

To: Superintendents and Principals

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Subject: Due process hearings during COVID-19

Parents, students, and schools have the right to, and expectation of, timely hearings to resolve disputes concerning the provision of a free appropriate public education (FAPE) to students with disabilities. Due to the uncertainty of school building closures and re-entry, requirements for social distancing, and concerns for the health and safety of all participants in due process hearings, conducting hearings in person may not always be possible. The Indiana Department of Education (IDOE) and independent hearing officers (IHOs) must ensure that virtual or distance options are available to the parties, while also ensuring that the due process rights of the parties are recognized and honored. The parties to a hearing should contact the assigned IHO if there are any questions.

General Considerations:

- ❖ The health and safety of all parties and participants should be the first priority.
- ❖ No individual may be forced to attend in-person hearing sessions if in-person attendance poses a health or safety risk to the individual, as determined by the individual or state and/or local health officials.
- ❖ During times of school building closures, whether by order of the Governor or by order of the State or County health department, there may be no venue where in-person hearings can be conducted.
- ❖ During school building closures, school personnel may be unable to access all required records to prepare for or participate in a hearing.
- ❖ During school closures, parents may be unable to adequately prepare for a hearing.
- ❖ The requirements of the Individuals with Disabilities Education Act (IDEA), 20 USC §§1400, *et seq.*, 34 CFR Part 300, and Article 7 (511 IAC 7) have not been suspended or waived at this time.
- ❖ The parties are encouraged to take full advantage of the resolution meeting to resolve the issues in the hearing. Mediation is also an available option.

- ❖ An IHO *may* grant a specific extension of time at the request of either party. Absent a request to extend the timelines, the IHO and parties must comply with the timelines in the IDEA and Art. 7.

All parties and their attorneys should work together with the IHO in a collaborative and collegial way to determine how to proceed during these extraordinary times. IDOE does not make scheduling decisions, nor does it determine whether a hearing must, or should, be held in person or virtually. IDOE does not manage or provide directives to the IHO in scheduling hearings. These matters need to be addressed to the IHO. A request for an extension of time needs to be filed with the IHO.

In-person Hearing or Virtual:

- ❖ An in-person hearing should always be the first consideration if schools are open and the hearing would be permitted under any applicable orders of the Governor or State or County health departments.
 - If an in-person hearing would otherwise be permitted, but an individual witness cannot participate in-person due to individual health concerns, accommodations must be made to obtain the witness' testimony through other means (telephonically, virtually, deposition, etc.)
 - If an in-person hearing would pose a risk to a party, consider remote or virtual participation of that party.
 - If an in-person hearing would pose a risk to a party's attorney or representative, or the IHO, consider remote or virtual participation of that individual, or a remote or virtual hearing.
- ❖ If an in-person hearing cannot be held due to orders of the Governor or State or County health departments, then in order for the hearing to proceed, it must be conducted virtually. The IHO must ensure the due process rights of all parties to the hearing.
- ❖ While an IHO may grant a specific extension of time at the request of either party, this should not result in an indefinite or indeterminate continuance of the hearing. Typically, after the first 30 day extension of time requested by a party, the IHO should require a party to provide a legitimate reason for the extension of time. While granting an extension of time is within the sound discretion of the IHO, if the reasons for the request are related to conducting a virtual hearing as opposed to in-person, the IHO's considerations should include:

- The reason for the request, and whether or how it can be accommodated, such as:
 - A party or witness lacks internet connection.
 - A *pro se* party may lack the capability to adequately participate in a virtual hearing.
 - A party or witness lacks a device (iPad, laptop, etc.) to be able to participate remotely.
 - A party or witness requires child care to be able to participate without interruption or distraction.
 - A virtual hearing will deny a party their due process rights.

The IHO should discuss the specific concern with the parties, and how that concern might be accommodated to ensure that the rights of all parties are preserved.

Granting a request for an extension of time is within the sound discretion of the IHO. If the request for an extension of time is more general and not specifically related to conducting a virtual hearing, the IHO should consider the response of the other party:

- If the parties are in agreement, the IHO should consider granting the extension of time; but always keep the needs of the student foremost.
- If the other party doesn't necessarily oppose the extension of time, the IHO may explore further the reasons for the extension.
- If the extension of time is opposed by the other party, the IHO may consider the reason and whether previous extensions have been granted, keeping the needs and education of the student as the primary focus.

Pre-hearing Conferences:

The determination of whether to conduct a virtual hearing should be made by the IHO after conducting a pre-hearing conference with the parties and a full consideration of the concerns of parties as well as the considerations mentioned above. To conduct a virtual hearing, it will be more important than ever that the IHO timely conduct a pre-hearing conference and effectively control the process. While these procedures are applicable in all due process hearings, whether conducted in-person or virtually, a reminder and review of some of the requirements¹ of Article 7 will help ensure that all hearings run smoothly. During the pre-hearing conference, the IHO must address:

- ❖ Rights of the parties.

¹ The reader should refer to Article 7, the IDEA, and the Indiana Administrative Orders and Procedures Act (I.C. 4-21.5-3) for a full explanation of hearing rights and procedures.

- Be represented by counsel or an advocate.
 - Present evidence and confront, cross-examine, and compel the attendance of witnesses.
 - Conduct discovery.
 - Prohibit the introduction of any evidence that was not disclosed at least 5 business days prior to the hearing.
 - Separation of witnesses.
- ❖ IHO discretion and authority.
- Frame and consolidate the issues to provide clarity.
 - The issues should be framed by the IHO early in the process,² preferably at the initial pre-hearing conference, to ensure that all parties can adequately prepare for the hearing. No party should be expected to prepare for a hearing without fully knowing the issues.
 - The issues should be based upon the reasons for the hearing specified in the request for hearing. 511 IAC 7-45-3(b)(4).
 - The party requesting the hearing cannot raise issues at the hearing that were not raised in the due process hearing request unless the other party agrees.
 - Limit the scope and nature of discovery. Discovery should be:
 - Related to the identified issue(s).
 - Not unduly burdensome.
 - Not a fishing expedition.
- ❖ Scheduling.
- Pre-hearing timelines.
 - Exchange of witness list and exhibits - at least 5 business days prior to the hearing.
 - Disclosure of any evaluations completed and recommendations based on the evaluations - at least 5 days prior to the hearing.
 - Hearing.
 - Timeline - hearing held and decision rendered within 45 days of the end of the 30 day resolution period if the parent requested a hearing, or within 45 days of a school's request for a hearing.
 - Hearing dates.
 - IHO should encourage the parties to stipulate to facts and exhibits.

² The initial pre-hearing conference should be held soon after the expiration of the 15 day timeline for conducting the resolution meeting when the hearing is requested by the parents.

- Witnesses.
 - Identification and order of presentation.
 - Need for subpoenas.
 - IHO discretion to limit the length of the hearing. Equal time to each party.
 - IHO discretion to limit the number of witnesses.
 - IHO discretion to limit the length of a witnesses' testimony.

Virtual Hearings:

If the decision is made to proceed virtually, the following areas should be addressed:

- ❖ Virtual platform.
 - IDOE has made the Zoom platform and Zoom training available to all IHOs. If a school has another platform available, the IHO may choose to use the school's platform provided the IHO retains control of the virtual setting and the role of host.
 - The IHO must have the ability to set security parameters for the hearing to limit participation to the parties, their representatives, and witnesses.
 - The platform must provide for a waiting room, controlled by the IHO, such that invited participants remain in the waiting room until admitted by the IHO.
 - The IHO should provide the parties and their representatives with the opportunity to practice in the virtual arena to test and address any user concerns. The IHO, parties, and their representatives need to have reliable internet service and audio.
 - Provision must be made for sharing exhibits during the hearing and ensuring the witness is able to view the exhibit. The parties and IHO may consider the option of sharing screens or utilizing another service such as Dropbox, GoogleDrive, or other means to ensure exhibits can be viewed during the hearing.
- ❖ Managing the hearing.
 - The parties should be encouraged to stipulate and offer as joint exhibits documents from the student's education record, including individualized education programs (IEPs), educational evaluations, or progress reports. These documents should be provided to the IHO in electronic form, and at the discretion of the IHO, in paper form.
 - Any additional exhibits that may be offered by a party should be exchanged electronically with the other party and the IHO at least 5 business days prior to the hearing. For ease of review, the IHO may also require the parties to provide paper copies of any exhibits to the IHO.

- The IHO has discretion to limit the number of witnesses as well as the length of time a witness may be questioned, both on direct examination as well as cross-examination.