



Proposed Special Education Due Process Hearing Guidelines
Jointly Issued by the Office of Administrative Law and the New Jersey Department of Education
Issued: January 17, 2020

Public Comment Period Extended to May 1, 2020

Background

Under the federal Individuals with Disabilities Education Act (IDEA), states are required to operate a special education dispute resolution system that provides procedural protections for students with disabilities and their families when it comes to a student's education placement, programs, and/or services. New Jersey's system involves two Executive branch agencies: The New Jersey Department of Education (NJDOE) and Administrative Law Judges (ALJs) employed by the Office of Administrative Law (OAL).

Disputes are filed with the NJDOE through the Office of Special Education Policy and Dispute Resolution (SPDR). Due process hearings are formal proceedings conducted by ALJs to determine whether a school district provided a free and appropriate public education (FAPE) to a student with disability. A due process hearing concludes with a written decision issued by an ALJ, which can be appealed in state or federal court. By law, due process hearing decisions must be issued within 45 calendar days.

New Jersey remains a high-volume state when it comes to special education disputes. The average number of dispute resolution filings over the last three state fiscal years is 1,752. In state fiscal year 2019, 1,862 special education disputes were filed with the NJDOE.

The high number of filings, combined with an insufficient number of ALJs available and properly trained to preside over due process hearings, has resulted in significant delays in conducting hearings. Additionally, because parties regularly seek and are granted adjournments thereby extending the hearing timelines, it is not uncommon for due process hearings to last an entire school year, if not longer.

Following numerous complaints from parents, attorneys, and school officials, the United States Department of Education's Office of Special Education Programs (US OSEP) conducted an on-site monitoring visit in September 2018. On May 6, 2019, the US OSEP issued its findings, which require the NJDOE and the OAL to undergo significant corrective action activities concerning the conduct of due process hearings.

As a result of the US OSEP findings of noncompliance, the NJDOE and OAL have worked collaboratively to identify areas to ensure due process hearings are conducted in compliance with the timelines set forth in the IDEA. The NJDOE and OAL have executed a revised Memorandum of Agreement (MOA) that provides the OAL with additional funding to:

- Designate additional ALJs to preside over special education due process hearings;
- the position of Special Education Assignment Judge to ensure special education due process hearings are conducted within the required timelines;
- Identify and obtain training and professional development programs for ALJs; and
- Develop guidelines governing the conduct of special education due process hearings.

The proposed guidelines are provided below. **Public comments are invited and encouraged. The public comment period has been extended to May 1, 2020.** Comments and feedback may be submitted by email to dueprocessfeedback@doe.nj.gov.

Uniform Prehearing Guidelines

Purpose

To increase the efficiency and effectiveness of special education due process hearings, and to promote timeliness in the disposition of special education disputes as required by law, effective immediately, Administrative Law Judges, in the exercise of their discretion under the Individuals with Disabilities Education Act, 20 U.S.C. 1415, and in keeping with the procedural safeguards set forth in N.J.A.C. 6A:14-2.7, among other applicable laws, will implement the following procedures in all special education due process hearings.

Prehearing Matters

1. Hearing Dates

To comply with statutory and regulatory requirements, the New Jersey Department of Education (NJDOE), through the Office of Special Education Policy and Dispute Resolution (SPDR), will schedule the first hearing date upon transmittal of the case to the Office of Administrative Law (OAL). The first hearing date will function as a settlement conference, which will allow the parties to begin or continue settlement discussions. The Administrative Law Judge (ALJ) assigned to preside over the first hearing, *i.e.*, the settlement conference, will assist the parties during settlement discussions. ALJs assigned to preside over the settlement conferences will be highly and regularly trained in the areas of special education, negotiation, and dispute resolution.

At the conclusion of the settlement conference, the case will be either marked as settled (pending receipt of a formal, signed settlement agreement, approved by the respondent board of education by resolution if necessary, in which case the ALJ assigned to the settlement conference will retain administrative responsibility through entry of a Final Decision) or prepared for a hearing.

Preparation for a hearing at the settlement conference shall include a discussion of all the matters listed in the regulation for preparing a prehearing order, N.J.A.C. 1:1-13.2, which shall include but not be limited to:

- (i) a discussion of the issues to be resolved at the hearing,
- (ii) a discussion of the dates for hearing, and
- (iii) a discussion of the identity of the witnesses the parties expect to call at the hearing.
(If the parties do not know the identity of the witnesses whom they expect to call at the hearing, they must at least be prepared to provide an estimate of the number of witnesses whom they expect to call at the hearing.)

The ALJ who presides over the settlement conference will immediately relay the information discussed above to the ALJ assigned to the case. Within ten days, the ALJ assigned to the case will hold a prehearing conference and issue a prehearing order incorporating such information. Should either party deem the prehearing order to be inaccurate or to require amendment based on developments subsequent to the settlement conference, such party may request another prehearing conference with the ALJ assigned to the case to seek an amended prehearing order.

Should any party be unable to participate in the settlement conference, the initial prehearing conference, or any other hearing date, that party shall immediately notify the ALJ assigned to the case, stating the exact reason for the request for the adjournment. The party requesting the adjournment shall seek consent of the other party before such notification. Whether or not the consent of the other party is obtained, the ALJ determines the grant or denial of any such request for an adjournment. Since the purpose of the timelines set forth by the IDEA is to ensure the timely resolution of disputes relating to the identification, evaluation, placement, and/or program of a student with a disability, the ALJ will grant requests for adjournments only in extraordinary circumstances and only upon agreement for a prompt rescheduled date of the settlement conference, initial prehearing conference, or any other hearing date.

2. Scope of the Claim

If there is a dispute over the timeliness of the filing of the petition or the scope of the claims, the ALJ may request an offer of proof, take evidence, or both, regarding the date on which the petitioner knew or should have known of the basis for his or her claims.

3. Decision Due Dates

A request for an adjournment of a hearing date is different from a request for an extension of the timeline for the due date of the decision. The 45-day deadline for the due date of the decision begins with the conclusion of the resolution period (when the case is transmitted from SPDR to OAL), but it may be extended due to the grant of adjournments, the scheduling of hearing dates, the submission of closing briefs, or other reasons. In all such instances, a party seeking an extension of the due date of the decision must make a written request to the ALJ assigned to the case. If the ALJ grants such a request, the ALJ shall set the new due date in writing at the time of the ruling.

4. Expedited Hearings

Expedited due process hearings are available for disputes regarding the placement of a student with a disability resulting from a disciplinary action or when a local educational agency (LEA) believes that

maintaining the current placement of the child is substantially likely to result in injury to the child or others. Those due process hearings must occur within 20 school days of the date the hearing is requested, and the ALJ must issue a final written decision within 10 school days after the hearing. As a result, requests to adjourn an expedited due process hearing will not be granted, and all decisions resulting from expedited due process hearings will be issued within the above timeframe.

Exhibits

5. Notice for Disclosure of Witnesses and Exhibits

So that the parties have the entire scope of evidence before a hearing begins, parties shall disclose all potential witnesses and exhibits that may be used during the entire proceeding as soon as possible but no less than five business days before the first actual hearing date (*excluding the hearing date used as a settlement conference*) or no less than two business days before an expedited hearing.

After the hearing begins, if the parties wish to admit evidence that was not previously disclosed, the ALJ retains the discretion to permit its use in the hearing, but only after strict offers of proof regarding the materiality and relevance of the evidence, the reason it was not discovered or disclosed sooner, and the absence of prejudice to the adverse party. In all instances, the adverse party shall be given an opportunity to examine the evidence in advance of any ruling.

This disclosure requirement does not obviate the requirement at the settlement conference to identify or at least estimate the number of witnesses whom the parties expect to call at the hearing; nor does it obviate the requirement discussed below to eliminate duplicative exhibits and designate joint exhibits.

6. Joint Exhibits

Eliminating duplicative exhibits creates a much clearer and more concise hearing record.

Accordingly, the parties should confer before the hearing and designate one set of exhibits of record—including, but not limited to:

- (a) permissions to evaluate or reevaluate;
- (b) any expert reports;
- (c) classroom assessments, observations, and reports;
- (d) invitations to any meeting;
- (e) IEPs/IFSPs/Section 504 plans; and
- (f) prior written notices.

These documents or any other documents may be marked as an exhibit of either party or as a joint exhibit, and the parties are encouraged to confer and designate a single copy of any other document that may be duplicative to serve as the document of record.

7. Exchange of Exhibits

With respect to any exhibits not agreed upon as joint exhibits, the parties shall exchange a complete set of their respective exhibits at or before the first actual hearing date, and provide a complete set of their respective exhibits, as well as any agreed-upon joint exhibits, to the ALJ on the first hearing date, except

for expert reports, which shall be submitted to the ALJ at least five days in advance of the hearing for review in preparation for the hearing, unless the ALJ requests otherwise.

Hearings

8. Presentation of Evidence

Under N.J.S.A. 18A:46-1.1, the school district bears the burden of proof, *i.e.*, the burden of persuasion and the burden of production. This statutory provision notwithstanding, the ALJ may issue an order adjusting the presentation of evidence to accommodate the needs of the parties and to expedite the hearing. Toward this end, LEAs are encouraged to limit the number of witnesses they call at a hearing. For example, not every member of the child study team needs to testify. Typically, one or two members of the Child Study Team will suffice. The intent is to shift the burden of production as early as possible with the proviso that LEAs may call or recall witnesses on rebuttal.

9. Reports as Evidence

Any evaluation report, re-evaluation report, independent report, or other report, which is offered as an exhibit, shall speak for itself and serve as direct testimony of its author as to the *substantive contents of the report*. Direct examination of the author may be permitted on matters that are important to establishing its evidentiary weight or relevance or to fostering a better understanding of the report. The author shall not repeat the substantive contents of the report. Upon admission of the report and direct examination of the author, the opposing party may cross-examine the author. Re-direct examination will be permitted.

In no instance shall the ALJ admit into evidence an expert report addressing the ultimate issue or issues to be decided unless the author of such report is produced to testify in support of such report. The parties shall have sixty minutes for the direct examination of each witness and sixty minutes for the cross-examination of each witness. The sixty-minute time periods include the re-direct examination and re-cross examination of each witness. Any sixty-minute time-period may be enlarged or extended for good cause shown at the discretion of ALJ.

10. Number of Hearing Dates

The timely resolution of due process hearings is not only required by the law but is also in the best interest of all stakeholders. Thus, absent strong justification, hearings will be concluded within two full days, with consecutive days whenever feasible. Toward this end, LEAs are required to assure the availability of their witnesses during the summer months when school is not in session.

11. Notice of Settlement

As soon as the parties have settled the case, the party who filed the petition shall immediately notify the ALJ assigned to the case that the case has settled.