HOW TO CONDUCT AN ADMINISTRATIVE HEARING: (MY POWERS ARE BEYOND YOUR COMPREHENSION)

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I. INTRODUCTION

The administrative hearing is the key battleground for many types of disputes. Most courts require parties to "exhaust their administrative remedies" by having an administrative hearing before bringing an issue to the courts. See, *Fry v Napoleon Community Schools* 69 IDELR 116, 580 U. S. ____, 137 S.Ct. 743 (2/22/2017). The hearing is, therefore, the critical venue for resolving numerous disagreements.

Despite the crucial role that the hearing plays in the resolution of disputes, there is very little guidance concerning what happens at the hearing. For example, in special education hearings, the federal statute provides only that parties have the following rights: the right to be accompanied by counsel/advocate; the right to "present evidence and confront, cross-examine, and compel the attendance of witnesses"; the right to a record of the hearing; and the right to a decision with findings of fact. Section 615 (h). The federal regulations add only that evidence not disclosed at least five days before the hearing may be excluded {34 C.F.R. Section 300.512 (a)(3) and (b)} and that the parents may decide whether the hearing is open or closed and whether or not the student attends the hearing; and that the parents may obtain the decision and the record without cost. {34 C.F.R. Section 300.512 (c)(1)(2) and (3)}.

Where courts have commented, the rules are generally quite vague. For example in Dworshak v. Moore 583 N.W.2d 799 (N.D. S.Ct. 1996), the court held that the procedures used in an administrative hearing must afford the parties a fair hearing.

Some states and federal agencies have regulations, policies, rules or manuals that provide further guidance for hearing officers. Some state agencies follow the state Administrative Procedure Act for basic procedures. Other agencies have adopted a hearing officer manual or guide. See for example, Texas Workforce agency's Hearing Officer Handbook, http://www.twc.state.tx.us/ui/appl/app_man1.html, and the state of Alaska Hearing Officer's Manual, http://www.law.state.ak.us/pdf/manuals/hearing_officer.pdf. Where said regulations and statutes provide specific procedures, clearly they

should be followed. Even where such manuals or procedure statutes exist, however, there will be many situations which the hearing officer must address that are not covered by the manual. It is within these areas that the hearing officer must exercise discretion.

If the guidance does not pertain to a particular problem, however, the hearing officer determines hearing procedures. The United States Supreme Court has noted, for example, that special education "hearings are deliberately informal and intended to give the…(hearing officers)… the flexibility that they need to ensure that each side can fairly present its evidence." Schaffer v. Weast 546 U.S. 49, 126 S.Ct. 528, 44 IDELR 150 (11/14/5). In discussing the new federal regulations, the U. S. Department of Education has stated that "the specific application of (due process hearing) … procedures to particular cases should generally be left to the discretion of hearing officers… 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 …'' do not deny a party's "…right to a timely due process hearing." Federal Register, Vol. 71, No. 156 at p. 46704 (August 14, 2006).

The following cases support the proposition that the hearing officer has broad discretion to determine hearing procedures: JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (SD WVa 11/4/9) HO has **discretion** to control hearing procedures (including imposing **sanctions**) and absent an abuse of discretion, HO will be upheld, aff'd on other grounds, JD by Davis v. Kanawha County Bd of Educ 54 IDELR 184 (4th Cir. 4/27/10) NB: **UNPUBLISHED;** (In the absence of abuse of discretion, HO has the power to grant or deny continuances and impose sanctions); Utah Schs for the Deaf & Blind (JG) 111 LRP 29590 (SEA UT 4/8/11) HO has wide discretion to regulate hearing procedures for a dph –including the power to require compliance with HO's reasonable directives; Dist of Columbia Public Schs (JG) 111 LRP 77405 (SEA DC 7/20/11); O'Neil v. Shamokin Area Sch. Dist. 41 IDELR 154 (Pa. Comm. Ct. 2004); Comito v. Police Bd of the City of Chicago 317 Ill.App.3d 677, 739 N.E.2d 942 (Ill.Ct.App. 11/1/00) (HO has wide discretion as to how to conduct hearing.); Calvin C. Desmond v. Administrative Director of the Courts, State of Hawaii 982 P.2d 346, 91 Haw. 212 (Haw.Ct.App. 5/12/98). (HO has authority to regulate course and conduct of a

hearing.); Melvin E. Knoblett v Alabama Board of Massage Therapy ___S.2d___, No 2050575 (Ala. S.Ct. 3/9/07); (HO has discretion to permit or deny further cross examination after the testimony of expert Ws); O'Neil v. Shamokin Area Sch. Dist. 41 IDELR 154 (Pa. Comm. Ct. 2004) (hearing officer has wide latitude in making decisions regarding procedure.); School District of Swastopol 24 IDELR 482 (SEA WI 1986) (hearing officer is afforded substantial discretion in regulating the course of the hearing); Devlin v. Office of the Architect of the Capitol Case No. 06-AC-20(RP) (Office of Compliance 4/25/07)(HO properly exercised his discretion in conducting in camera review of documents sought in discovery and where HO dismissed claim of unsuccessful applicant for promotion where claimant refused to offer any evidence in protest of HO's discovery ruling); Philadelphia School District 29 IDELR 780 (SEA PA 1999) (hearing officer has great latitude in the conduct of hearing); Renollett by Renollett v. Indep. Sch. Dist. No 11, Anoka-Hennepin 105 LRP 3047 (D. Minn. 2005) (hearing officer appropriately narrowed and refined the issues and applied her independent analysis to the record evidence.); Central Susquehanna Intermediate Unit 102 LRP 11145 (SEA PA 2000) (hearing officer has the authority to schedule hearings, maintain order in the hearing room, determine issues, admit or reject evidence, etc.). OSEP has also concluded that the conduct of the hearing is within the discretion of the hearing officer. Letter to Anonymous 23 IDELR 1073 (OSEP 1994);; Clark County Sch Dist (LB) 111 LRP 65198 (SEA NV 8/26/11) Ho has wide **discretion** to regulate hearing procedures for a dph –including the power to require compliance with HO's reasonable directives; But See, Wyomissing Area Sch. Dist. 106 LRP 40105 (SEA Pa. 6/13/6) (hearing officers have considerable discretion in conducting hearings, but the state review panel chastised the hearing officer for announcing at the end of the second hearing session that the parties would have only one more session to present their evidence).

The ***reason*** why the administrative hearing officer is vested with substantial discretion in determining hearing procedures is that discretion "… is indispensable whenever individuality is needed…The administrative process allows discretion in order to take care of the need for ***individualized justice***…" Old Abe Co. v. New Mexico Mining Comm. 908 P.2d 776, 121 N.M. 83 (NM S.Ct.

12/11/95). In other words, the hearing officer has discretion to determine unspecified procedures in order to ensure that the process is fair and just based upon the facts and circumstances of the individual case. The hearing officer utilizes his discretion to ensure that hearing procedures are fair and just given the situation presented.

The fact that the hearing officer has the responsibility for regulating the conduct of the hearing within his/her discretion is also implicitly supported by caselaw establishing quasi-judicial immunity for hearing officers. In Walled Lake Consolidated Schools v. Doe by Doe 42 IDELR 3 (E.D. Mich. 2004), for example, the Court held that because the job of special ed hearing officers is functionally comparable to that of a judge (we both exercise discretionary judgment in that we preside over hearings, take evidence, oversee proceedings and issue decisions), IDEA hearing officers should be entitled to absolute quasi-judicial immunity from suits for money damages when they act within their jurisdiction. If we function like a judge, it follows that hearing officers control the procedures during the hearing.

Moreover, under general principles of administrative law, a hearing officer has the ***inherent authority*** to do all that is necessary to execute the power or perform the duty conferred by statute. In re Student with a Disability 103 LRP 20843 (SEA WV 2002); Stanley Manufacturing v. EPA 8 Ill.App.3d 1018 (Ill. App. 1972); Ray v Ill. Racing Bd 447 N.E.2d 886 (Ill App 1983). A hearing officer has the inherent authority to regulate the conduct of a hearing. In Gil N. Mileikowsky v. Tenet Healthsystem, et al 128 Cal.App.4th 531, 27 Cal.Rptr.3d 171 (Second Div. April 18, 2005), the Court held that even if the power to control the proceedings was not specifically enunciated by the statutes and other law, hearing officers have wide latitude as to all phases of the conduct of the hearing. The court stated further that just as judges have the ***inherent authority*** to control litigation before them, so too administrative hearing officers "… must have the power to control the parties and prevent deliberately disruptive and delaying tactics." In Stancourt v. Worthington City Sch. Dist. Bd. of Educ. 44 IDELR 166 (Ohio App. Ct. 10/27/05), the state appellate court held that a special ed hearing officer has broad discretion in accepting and rejecting evidence and in conducting a hearing. Noting that a hearing officer has **implied powers** similar to

those of a court, the court ruled that the hearing officer has the implied power to impose "… silence, respect, and decorum… and submission to his lawful mandates. In LS v Bd of Educ of Lansing Sch Dist 65 IDELR 225 (ND Ill 6/11/15), the court said "Moreover, IHOs, like judges, have the **inherent authority** to manage hearings to avoid needless waste and delay. They should exercise control where necessary to manage the proceedings and eliminate unnecessary costs and redundancy, including imposing reasonable time limits where appropriate." In Edward S & Virginia S ex rel TS v West Noble Sch Corp 63 IDELR 34 (ND Ind 3/31/14) @n.1 HO's dismissal with prejudice for failure to comply with four ho directives was akin to a sanction pursuant to the **inherent power** of a court. (!!);Letter to Eig 68 IDELR 109 (OSEP 8/4/16) OSEP stated that in carrying out his **duty** to conduct a **fair and impartial** hearing, a **HO may remove from a dph** any individual whose behavior is **disruptive** or otherwise **interferes** with conducting a fair and impartial dph; See also Clark Co. Sch. Dist 102 LRP 18829 (SEA NV 1998) (authority to reduce the number of witnesses from 50), In Re Student with a Disability 103 LRP 21076 (SEA MI 2001) (inherent authority to rule on motions during hearing.), and District of Columbia v. Doe ex rel Doe 611 F.3d 888, 54 IDELR 275 (DC Cir 7/6/10) (reversing District Court ruling that HO lacked authority to reduce length of suspension of student with a disability as well as authority to rule on whether suspension met statutory requirements re manifestation) Thus the principle of inherent authority also supports the proposition that the hearing officer determines hearing procedures. (??); BG by JAG v City of Chicago SD # 299 69 IDELR 177 (ND Ill 3/20/17) hos have the **inherent authority** to manage hearings to avoid needless waste and delay; EP by JP & AP v Howard County Public Sch System 70 IDELR 176 (D Md 8/21/17) HOs have the **inherent authority** to manage a hearing.

II. Top Eight General Rules for Conducting a Hearing

Although the procedures to be followed by a due process hearing officer are within the sound discretion of the hearing officer, there are some general rules that apply concerning how to exercise that discretion. The following eight general rules have been derived from my experience as a hearing officer. The following general rules provide some basic guidance on the manner in which a hearing officer should exercise his discretion in conducting a hearing:

1. **Be Fair**
2. **Appear to be Fair**
3. **Be Firm, Decisive and Prompt**
4. **Control the Record**
5. **Be in the Present**
6. **Manage Complex Evidence**
7. **Make a Complete Record**
8. **Communicate Clearly and Calmly**

Rule Number One: Be Fair

The most important consideration for conducting a hearing is to be fair. Fairness in our hearings is a constitutional mandate. The United States Supreme Court has held that the right to a fair hearing in a fair tribunal is a basic requirement of due process of law. Withrow v. Larkin 421 U.S. 35 (1975). The Supreme Court has also made it clear that the requirement of fairness applies equally to both administrative hearing officers and judges. Gibson v. Berryhill 411 U.S. 564 (1973); Schweiker v McClure 456 U.S. 188 (1982). See, L.C. & K.C. on behalf of N.C. v. Utah State Board of Educ., et al 43 IDELR 29 (10th Cir. 3/21/05)(special education case.) and Madden v. U. S. Assoc. 844 S.W.2d 374, 377, 40 Ark. App. 143 (Ark.Ct.App. 12/16/92).

The concept of fundamental fairness is at the heart of the requirement of due process of law, and fairness must be the primary principle applied by hearing officers in conducting a hearing. LTV Steel Co v. Indust. Comm 140 Ohio App.3d 688 (Ohio Ct. App. 2000); In Re; Sturtz 652 N.E.2d 41 (Ind. 6/16/93); State of Oklahoma Bd of regents v. Lucas & George 297 P.3d 378 (SCt Okla 2013) at n. 8 (procedural due process contemplates a fair hearing.); Due process guarantees fundamental fairness. Commonwealth of Pennsylvania v Cosby, _____A.3d_____(Pa SCt 2021) (slip op @p. 53) {available at 163038-june302021opinionwecht.pdf (pacourts.us) }: Genn ex rel Genn v New Haven Bd of Educ 69 IDELR 35 (D Conn 11/30/16) HO is required to conduct a dph in a fair and orderly manner.

While considerable discretion is provided to administrative agencies in determining their procedures, they may not disregard basic precepts of fairness in structuring adjudicatory functions. One fairness principle directs that in adjudicative matters one adversary should not be permitted to bend the ear of the hearing officer in private. The court struck down a practice permitting ex parte communications. Department of Alcoholic Beverage Control v. Alcoholic Beverage control Appeals Board 145 P.2d 462 (Cal S.Ct. 11/13/06).

A reviewing court will examine the procedures utilized at an administrative hearing to ensure that fair and impartial procedures

were used. Forrest Preserve District of Cook County v. ILRB 861 N.E.2d 231, 242 (Ill. App. Ct. 12/21/06); Nickerson-Reti v Lexington Public Schs 59 IDELR 282 (D Mass 9/27/12) Court noted that the hearing was **procedurally fair** in rejecting allegations of HO bias. On judicial review, a court will examine the record to determine whether the procedures employed by the hearing officer afforded the parties a full and fair opportunity to litigate the issues. Christianson v. Dir., Dep't of Transp., 951 N.W.2d 231 (N.D. 2020) A hearing officer must provide a fair and impartial hearing: Ex Parte Paul Rene Serna 957 S.W.2d 598 603 (Texas Ct. App. 11/19/97). The right to a fair hearing before an administrative agency includes the opportunity to be heard, the right to cross-examine adverse witnesses and the right to impartial rulings on evidence. Comito v. Police Bd of the City of Chicago 317 Ill.App.3d 677, 739 N.E.2d 942 (Ill.Ct.App. 11/1/00) (HO has wide discretion as to how to conduct hearing.)

In the spirit of fairness, it is advisable for the hearing officer to let the parties know the procedures that will be used during the hearing. Calvin C. Desmond v. Administrative Director of the Courts, State of Hawaii 982 P.2d 346, 91 Haw. 212 (Haw.Ct.App. 5/12/98). PR & JR ex rel JR v Shawnee Mission Unified Sch Dist No 512 58 IDELR 283 (D KS 4/30/12) Court ruled that HO did not violate parent right to **due process of law** at dph. Ho correctly allowed parent attorney to withdraw and properly denied a continuance. HO properly advised pro se parents of their right to testify and present evidence before they choose not to do so; Nickerson-Reti v Lexington Public Schs 59 IDELR 282 (D Mass 9/27/12) Court noted that the dph was **procedurally fair** in rejecting allegations of HO bias; DN ex rel GN v New York City Dept of Educ 112 LRP 59304 (SDNY 12/7/12) HO ruled in parent's favor on two of three issues in dpc but did not address third. SRO reversed on the two but did not rule on third issue. Court remanded; **fairness** requires that parent third issue be resolved at dph; SH v Fairfax County Bd of Educ 59 IDELR 73 (ED VA 6/19/12) HO decision given deference where findings were regularly made and where **hearing procedures** were **fair**, both parties were fairly allowed to present evidence and make arguments.

In order to fairly present their evidence, parties may need occasional breaks during the hearing. For example, in YA ex rel SG v NYC Dept of Educ 69 IDELR 76 (SDNY 9/21/16) one party argued

that the HO convened 9 hour hearing session without breaks; although the court found the assertion not supported by the record, the party apparently perceived the hearing sessions to be extremely long.

Thus, fairness must be the guiding principle for those who conduct hearings. Hearing officers are accorded wide discretion in conducting a hearing, and they must exercise that discretion in a fair manner. The rule that the hearing be conducted in a fair manner is by far the most important rule.

A hearing officer should make disclosures of any matters which might be construed to constitute actual bias to all parties and counsel at the earliest opportunity. In such cases, the hearing officer should only continue to serve if all parties have agreed that he should after full and complete disclosures have been made.

Motions to recuse (or disqualify) the hearing officer should be ruled upon promptly and in conformity with any state rules or procedures. Where such a motion is denied, the hearing officer should ensure that an adequate record has been created in the event of review by a court or review officer.

A good discussion of the considerations involving impartiality is set forth in Section III of the Model Code of Ethics promulgated by the National Association of Hearing Officials. See the website, http://naho.org/ethics.htm In addition, in some states the Judicial Code of Conduct applies to administrative hearing officers. In such states compliance with these rules is mandatory. Even in states that do not require compliance with the ethical rules for judges, however, it is wise for administrative hearing officers to utilize these rules as guidance.

Rule Number Two: Appear to be Fair

Lawyers are required under their Cannons of Ethics to "avoid even the appearance of impropriety." See eg., Clinard v. Blackwood 46 S.W.3d 177 (Tenn. 2001). The philosophy underlying the rule prohibiting conduct which might have the appearance of impropriety

is that public confidence in the system requires the belief that the system is fair. Respect for the rule of law cannot exist in the absence of such public confidence. An administrative Hearing Officer must give the appearance of complete fairness.

Due process requires disqualification where a hearing officer is biased or where circumstances fairly give rise to an appearance of impropriety or reasonably cast suspicion on the adjudicator's impartiality. *Liberty Dialysis Hawaii, LLC v Rainbow Dialysis, LLC* 130 Hawaii 95, 305 P.3d 140 (Hawaii SCt 2013). A due process challenge to HO rulings on evidence was rejected by the Court. Erica v. New Mexico Regulation & Licensing 184 P.3d 444 (New Mexico Ct App 3/31/2008).

In a very significant development, recusal or disqualification of an administrative hearing officer, was found to be constitutionally required in cases where the appearance of unfairness is overwhelming. Caperton et al v. Massey Coal Co, Inc, et al 556 U.S. 868, 129 S.Ct. 2252 (USSCt 6/8/2009); http://www.supremecourtus.gov/opinions/08pdf/08-22.pdf In this case, the petitioners had won a $50M jury verdict against Massey in a 2002 fraud case. In 2004, while Massey was appealing the decision, Brent Benjamin challenged sitting Justice Warren McGraw for a seat on West Virginia's only appellate court. Don Blankenship, President of Massey Coal, formed a 527 organization and spent over $3M campaigning against McGraw. When Massey's appeal of the verdict reached the West Virginia Supreme Court of Appeals, Benjamin refused to recuse himself and the state court ruled 3-2 to reverse the jury award.

The U. S. Supreme Court reversed the West Virginia court in a 5 to 4 decision. The majority opinion by Justice Kennedy explained that Blankenship's contributions "had a significant and disproportionate influence" upon Justice Benjamin's election and that there was a serious risk of actual bias. The opinion concludes that this risk is compelled recusal under the Due Process Clause. Although the majority gave no clear guidance for decision makers to follow in the future, it is clear that the appearance of bias may now be so extreme on a particular set of facts as to require disqualification even in the absence of actual bias. This is a significant change for

administrative hearing officers faced with motions to disqualify themselves. See, Miller v. Carroll (In re Paternity B.J.M.), 392 Wis.2d 49, 944 N.W.2d 542, 2020 WI 56 (Wis. 2020)(applying Caperton, court ruled that undisclosed social media relationship with a litigant overcame the presumption of freedom from bias.)

For those who conduct hearings, whether or not they are lawyers, giving the appearance of being fair is almost as critical as actually being fair. Having had the fairest hearing in the world means nothing to the party who believes that he has just been to a kangaroo court. In the education context, by the time that parents and school personnel get to a due process hearing, they are often angry, if not outraged. Parents frequently believe that the schools are messing with their kid. School district employees often believe that the parents don't appreciate their efforts. Now they are being forced into a "legal" proceeding

Imagine how a party to a hearing would feel if, in addition to all the elevated emotions they have entering a hearing, they now believe that the hearing itself will be unfair. Hearing officers should remember treatment that they have received from a person in a position of authority that they feel was unfair. Parties to a hearing should never leave the hearing with that sinking feeling of unfair treatment. It is incumbent upon the hearing officer to ensure that the parties believe that the hearing process has been conducted in an absolutely fair manner.

In order to avoid even the appearance of unfairness, the hearing officer should take extraordinary steps to make it abundantly clear that the hearing officer does not favor one party or attorney over the other. In this regard, the hearing officer should never call one lawyer or party by their first name and the other by their last name. The hearing officer should never go to lunch with one party or lawyer. (If there is a court reporter at the hearing, she is the only person you can eat with.)

The hearing officer also should avoid all types of ex parte communications, i.e., communications with one attorney or party without the other side being present. Obviously, the substance of a case should never be discussed unless all parties and their lawyers are

present. Even communications as to non-substantive matters, however, should be avoided unless both sides are present. The danger of ex parte communications is that the party who is not present may well fear that the merits of the case were discussed in a private meeting or conversation by the opposing party with the hearing officer. See, Chester Community Charter Sch v Hardy ex rel Philadelphia Newspaper 38 A.3d 1079 (Comm Ct Penna 2012). Such a fear in itself could vitiate the appearance of impartiality, thereby making it impossible for the party to believe that the hearing will be fairly conducted and the decision will achieve a fair result.

Avoiding the appearance of partiality or unfairness also requires the hearing officer to make appropriate disclosures of prior relationships with the parties and their counsel at the prehearing conference or some other early interaction with the parties. I disclose all past interactions with the lawyers and parties. Although this at times may seem extreme or even absurd, I find that disclosure of even brief interactions or encounters tends to make the parties, especially pro se parties, feel more confident that the hearing process will be fair. When a hearing officer is in doubt as to whether a disclosure should be made, a good rule of thumb is to make the disclosure.

The appearance of impartiality and fairness also requires that the hearing officer maintain strict confidentiality. No matter how juicy the facts of a hearing may have been, they are not a proper topic of conversation at a cocktail party. The hearing officer's decision should avoid reference to personally identifiable information to the extent possible. Office staff, especially typists, should be made aware of, and periodically reminded of, the requirement that they also keep all matters related to a due process proceeding strictly confidential.

Where a hearing officer had an extensive ex parte communication about the substance of the case with the lawyer and party of one side only, the reviewing court reversed the decision. Madden v. U. S. Assoc. 844 S.W.2d 374, 377, 40 Ark. App. 143 (Ark.Ct.App. 12/16/92). The court criticized HO as leaving the appearance of bias where HO denied a continuance when the driver's lawyer did not appear while granting a continuance when the police officer did not appear. Alvarez v. State of Alaska (Alaksa S.Ct. 8/13/2010).

The fact that a contract hearing officer made a substantial amount of money as a hearing officer ($175,000 over 2007-2009) was not enough to overcome the presumption of integrity where the decision was supported by substantial evidence and the proceedings were not arbitrary or capricious. Buchanan v. City of Minneapolis, No A10-1695; 2011 Minn. App. (Minn. Ct App July 25, 2011).

My favorite anecdote about the appearance of unfairness involves the hearing officer who was asked by a party at a break in the hearing whether he had change for a five dollar bill. The hearing officer hands five ones to the party who pockets them and hands the hearing officer the $5 bill. Just then the other party comes around the corner and says to the hearing officer, "I don't really mind you selling my case, but I think that you should have held out for more than five bucks."

The appearance of fairness is obviously not a shortcut to avoid the cardinal requirement that the hearing truly be conducted fairly. The appearance of fairness is not meant to be a disguise for an unfair proceeding. Rather, the requirement of the appearance of fairness is an additional requirement. The hearing must itself have been fair, and the parties must have no reasonable basis to believe otherwise. The two rules work in tandem. By paying attention to both, the hearing officer follows the mandate of the due process clause.

Rule Number Three: Be Firm, Decisive and Prompt

By setting a firm but fair tone for the hearing, the hearing officer ensures that the hearing will run smoothly. In addition, the hearing officer establishes for all present that the hearing will be fair. The firm tone and the fair tone should both be apparent from the prehearing conference or the first contact with the counsel/parties.

In ruling on objections and motions that are raised during the hearing, be decisive. Allow each party to address an objection briefly, unless you direct otherwise, on a particular objection you want help with, and then rule firmly. Do not permit attorneys or pro se parties to

argue with you after you have ruled. If difficult lawyers contest your rulings after you have made them, simply state "Your comments are noted for the record. Please proceed."

Being decisive in making rulings is a continuation of the firm, yet fair, tone that the hearing officer should set in the prehearing conference or at the first contact with the parties. A firm tone denotes a confident attitude, a secure belief by the hearing officer that she is in control. The firm tone should not be abusive or intimidating. To the contrary, the firm tone is the best indicator that the hearing will be conducted professionally with each party getting the opportunity to fairly present their evidence.

Some attorneys will ask you to "take it for what it's worth," after you have excluded "it." Never do this. If the proponent of an exhibit cannot explain clearly how it is relevant, it's not worth anything. In any event, it is important to be decisive in ruling and to stick by your rulings once you have ruled. Otherwise overly aggressive lawyers will consume an unreasonable amount of hearing time contesting your rulings or trying to make you doubt yourself.

A hearing officer is not required to explain her rulings on objections or motions (unless, of course, your state has a rule, regulation, policy, or manual to the contrary.) Unlike your decision, which is required to have findings of fact and conclusions of law and should include an explanation of your reasoning, your rulings during the hearing require no explanation. Of course, if explaining a ruling, (particularly early on when the lawyers are unsure of the rules of evidence) will help the lawyers or parties understand how to proceed for the remainder of the hearing, then by all means explain the ruling.

Being prompt requires timely rulings on objections and motions. It is far easier for everybody involved if the hearing officer rules on objections and motions when they are raised. Being prompt also involves constantly keeping track of any deadlines for the hearing or for your decision. Particularly before ruling on any motion for a continuance that occurs during a due process hearing, the hearing officer must take into account any deadlines.

Generally ruling upon motions for a continuance are within the sound discretion of the administrative hearing officer subject to any statutory deadlines and agency rules. . JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (**SD WVa** 11/4/9), aff'd on other grounds, JD by Davis v. Kanawha County Bd of Educ 54 IDELR 184 (**4th Cir.** 4/27/10) NB: **UNPUBLISHED;** Student v Preston Bd of Educ, et al (JJ)(SEA CT 7/9/14) After the first day of dph, parent requested a continuance for unspecified medical reasons without a corresponding motion to extend the decision deadline. HO refused to grant continuance and dismissed dph.

Rule Number Four: Control the Record

A hearing officer should remember at all times that a verbatim or electronic record is being made of everything that is said during a hearing. Try to visualize exactly how what you are saying will look in black and white in the transcript. Even innocent statements can sometimes seem sinister, or worse be construed to be evidence of bias, when they appear in the transcript.

As the hearing officer, you alone control the record. If there is a court reporter, you should make it clear that you determine when to go "off the record." The parties can ask to go off the record, but unless you say so, everything said gets recorded.

Controlling the record also requires that the hearing officer take appropriate actions to ensure that the parties and reviewing courts can make sense of what happened during the hearing. For example, when more than one attorney or witness talks at the same time, the record will not include all that was said. Prohibit those who don't have the floor from interrupting or from talking over other participants.

Some witnesses have a tendency to nod their heads. Remind them that inaudible responses do not get recorded. Similarly, the hearing officer should clarify what is meant by the similar sounding "uh huh" and "nuh uh." When a witness speaks so fast or so low that the record will be jeopardized, ask the witness to slow down, speak

up, etc. It is also important to have witnesses clarify what acronyms and abbreviations mean.

When a witness makes a gesture or other nonverbal response, describe (or ask someone else to describe) for the record what the witness did. A convenient way to begin such a description involves the words "let the record reflect that …"

Because testimony must generally be sworn, make sure that all witnesses take an oath or affirmation to tell the truth. It is also important to administer appropriate oaths to any translator or interpreter who participates in a hearing. Translators and interpreters should be reminded that they are required to state the testimony verbatim, ie, without any summaries or editorials.

Another key factor in controlling the record involves letting attorneys know early on that they are required to address any comments they may have to the hearing officer. Do not permit lawyers under any circumstances to argue with each other. Unless questioning a witness, they talk to you, only to you and only when you so direct.

DZ v. Bethelehem Area Sch Dist 54 IDELR 323 (Penna Commonwealth Ct 7/27/10) Court rejected parent argument that HO improperly used a foreign language **interpreter** for all words rather than just the specific words selected by the parent. See, TR v Sch Dist of Philadelphia 69 IDELR 34 (ED Penna 11/30/16) Court refused to dismiss parent's IDEA/504/ADA claim that district-wide SD routinely failed to provide **interpretation and translation** services that EL parents required to participate meaningfully in the process;

Rule Number Five: Be in the Present

It is difficult enough to preside over a hearing if you are paying attention to what is happening in the present course of the proceedings. It is impossible to do a good job if you are obsessed with whether a ruling you made on an objection a few hours ago was

correct. Rule and move on. Period. Concentrate upon the present aspects of the hearing.

One case in which it was alleged that the hearing officer was not in the present is DB by CB v. Houston Independent Sch Dist 48 IDELR 246 (D.Tex. 9/28/7). The parent alleged that the hearing officer denied them a fair hearing by **sleeping** through the hearing. The court did not credit the allegations, however, where the hearing transcript revealed that the HO appeared to be awake while asking questions of witnesses and when ruling on objections and where the parents failed to preserve their objection by objecting to the alleged napping on the record. But NB déjà vu all over again: https://www.foxnews.com/us/texas-judge-resigns-after-reportedly-caught-sleeping-during-testimony and déjà vu rides again: (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13) Parent allegations that HO fell **asleep** during dph were not supported by the record. Court noted that HO actively participated, ruled on objections, etc. HO appropriately **interrupted** witnesses who testified as to issues not in dpc, and not listed by counsel when HO clarified the issues at the PHC. And Again: JE & CE ex rel DE v Chappaqua Central Sch Dist 68 IDELR 48 (SDNY 6/28/16) Court rejected claims that HO fell asleep during the dph where he ruled on objections and questioned witnesses, etc

Lest this begin to sound too much like a Zen manual, there is one major exception to being in the present. You should at all times during the hearing keep an eye on your decision which, of course, will be written in the not too distant future. As to all testimony and exhibits, you should at least have some idea as to how this evidence relates to your decision. Also, during the hearing, you should determine whether the evidence as presented has any gaps that will affect your decision. Would it be helpful for you to hear testimony from a witness on a particular subject? If the answer is yes, ask the parties to call or recall the witness or call the witness yourself. Would it make it easier for you to write your decision, or would the record be clarified, if a witness who is testifying answered some additional questions. If the answer is yes, ask the questions yourself (after everybody else has had a turn.) A good example of a hearing officer asking appropriate questions is Doggett v Wyoming Unemployment

Insurance Comm 2014 WY 119 (Wy S.Ct. 9/20/2014). In these situations, you need to take an active role in the hearing; it will be your name on the decision. The best way to avoid an embarrassing remand because you did not make a record of all necessary facts, is to ask the questions at the hearing in the first place. See Mr. and Mrs. R ex. rel. S. R. v. Maine Sch. Administrative Dist No. 35 40 IDELR 93 (D. Maine 2003), See, J. P. by Popson v. West Clark Community Schs. 38 IDELR 5 (S. D. Indiana 2002) (a request by a hearing officer for more evidence on a particular issue was upheld as proper and did not constitute error.)

Rule Number Six: Manage Complex Evidence

Many administrative hearings have become increasingly complex. Often there is voluminous testimony from multiple witnesses. Expert witnesses are sometimes called to testify. Documentary evidence in some cases could fill a file cabinet. Because of the complex nature of certain hearings, it is crucial that the hearing officer manage the complex evidence. It is important to manage the evidence to ensure that the parties have a fair opportunity to present their case. NY City Bd of Educ 118 LRP 50576 (SEA NY 2018) (Court ruled that ho violated parents' right to due process where HO requested security because of parents and refused father's request for medical assistance for an issue during the hearing thereby denying the parents a fair opportunity to present their evidence.)

In most administrative hearings, the hearing officer is afforded wide latitude in applying procedures; and in most agencies the formal court rules of evidence do not apply. See, Hallums v. Michelin Tire Corp. 308 **S.C.** 498, 419 S.E.2d 235, 239 (S.C. Ct. App. 1992); Genn ex rel Genn v New Haven Bd of Educ 69 IDELR 35 (D Conn 11/30/16); DZ v. Bethelehem Area Sch Dist 54 IDELR 323 (Penna Commonwealth Ct 7/27/10) Court upheld HO's evidentiary rulings over parent's challenge. Revere Local School District 76 IDELR 141(SEA OH 2019) HO properly excluded irrelevant evidence and correctly ruled on evidentiary issues. Maple Heights City Sch Dist Bd of Educ v Ac ex rel AW 68 IDELR 5 (ND Ohio 6/27/16) HO is given **wide latitude** in ruling on objections and in **conducting the hearing**. HO has the power to bifurcate an IDEA hearing; Jason O & Jill O ex

rel Jacob O v Manhattan Sch Dist #114 67 IDELR 142 (ND Ill 3/29/16) HO did not err by **refusing** to permit an **offer of proof** for excluded evidence; by refusing to permit mom to give **"rebuttal" testimony** that was not relevant; or by excluding parent's advocate from dph room until after testifying; YA ex rel SG v NYC Dept of Educ 69 IDELR 76 (SDNY 9/21/16) Court rejected a party's claims of ho bias, finding that a **tally of objections sustained** for each party was not evidence of bias. Davis v. City of Chi., 481 F.Supp.3d 757 (N.D. Ill. 2020) Hearing procedures requiring in-person attendance were constitutional. Sw. Org. Project v. Albuquerque-Bernalillo Cnty. Air Quality Control Bd., 482 P.3d 1273 (N.M. App. 2020) HO properly applied agency's rules of evidence.

It is very helpful if, during the hearing, the hearing officer maintains a list of witnesses, an exhibit log and takes other notes, especially charts concerning which pieces of evidence either support or negate each element of each issue in the case. The witness list should include the correct spelling of the name of every witness and a notation as to the date and time (or at least am vs. pm) that the testimony began. Witness notes should also include credibility factors for each witness as he or she testifies.

An exhibit log should specify each exhibit number (or letter) and a brief description of each exhibit. A code should be used to designate whether the exhibit was offered and/or admitted into evidence. Whenever an offered exhibit is not admitted into evidence, the hearing officer should make a notation as to the reason why the exhibit was excluded. Parties should be directed to submit exhibits in a three ring binder and to bring copies for the hearing officer, their opponent and the witness. Once the hearing is over, the copy for the witness can be given to the court reporter.

The hearing officer should also keep a "scorecard," which will make writing the decision much easier. By "scorecard," I mean that there should be a set of notes that specifies which pieces of testimony or exhibits concern each element of each issue in the case. This can either be included in the hearing officer's contemporaneous hearing notes or on a separate pad of paper. Using multiple colors of ink to code different types of notes is a useful tool. For example, black ink could signify regular notes, blue ink could be used to note possible

areas where the hearing officer might want to ask a question, and red ink could designate important testimony or exhibits to be highlighted.

The hearing officer manages the procedures for the taking of evidence. For example, a party does not have the right to call witnesses to testify in a particular order. Calvin C. Desmond v. Administrative Director of the Courts, State of Hawaii 982 P.2d 346, 91 Haw. 212 (Haw.Ct.App. 5/12/98). Hearing Officer rulings as to relevance are generally upheld where there is no abuse of discretion. GB & DB ex rel JB v. Bridgewater-Puritan Regional Bd of Educ 52 IDELR 39 (D. NJ 2/27/9): Rammell v. Idaho Department of Agriculture 2009-ID-0602.11 (Idaho S.Ct., Docket No. 34927 6/1/9); A due process challenge to HO rulings on evidence was rejected by the Court. Erica v. New Mexico Regulation & Licensing 184 P.3d 444(New Mexico Ct App 3/31/2008). The Court held that the HO did not err in denying requests for subpoenas or in limiting testimony that was not relevant. Alvarez v. State of Alaska (Alaksa S.Ct. 8/13/2010); JDG by Gomez v. Colonial Sch Dist 55 IDELR 197 (D. Del 11/2/10); Weston ex rel CS v. Kansas City Sch Dist 57 IDELR 284 (D Missouri 11/10/11), n.2; However, where evidentiary objections are ridiculed, and ruled upon using a handmade sign with the word "overruled," the court reversed. James Haluck, et al v. RICOH Electronics, Inc, et al 60 Cal.Rptr.3d 542, 151 Cal.App.4th 994 (Cal. Rptr. 6/1/7), and in Lightning Energy, LLC v Board of Review, et al (W.Va. S.Ct. 10/2/14) Court reversed ho who declined to accept evidence that was not in accordance with prehearing instructions where the instructions were not part of the hearing record. Decision available here: http://www.courtswv.gov/supreme-court/memo-decisions/fall2014/13-1242memo.pdf

Another aspect of managing complex evidence involves keeping hearings moving. One of the big criticisms of hearings is that they take too long, thus adding to the expense and anxiety of the parties. By properly managing exhibits, a hearing officer can dramatically shorten a hearing. If the parties stipulate to the admissibility of all or at least most exhibits, the length of the hearing can be greatly reduced. If a party has the same objection to each of a group of exhibits, the hearing officer can entertain the offer of the whole group of exhibits all at the same time. See, ES & MS ex rel BS v. Katonah-Lewisboro Sch Dist 55 IDELR 130 (SD NY 9/30/10) (Ct

found that HO properly exercised his authority to move along the lengthy proceeding.) and (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13) Court ruled that it was appropriate for HO to **control the hearing process** by interrupting witness who was testifying to issues that were not identified in prehearing memo or prehearing conference.

Similarly, proper management of witness testimony by the hearing officer will also shorten the hearing. Carefully ruling on relevance objections is the best tool for keeping the hearing on track. Even in the absence of an objection, the hearing officer should not be shy about asking a lawyer where he is going with this line of questions. Encouraging stipulations of fact also shortens the hearing.

By carefully managing the complex evidence, a hearing officer runs a more fast-paced hearing, and more importantly, a fairer hearing. When the hearing is adjourned, careful management of the evidence, coupled with the parties' briefs and proposed findings of fact, also gives the hearing officer the tools necessary to write a good decision.

TM v Dist of Columbia 64 IDELR 197 (DDC 12/3/14) Court upheld HO's placing **time limits** on direct and cross examination of witnesses on the third and final day of a dph as a reasonable exercise of discretion; BS by KS & MS v Anoka Hennepin Public Schs 66 IDELR 61 (Eighth Cir 9/2/15) Eighth Circuit ruled that an IDEA HO did not abuse his considerable discretion by enforcing a nine hour **time limit** for each side to present its evidence; TM v Dist of Columbia 64 IDELR 197 (DDC 12/3/14) Court upheld HO's placing **time limits** on direct and cross examination of witnesses on the third and final day of a dph as a reasonable exercise of discretion; BL ex rel BM v Pine Plains Central Sch Dist 61 IDELR 275 (SD NY 9/6/13) Court dismissed parent appeal where parent was represented by counsel who was experienced and familiar with state rules imposing 20 **page limit** on appeal pleading but exceeded the limit anyway; Dunn-Fischer ex rel ADF v Dist Sch Bd of Collier County 61 IDELR 195 (MD Fla 7/23/13) The court dismissed the bulk of the parents 116 page third amended complaint noting that it was confusing, disjointed and at times repetitious; Bohn ex rel Cook v Cedar Rapids

Community Sch Dist 69 IDELR 8 (ND Iowa 11/18/16)Court approved 50 page limit imposed by HO.

The new technologies raise certain evidentiary issues for hearing officers. For example in one decision a hearing officer was affirmed when he ruled that the monitoring of a GPS device inserted by the Inspector General in the state vehicle of an employee suspected of taking unauthorized absences and of falsifying time records was not an unlawful search and seizure requiring the exclusion of the GPS records at the hearing. Matter of Cunningham v. N.Y. State Dept of Labor 2011 NY Slip Op 08529, 89 AD3d 1347 (NY Ct App. Third Dept 2012).

Note: In some cases the court will reverse the HO evidentiary ruling: Park Hill Sch Dist v. Dass ex rel DD & KD 655 F.3d 762, 57 IDELR 121 (8th Cir. 9/9/11) The Eighth Circuit held as a matter of law that the HO Panel erred as a matter of law by failing to admit into evidence a revised transition plan offered by the school district during the resolution session. AG v Dist of Columbia 794 F.Supp.2d 133, 57 IDELR 9 (DDC 7/1/11) Court reversed HO who ruled that evidence of billing statements for private counseling services where parent failed to offer the exhibit during parent's case. HO gave preference to form and technicality over substance. SF & YD ex rel GFD v. New York City Dept of Educ 57 IDELR 287 (SDNY 11/9/11) Court found that HO analysis was not entitled to deference where he did not carefully consider the evidence (3/4 of a page double spaced in decision), but did give deference to SRO who carefully considered the evidence (nearly 3 single spaced pages); Even where the formal rules of evidence are not applied, however, due process considerations require that the hearing officer apply evidentiary standards in a **fair** and even-handed manner to both parties. Daniel Daily v City of Sioux Falls 2011 S.D. 48 (SCt SD August 24, 2011); Dist of Columbia v Walker 65 IDELR 271 (DDC 6/12/15) Court found that HO **erred** by considering **irrelevant evidence**-

A U. S. Supreme Court decision involves evidence-related issues. In Schaffer v. Weast 546 U.S. 49, 126 S.Ct. 528, 44 IDELR

150 (11/14/5), the Supreme Court held that the burden of proof in an administrative hearing is generally upon the party filing the challenge or appeal. The Court noted that the term "burden of proof" is "one of the slipperiest in the family of legal terms." The decision attributes the confusion to the failure to distinguish between two distinct legal concepts which are unfortunately both referred to loosely as "burden of proof." The "burden of persuasion" involves which party loses if the evidence is closely balanced. In any civil legal proceeding, if the evidence for both sides is equal, the party with the burden of persuasion loses. The "burden of production," on the other hand, concerns which party bears the responsibility of coming forward with evidence at various points in the legal proceeding. The burden of production concerns the times at which a party must present its evidence.

The Weast decision involves only the burden of persuasion. The statute was silent as to burden of persuasion. Normally in administrative hearings the party making the claim (the plaintiff) bears the burden of persuasion. Counsel for the parents argued that the "default" rule should not apply here citing the statutory language (e.g., "due process" hearing) and the history of the law. The parents also argued that an exception to the default rule was applicable; in some cases courts recognize an exception where the relevant facts are peculiarly within the knowledge of the adversary. The Court rejected these arguments because the IDEA's procedural safeguards for parents level the playing field. The Court ruled that the party seeking relief in an IDEA due process hearing has the burden of persuasion.

The Court exempted from its decision, however, the burden of persuasion applicable in those states that have laws or regulations placing the burden upon the respondent.

Rule Number Seven: Make a Complete Record

NOTE: In the recent special education case before the U. S. Supreme Court, *Fry v Napoleon Community Schools* Docket No. 15-497, 69 IDELR 116, 580 U. S. ____, 137 S.Ct. 743 (2/22/2017),

three powerful organizations (NSBA, NASDSE, AASA and others) filed an amicus brief, and the brief **a previous version of this outline** concerning the duty and power of a hearing officer to make a complete record. Check out footnote 18 on page 24 for the reference to my outline and the complete record discussion. You can read the amicus brief here.

Particularly where a party is not represented by counsel (such parties are sometimes referred to as "pro se" parties), an administrative hearing officer has a duty to develop a complete record fully and fairly. Thompson v. Schweiker 665 F.2d 936 (9th Cir 1982); Sun v. Colvin, 793 F.3d 502, 509 (5th Cir. 2015); Reid v. Comm'r of Soc. Sec. Admin. (M.D. La. 2021)Baker v Employment Appeal Board 551 N.W.2d 646 (Iowa Ct App 1996). See, Board of Education of the Victor Central School District 27 IDELR 1159 (SEA NY 1998); Salisbury Township School District 26 IDELR 919 (SEA PA 1997); LBDE Public Schs v Massachusetts Bureau of Special Education Appeals 59 IDELR 284 (D Mass 9/27/12) (HO develops the administrative record which a court needs to review an appealed decision.); FL by AL & RL v NY City Bd of Educ 938 F.Supp.2d 417, 61 IDELR 45 (ED NY 4/12/13) Court remanded to HO because the administrative dph record was unacceptably sparse, Student's disability was severe and court needed more information regarding the physical environment in the school; Hiawatha Sch Dist # 426 (JS) 58 IDELR 269 (SEA Ill 2/27/12) HO has a duty to make a complete record (including the **power to ask questions** of Ws).

Related to this is the duty of the hearing officer to ensure that each party has the opportunity to present its case at the hearing. Bd. Of Educ. Of the City School District of the City of New York 28 IDELR 263 (SEA NY 1998); Wimbler Area Sch. Dist. 36 IDELR 53 (SEA PA 2001); Cantwell v. City of Boise 2008-ID-R0718.001 (Id. S.Ct. 6/17/8) (Due process requires that the parties be permitted to give their side of the story.); *Walker v Dept of Housing* 29 A.3d 293 (Ct App Md 2011) Hearing officer must develop a record; Butler v Astrue 926 F.Supp.2d 466 (ND NY 2013) (hearing officer has an affirmative duty to develop the record); District of Columbia Public Schs (JS) 112 LRP 47415 (SEA DC 6/28/12) HO ruled that in IDEA cases, HO has the power to **develop** the administrative record, including the ability to depart from the adversary process so long as

the HO remains impartial; Hiawatha Sch Dist # 426 (JS) 58 IDELR 269 (SEA Ill 2/27/12) HO has a duty to make a complete record (including the power to ask questions of Ws) and to ensure a fair process. But see, Wafford v. Industrial Claim Appeals Office 907 P.2d 741 (Colo.Ct.App. 10/26/95) (HO only required to conduct hearing so that either party has an opportunity to develop fully and fairly his or her own record.)

The duty to make a complete record is rooted in the principle of fairness; each party should have an opportunity to present its evidence. See section 615 (h) of the IDEA, and Schaffer v. Weast 546 U.S. 49, 126 S.Ct. 528, 44 IDELR 150 (11/14/5). It is critical in making a complete record, however, that the hearing officer remain impartial. Making a complete record does **not** mean that the hearing officer becomes an advocate for a party. Walking the fence between compiling a complete record and advocacy on behalf of a party is a difficult, but very necessary, task.

When a pro se party is presenting his case, the hearing officer should ask enough questions to ensure that the party has testified to all relevant areas that he wants to provide testimony on. The less sophisticated and educated the pro se party, the more questions that the hearing officer may need to ask. It is a good idea to begin any such line of questions with a statement like "you understand Ms. X that I am neutral and cannot act as your lawyer in this case…" It is generally advisable to permit a pro se party to begin testifying in narrative form, rather that the traditional question and answer method, prior to cross-examination and the hearing officer's questions. If the testimony of a pro se party bogs down, the hearing officer should intervene and ask a few (or more) questions designed to elicit relevant information. Many courts have expressly approved of the hearing officer's right to ask questions of witnesses. Discipline of Haskell 962 P.2d 813, 136 Wash.2d 300 (Wash. 9/10/98) (also approves HO ordering W to retrieve document and making it an exhibit.); DM & JM ex rel MM v Seattle Sch Dist 68 IDELR 165 (WD Wash 9/9/16) approves of HO's questioning of witnesses; Comito v. Police Bd of the City of Chicago 317 Ill.App.3d 677, 739 N.E.2d 942 (Ill.Ct.App. 11/1/00); SA by CA v. Exeter Unified Sch Dist 110 LRP 69145 (ED Calif 11/24/10) (HO may ask questions), See also, Doggett v Wyoming Unemployment Insurance Comm 2014 WY 119 (Wy S.Ct.

9/20/2014); (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13) (Court ruled that it was appropriate for HO to control the hearing process by interrupting witness who was testifying to issues that were not identified in prehearing memo or prehearing conference.) But see, Dept of Highway safety & Motor Vehicles v. Pitts 815 So.2d 738 (Fla.Ct.App. 5/2/02)(HO may ask questions to clarify the record evidence but may not abandon the position of neutrality and elicit new evidence which the parties themselves failed to submit.) But note that **even pro se litigants** are required to inform themselves of procedural rules and comply with them RB ex rel AB Dept of Educ City of NY 59 IDELR 139 (SDNY 7/18/12); WV by NV v Encinitas Union Sch Dist 59 IDELR 289 (SD Calif 9/25/12); Card ex rel JD v Citrus County Sch Bd 65 IDELR 3 (MD Fla 2/12/15); Manning ex rel RM & ES v Missouri Dept of Educ 68 IDELR 243 (ED Missouri 10/31/16)

The Hearing Officer should be careful not to step over the line and become an advocate for a party in the process of establishing a complete record Shaw v. Marques, et al RI Super. 2011 (R.I. Superior Court April 4, 2011).

Another technique for developing a complete record is asking the parties before you adjourn the hearing whether they have any more evidence and whether they have anything else to say. This technique is particularly effective for pro se parties who may be unsure as to when they were supposed to say or do something during the course of a hearing.

To a lesser extent, the duty to ensure a complete record also applies to a situation where a party has a lawyer who is not conversant with the area of law involved in the case. Many hearing officers believe, however, that when a party is represented by a lawyer, no matter how bad, the hearing officer's duty to ensure a complete record is inapplicable. In these situations, I believe that the duty does apply, although it is greatly reduced by the presence of counsel. The hearing officer should take minimal steps to ensure a complete record in these cases, such as requests to the lawyer as to whether certain topics will be covered. The hearing officer should again remember that the duty does not make the hearing officer an advocate for the party with a bad lawyer.

A corollary to the duty to make a complete record is the requirement that parties be permitted to fairly present their evidence. It was a flagrant disregard of a party's due process rights for a hearing officer to prevent any evidence or argument on an issue properly presented. Eastwood Nursing and Rehabilitation Center v. Department of Public Welfare 910 A.2d 134 (PA Commonwealth Ct. 11/3/06).

Also related to the duty to make a complete record is the requirement that a hearing officer consider only evidence in the record when making his decision. Ohio Bell Tel. Co. v. Pub. Util. Comn. 301 U.S. 292 (1937); United States v. Abilene & S. R. Co. 265 U.S. 274, 288-289 (1924). For example, in Bowles v. DC Dept of Empl Svcs 121 A.3d 1264 (DC Ct App 8/16/15) the court found that the HO erred by considering evidence outside the record, but ruled the error harmless where there was other evidence to sustain the decision.

A generally recognized exception to the record only evidence concept involves **official notice**. In general terms a hearing officer may usually take official notice of statutes, regulations, court decisions and other well-established and readily ascertainable facts, such as the calendar or the alphabet. Where a hearing officer intends to take official notice, she should notify the parties of her intention, provide them with an opportunity to object on the record and allow them the opportunity to present evidence upon the point if they desire to do so. JW by JEW & JAW v. Fresno Unified Sch Dist 611 F.Supp.2d 1097, 52 IDELR 194 (E.D. Calif 4/27/9), aff'd 55 IDELR 153; Attleboro Public Schs 109 LRP 74987 (SEA Mass 11/18/9) (HO used Mapquest to take official notice of the distance between two elementary schools at issue.); CS ex rel MS v NYC Dept of Educ 67 IDELR 87 (SDNY 2/29/16) (HO did not err by taking official notice of information on SD website re SpEd school serves students with severe disabilities. Although not evidence in the record, HO merely used the website to confirm his findings of fact and credibility determination.)

Rule Number Eight: Communicate Clearly and Calmly

Because the hearing officer is in charge of the hearing, it is critical that the hearing officer communicate clearly during the hearing. It is important that the attorneys and parties and witnesses and court reporters in the hearing understand the hearing officers' directions, rulings and other statements. Do not use legalese or unnecessarily large words or foreign phrases. The due process hearing is not an opportunity for the hearing officer to show off. Use understandable language throughout the hearing.

Closely related to the need to communicate clearly is the need to communicate calmly. Do not lose your cool. Yelling at lawyers or other participants is a bad way to conduct a hearing. Angry tirades also negate the demeanor necessary to maintain a fair hearing. The quickest way to have a reviewing court reverse you is to blow your stack during the hearing. A good example of this rule is the case of Knight ex rel JKN v. Washington Sch Dist 51 IDELR 209 (E.D. Mo. 12/22/8) The HO panel chair dismissed 4 of 5 issues, and was then asked by parent attorney to recuse himself. The chair then had a heated exchange with the attorney on the record and dismissed the fifth issue in retaliation for the motion to recuse. The court reversed noting that especially dismissal of the fifth claim was improper because it denied parents an opportunity to present evidence, as well as a fair hearing on the issue.

If you feel that you could be near the boiling point, take a recess. The hearing officer controls when breaks occur and should take advantage of it in these situations. Take your time to ensure that you have cooled down before resuming the hearing. Maintaining a calmness is necessary for the professional demeanor that a hearing officer must possess.

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