasoning for moving forward or for rescheduling should be documented on the record.

### **Record**

The due process hearing must be conducted in the presence of a court reporter. Establishing a clear and accurate record is of utmost importance. The Hearing Officer should be mindful of things that may negatively impact the record, such as simultaneous conversations, use of acronyms, proper reference to exhibits, and use of gestures. The record will be used if the decision is appealed, so ensuring its accuracy is very important.

### **Procedure**

The Hearing Officer should ensure that all necessary parties are present. Hearings are closed to the public and all unauthorized persons should be excluded from the room, unless the parent exercises their right to an open hearing. If the parent exercises their right to an open hearing, members of the press and public are permitted to attend. However, the Hearing Officer has the discretion to place reasonable limits on the media and public, such as prohibiting cameras and recording devices. Persons not on

the agreed upon witness list should be excluded from the hearing unless both parties agree otherwise prior to the hearing.

It is within the Hearing Officer's discretion to decide how many additional individuals may sit at the table with the parties. The Hearing Officer should consider the assistance the attorney, or pro se party, needs in presenting the case, being fair to both parties.

If the Hearing Officer anticipates problems, the Hearing Officer should announce ground rules for the conduct of the participants prior to commencing the hearing. The Hearing Officer can require that the participants address the Hearing Officer, rather than each other, that they keep silent, that they remain seated, etc. The Hearing Officer may exclude a non-party, or a party's attorney, for being disruptive.

The Arkansas Rules of Evidence and the Federal Rules of Evidence do not apply in a due process hearing, but may be used as guidelines. However, the Hearing Officer must abide by the specific evidentiary rules outlined in Section 10.00 of the Arkansas Department of Education Special Education and Related Services Rule. The administrative process is designed to be less formal than a judicial proceeding and the Hearing Officer has discretion in procedural and evidentiary matters. Although the rules of evidence do not apply, parties may still make objections. Admission of hearsay is allowable.

The Hearing Officer must follow the order of the hearing established in Section 10.01 of the *Arkansas Department of Education Special Education and Related Services Rule*.

### **Exhibits**

Copies of exhibits must be exchanged not less than five business days prior to the hearing, unless the parties agree otherwise. Parties should be encouraged to discuss exhibits prior to the hearing to avoid duplications and unnecessary objections. Exhibits should be marked in the manner the Hearing Officer specifies during the prehearing conference. The Hearing Officer must be provided with a list of all exhibits and a copy of each exhibit prior to the hearing.

If a party seeks to admit an exhibit not included on the exhibit list and the opposing party objects, the Hearing Officer should inquire as to why it was not included on the list, determine how or if the objecting party would be prejudiced by its admittance, and decide whether the prejudice can be cured. *See Arkansas Department of Education Special Education and Related Services Rule, Section 10.00.*

## **Witnesses**

The Hearing Officer should make every effort to avoid witnesses having to appear more than once. Parties can agree to take witnesses out of turn, or to accommodate a witness at a specific time, even if it means interrupting another witness's testimony. If the parties cannot agree, the Hearing Officer has the authority to decide what is fair to both parties and how to get all relevant testimony on the record in an expeditious manner.

The Hearing Officer should exercise his or her discretion in allowing an excessive number of witnesses to testify. Similarly, the Hearing Officer should limit the amount of repetitive testimony. Both parties have the right to request relief from the Hearing Officer in the event that the other party is attempting to call several unnecessary witnesses to prolong the hearing.

Both parties have the right to question each witness. The Hearing Officer also has the authority to question the witness after the parties to clarify or complete the record. Witnesses should be sworn in and all witness testimony is given under oath and penalty of perjury. The scope and duration of cross-examination rests within the discretion of the Hearing Officer. The number of re-directs and re-crosses is also within the Hearing Officer's discretion.

Hearing Officers have the authority to call additional witnesses or request to review certain documents if the Hearing Officer has reasonable cause to believe such review might be necessary as part of the record.

The parent has the right to determine whether or not the child testifies. If the parents decide to allow the child to testify, the Hearing Officer should take precautions concerning cross examination and the environment of the hearing. The Hearing Officer has the discretion to meet with the child informally, with all present, and ask the child the questions proposed by both parties.

Whether to allow testimony by phone or video conference is within the discretion of the Hearing Officer. If permitted, the witness should be provided with all relevant exhibits. The Hearing Officer must confirm that the witness is alone and in a confidential area. The Hearing Officer must also take steps to ensure that the witness is not reading from a script or being otherwise improperly influenced. Direct testimony by affidavit in lieu of verbal testimony is allowed at the discretion of the Hearing Officer. A witness, including an expert witness, who has testified by sworn affidavit can be subpoenaed by any party for the purpose of direct or cross-examination. See *Arkansas Department of Education Special Education and Related Services Rule, Section 10.01*.

The decision on whether the hearing is open or closed does not control whether witnesses will be sequestered. It is within the Hearing Officer's discretion whether to allow potential witnesses in the hearing room. Should the Hearing Officer allow the witnesses to remain in the hearing room, they should be instructed not to discuss their testimony with each other.

### **Expert Witnesses**

An expert witness can be called to offer opinion testimony based on knowledge, skill, experience, training, or education. IDEA grants Hearing Officers, subject to State statutes and rules, the discretion to determine whether expert testimony should be admitted and what weight, if any, should be accorded. If an expert witness is called, the expert may testify only if he or she has the minimum qualifications in the field that he or she is being called upon to offer expert testimony. The qualifications should be placed on the record. If an expert witness' qualifications are disputed, the witness may be questioned, but the Hearing Officer may take over the questioning to avoid spending excess time on the matter. The expert witness should also have sufficient familiarity with the child who is the subject of the hearing. Once the expert is qualified, the Hearing Officer should place on the record the area(s) in which the witness is being qualified.

### **Sanctions**

In general, Hearing Officers have broad authority to do all things reasonably necessary for the proper administration of the due process hearing. They have the inherent authority to control the hearing to prevent disruption and to control the course of the hearing to ensure an effective, efficient, and timely hearing. Although IDEA, does not expressly discuss the Hearing Officer's authority to discipline parties and/or their attorneys when the party or the attorney has engaged in misconduct, it is implicit in Hearing Officer's broad authority.

Hearing Officers have the ability to sanction attorneys that have engaged in misconduct. Additionally, Hearing Officers have the ability to report unethical behavior to the Arkansas Office of the Committee on Professional Conduct.

### **Compelling Attendance and Production of Documents**

The Hearing Officer has the power to issue subpoenas under Ark. Code Ann. § 6-41-216. Upon the request of a party to a pending proceeding over which the Hearing Officer is assigned and presiding, the Hearing Officer may issue a subpoena. The subpoena must be directed to the sheriff of the county where the witness resides or may be found. The subpoena may require the witness to bring with him/her any book,

writing, or other thing under his or her control the purpose of testifying. The subpoena cannot be a subpoena duces tecum. Service of the subpoena must be in the manner provided under the Arkansas Rules of Civil Procedure.

In the event that a witness is served with a subpoena and fails to attend the hearing or otherwise comply, the Hearing Officer may apply to the circuit court of the county where the hearing is held for an order commanding the arrest of the witness and directing that the witness be brought before the court.

### **Objections**

Should either party have an objection to witness testimony or an exhibit, they may make a formal objection on the record.

The Hearing Officer may either sustain, overrule, or take under advisement the objection, but should note the decision on the record.

### **Privileges**

Professional privileges are sometimes asserted by parties to deny access to the student's medical and psychological reports. However, once the parent places an issue in an administrative proceeding related to the emotional or medical condition of the student, the party either has the option of presenting no evidence of professionals regarding the issues, or waiving the privilege with regard to all professionals who diagnosed or treated the student regarding the condition at issue. The Hearing Officer should issue rulings on whether such privileges are waived, and, if so, to what extent.

### **Burden of Proof and Persuasion**

The burden of proof is placed upon the party seeking relief. At the beginning of the hearing, the Hearing Officer must determine which party bears the burden of proof for each issue raised.

The Hearing Officer should review the evidence using the preponderance of the evidence standard.

## **EXPEDITED DUE PROCESS HEARINGS**

If a parent disagrees with a determination that a child's behavior was not a manifestation of the child's disability or with any decision regarding the placement of the child during disciplinary removals, the parent may appeal the decision by filing a complaint requesting an expedited due process hearing pursuant to 34 CFR 300.507 and 300.508(a)-(b).

A school district may appeal the decision by requesting an expedited hearing when school personnel have reason to believe that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

In the event of an expedited due process hearing, the non-complaining party has ten (10) days to respond to issues raised in the complaint. The district must commence a resolution meeting within seven (7) days, and has a total of fifteen (15) day to resolve the due process complaint to the parents' satisfaction, unless both parties agree to waive the resolution period. In the event that the issues in the due process complaint are not resolved, the Hearing Officer has twenty (20) school days from the date the complaint was received to hold the hearing and ten (10) days from the hearing to issue a written decision. *See Arkansas Department of Education Special Education and Related Services Rule, Section 10.01.4.4*

## **FINAL DECISION AND ORDER**

Following the close of a hearing, the Hearing Officer must issue a written final decision and order that states concisely and explicitly the findings of fact and conclusions of law. The final decision should not be abstract and should not be a summary of the testimony offered at the hearing.

The final decision must contain findings of fact, the decision(s), and any orders resulting from the final decision. The findings of fact are limited to the facts that were supported by the evidence and upon which the Hearing Officer based any portion of the final decision. Any orders resulting from the final decision must be issued in concise language, address any violations noted in the final decision, and mandate definite action to remedy those violations. The final decision should cite to on point precedent and law to support the conclusions of law.

The final decision and order should be signed by the Hearing Officer and dated. The Hearing Officer must provide the DESE-OSE a redacted and an unredacted copy of the final decision and order. The final decision and order should be submitted to the ADE designated contact, preferably in electronic format.

Upon receipt of the final decision and order, ADE will send it to the parties electronically or by certified mail. If ADE sends the final decision and order electronically, a copy will also be mailed by certified mail. The final decision and order will be translated, as appropriate, or tape-recorded, if the primary language of the child's home is one other than English, or if the parents are visually impaired or blind.

The final decision and order of the Hearing Officer is final, unless either party appeals it. Once the final decision and order is entered, the Hearing Officer is without authority to retain jurisdiction or re-open a case. The Hearing Officer is prohibited from any attempts to retain jurisdiction over the parties to the hearing after the final decision has been issued.

ADE must transmit the final decision and order of the Hearing Officer to the State Advisory Council for the Education of Children with Disabilities. ADE must also make the final decision and available to the public. All redacted final decisions and orders can be found on the Arkansas Department of Education website.

[https://dese.ade.arkansas.gov/Offices/special-education/dispute-resolution/du-process-hearings](https://dese.ade.arkansas.gov/Offices/special-education/dispute-resolution/due-process-hearings)

## **APPEAL**

### **Appeals Process**

IDEA provides a mechanism for appealing decisions, or parts of decisions, of Hearing Officers. Both the school district and the parent or guardian of the child with a disability have the right to appeal a decision of the Hearing Officer within 90 days after the date of the Order. Decisions of the Hearing Officer may be appealed to state or federal court, although they are generally appealed to federal court.

Either party may ask the court to supplement the record to include evidence not introduced at the administrative hearing. The court will decide the case on the administrative record from the due process hearing and, if the court has granted one or both parties the right to supplement the record, on new information provided to the court.

Generally, decisions on procedural and evidentiary matters are given deference on appeal and the standard of "abuse of discretion" is used to determine whether the ruling should be reversed. The judge's decision may affirm, reverse, or reverse in part the order. Parties may also appeal from the state or federal court decision.

### **Requesting the Record**

Once a lawsuit is filed, the party may request the administrative record from the DESE-OSE. The record will be forwarded directly to the court. If a party requests any additional copies, ADE will provide copies at a charge to the requesting party.

Hearing Officers should be mindful when drafting their final order that, if appealed, the order may be cited in a federal or state court decision and that they may be required to comply with document and record requests if the case is appealed. The judge assigned to review the appeal will review the record developed at the hearing, including the pleadings, exhibits, and the transcript.

## **DOCUMENT RETENTION, MAINTENANCE, AND PRIVACY**

### **Personally identifiable information in e-mail**

In order to ensure that protected student information is not compromised when using e-mail, the student's name should never be used. Cases should be referred to by the school district name and the case number.

### **Document retention and maintenance**

All relevant documents must be retained until the close of the due process hearing. At the conclusion of the due process hearing, all relevant documents must be included in the hearing folder that is turned into ADE. Documents should be kept in a secure manner.

### **Personal Notes**

At the close of the hearing, after the Hearing Officer has turned in the case file and all relevant records, the Hearing Officer may shred or delete any personal notes about the case that they made during the proceeding.

### **Hearing Folders/Files**

At the close of each case, the case file should be given to the DESE-OSE for filing. The case file may be kept electronically or on paper. The case file must include, at a minimum, written correspondence between the parties, a complete list of exhibits, a complete list of pleadings, the transcript, and a copy of any order issued by the Hearing Officer. Copies of exhibits and pleadings do not need to be provided to ADE, unless requested.

The case file should be returned to ADE no more than two weeks following the issuance of the Hearing Officer's final decision in the case. Once the case file has been given to ADE, the Hearing Officer should delete or shred information related to the case that is on his or her computer, phone, or kept in physical form.

Upon receipt of the case file, the DESE-OSE is responsible for maintaining the case file.

## **Requests for Information from the Media and Public**

All requests for information, including FOIA requests, from the media and the public should be forwarded to the DESE-OSE for review by Legal Services. The Hearing Officer should not speak with the media or other members of the public, or supply information about the proceedings. Hearing Officers should be mindful that they may be subject to the Arkansas Freedom of Information Act.