

VIRGINIA DEPARTMENT OF EDUCATION
Division of Special Education and Student Services
Office of Dispute Resolution and Administrative Services

**MANAGING THE TIMELINE
IN
DUE PROCESS HEARINGS**

**GUIDANCE DOCUMENT
FOR
SPECIAL EDUCATION HEARING OFFICERS**



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MANAGING THE TIMELINE IN DUE PROCESS HEARINGS

INTRODUCTION

The *Individuals with Disabilities Education Improvement Act of 2004* (IDEA) was signed into law on December 3, 2004. With the exception of some elements of the definition of “highly qualified teacher” which took effect on December 3, 2004, the provisions of IDEA 2004 became effective July 1, 2005. The federal regulations implementing the IDEA took effect on October 13, 2006.¹

The following materials are intended to assist special education hearing officers to more effectively manage the timeline during the course of the due process case. This material is presented as part of an ongoing program of providing useful technical assistance and practical resources that can be utilized on an ongoing basis. The resources included in this document provide ready reference to important information regarding the applicable timeline to be applied in due process cases. In addition, practical guidance is included that should assist the hearing officer to establish practices that can avoid common problems related to the hearing timeline. Through the consideration of the practical suggestions and easy reference to time limitations applicable to these hearings, it is expected that fewer critical time related issues will be encountered in handling these cases.

I. HEARING TIMELINE SUMMARY

The first issue in a due process case is what time limits apply in the case. The following is a summary of the important time limits. You must be aware of the time limits that apply at each stage of the case in order to effectively manage the entire case. Plan how the case will be scheduled to meet each of the applicable deadlines in the case and advise the parties of their obligation to meet the pertinent deadlines.

Non-Expedited Hearing Timeline:

- The local educational agency (LEA) must appoint a hearing officer within 5 business days of receiving a due process request. 8 VAC § 20-80-76.C.4.² Business day means Monday through Friday, except for Federal and State holidays (unless holidays are specifically included in the designation of business day as in § 300.148(d)(1)(ii)). 34 C.F.R. § 300.11(b).
- A hearing officer must set hearing date, time and location within 5 business days of appointment and provide written notification to the parties. 8 VAC § 20-80-76.J.4.

¹ At this time, Virginia special education regulations are under revision. The Virginia regulations cited in this document relate to the 2002 regulations. VDOE does not anticipate that changes in its proposed revised regulations will impact this document, except for changes in citations.

² In the event there is some reason why you are not able to fulfill the responsibilities of overseeing the prehearing and hearing in a timely manner, you should inform the LEA and decline the appointment.

- A hearing officer must complete a hearing by rendering a final written decision within **45 calendar days**. 8 VAC § 20-80-76.J.1 ; 8 VAC § 20-80-76.L; 34 CFR § 300.515(a).
- The 45-day period for a non-expedited hearing follows the resolution session unless the parties agree in writing to waive the resolution session meeting or agree to mediate. [Note that the parties may agree to extend the Resolution period if they remain in Mediation. 20 U.S.C. § 1415(f)(1)(B)(i); 34 C.F.R. § 300.510(c); 34 C.F.R. § 300.515(a).
- A hearing officer must conduct a prehearing conference via telephone conference call or in person unless the hearing officer deems such conference unnecessary. If a pre-hearing conference is not held, the hearing officer shall document in the written prehearing report to the Virginia Department of Education (VDOE) the reason for not holding the conference. 8 VAC § 20-80-76.J.6.
- Mediation must not be used to deny or delay the right to a due process hearing and the hearing must be concluded within regulatory timelines. 8 VAC § 20-80-76.J.8; 34 C.F.R. § 300.506(b)(ii).
- Mediation may be substituted for the Resolution meeting if both parties so agree. If they agree to proceed in this manner, the resolution period of 30-days applies. 34 C.F.R. § 300.510(c)(2).
- If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, then the period continues. However, if one of the parties withdraws from the mediation, then the 45-day period begins. 34 C.F.R. § 300.510(c)(2).
- Except where the parties have jointly agreed to mediate or waive the resolution process in writing, the failure of a parent filing a due process request to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held. 20 U.S.C. § 1415(f)(1)(B); 34 CFR § 300.510(b)(3).
- It is required that a party may not have a due process hearing until the party, or the attorney representing the party, files a written request that includes:
 1. the name of the child;
 2. the address of the residence of the child or available contact information for a homeless child;
 3. a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to the problem; and
 4. a proposed resolution of the problem to the extent known and available to the party at the time.
- The due process request is deemed sufficient unless the party receiving the request within 15 days notifies the hearing officer and the other party in writing that the receiving party believes the request has not met the requirements of 20 U.S.C. § 1415(b)(7)(B); 20 U.S.C. § 1415(c)(2)(A); 34 C.F.R. § 300.508(d)(1).

- Within 5 days of receipt of the sufficiency challenge, the hearing officer determines on the face of the request whether it meets the requirements and immediately notifies the parties in writing of her/his decision. 20 U.S.C. § 1415(c)(2)(D); 34 C.F.R. § 300.508(d)(2).
- A party may amend its due process complaint request, if:
 1. the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through the resolution session meeting; or
 2. the hearing officer grants permission, but not later than 5 days before a due process hearing. 20 U.S.C. § 1415(c)(2)(E); 34 C.F.R. § 300.508(d)(3).
- The applicable timeline recommences or begins again at the time the party files an amended request, including the resolution period timeline. 20 U.S.C. § 1415(c)(2)(E); 34 C.F.R. § 300.508(d)(4).
- In a non-expedited hearing, the hearing officer may grant a specific extension of time beyond the 45-day time period, if in the best interest of the child and requested by one of the parties. Such an extension for a reasonable period of time may not be granted for attorney convenience. Complete documentation for such a specific extension must be provided to the VDOE. Such extensions must be granted in limited circumstances and for specific periods of time. 8 VAC § 20-80-76.K.8. 34 C.F.R. § 300.515(d).
- The hearing officer documents in writing within five business days changes in hearing dates or extensions and sends documentation to all parties and the Virginia Department of Education. 8 VAC § 20-80-76.L.3.
- The hearing officer receives a list of witnesses and documentary evidence for the hearing (including all evaluations and related recommendations that each party intends to use at the hearing) no later than five business days prior to the hearing. 8 VAC § 20-80-76.J.11³. 34 C.F.R. § 300.512(a)(3).⁴

Expedited Hearings:

- The LEA appoints a hearing officer within 3 business days of receiving the due process request. 8 VAC § 20-80-76.C.4.

³ The two day exchange period for expedited is no longer effective in expedited hearings based on the current federal regulations. The exchange period is five business days as in non-expedited hearings.

⁴ 34 C.F.R. § 300.512(a)(3) provides that the party has the right to prohibit introduction at the hearing of evidence that has not been disclosed to that party. The hearing officer should order the parties to provide a copy to the hearing officer in addition to the other party in the case as part of their procedural responsibilities. 8 VAC 20-80-76 J.11 provides the hearing officer will receive a list of witnesses and a copy of the exhibits that each party intends to use at the hearing no later than five business days prior to the hearing. Make sure the parties understand that they should provide the hearing officer a copy.

- A hearing officer must secure a date, time and location for the hearing within two business days of appointment. 8 VAC § 20-80-76.J.4.
- An expedited hearing must occur within 20 school days of the date the hearing is requested and must result in a written determination within 10 school days after the hearing. 20 U.S.C. § 1415(k)(4)(B). 34 C.F.R. § 300.532(c)(2).
- An expedited hearing has a 15 calendar day resolution period from the date of the request for the hearing, unless the parties, in writing, mutually waive the resolution period. The resolution meeting is to occur within 7 days of receiving the due process hearing request. 34 CFR § 300.532(c)(3). A hearing officer's pre-hearing order should identify any resolution period to be applied. (*see* Appendix F). In addition, any other determinations affecting the overall time period must be carefully documented.
- The application of sufficiency challenges is not applicable to expedited hearings. 34 C.F.R. § 300.532(c)⁵.
- The hearing officer receives a list of witnesses and documentary evidence for the hearing (including all evaluations and related recommendations that each party intends to use at the hearing) no later than five business days prior to the hearing. 20 U.S.C. § 1415(f)(2). 34 C.F.R. § 300.512(a)(3) and (b).
- The hearing officer documents in writing within two business days changes in hearing dates or extensions and sends documentation to all parties and the Virginia Department of Education. 8 VAC § 20-80-76.M.2.
- There are no exceptions or extensions in an expedited case to the 20 school day time period for the hearing. 8 VAC § 20-80-76.M.1.

COMPUTING THE FIRST DAY AND THE LAST DAY

When computing days on the timeline, the first day is not counted and when the final day occurs on a non-business day (a weekend or holiday), the final day moves to the next business day.

Example: If a LEA receives the due process request from a parent on Tuesday, then Wednesday is considered the first day of the 5 days during which the LEA must appoint the hearing officer. Assuming a normal workweek (Monday through Friday), then Wednesday is counted as day 1 and the appointment of

⁵ The fact that the sufficiency challenge does not apply in expedited cases is emphasized in the commentary to the federal regulations. *See* Analysis, p. 46725 of the Federal Register, Vol 71.

the hearing officer by the LEA will be due on the following Tuesday, day 5. If the final day fell on a Saturday, then the final business day would be the next Monday.

CALCULATION OF THE 45-DAY TIMELINE

It is important to understand how you are going to calculate the timeline in your case. You are now assigned a hearing and must determine the actual dates on the calendar that make up the timeline for this case. It is necessary that you communicate the dates that make up your application of the timeline to the parties. This communication of actual calendar dates will help you to conform to the 45-day timeline and the timeline in an expedited case. The following explanation is intended to assist the hearing officer in understanding how the time limits are applied.

The 45-day timeline to render a final decision is **45 calendar days and applies to non-expedited hearings**. In non-expedited cases, if the LEA has *not* resolved the complaint to the satisfaction of the parents within 30 days (*i.e.*, 30 calendar days) of the receipt of the request, the due process hearing may occur provided that the parents participated in the resolution session meeting scheduled by the LEA. If the parents and LEA agree in writing to waive resolution, the 45-day period begins to run from the date of such agreement. When the parties are using mediation, the Regulations provide that there could be an agreed written extension of the Resolution period. 34 C.F.R. § 300.510(c)(3).

Prior to July 1, 2005, a final decision was required to be rendered within 45 calendar days of when the request for due process hearing was received in a non-expedited hearing.

After July 1, 2005, in a non-expedited hearing, a final decision is still required to be rendered within 45 calendar days. However, the date that starts the running of the 45 calendar day period may vary.

1. If the parents and LEA do not waive in writing the resolution meeting or do not agree to mediation, then the 45 calendar day period begins to run after a 30-day resolution period is concluded, provided that the parents participated in the resolution session meeting scheduled by the LEA and resolution was not reached on all of the issues raised in the due process complaint.
2. If the parents and LEA waive in writing the resolution meeting or agree to mediation, then the 45-calendar day period begins to run from the date of such agreement.

If the case involves an **expedited hearing** a different time requirement for the final decision exists. An expedited hearing is required to occur within **20 school days** of the

request with a final decision rendered within **10 school days** of the expedited hearing. No extension to the final decision due date may be granted in an expedited hearing. Additionally, an expedited hearing has a resolution period of 15 days from the LEA's receipt of the due process request. 34 CFR § 300.532(c)(3)(ii).⁶

II. TECHNIQUES TO AGGRESSIVELY MANAGE THE HEARING PROCESS AND TIMELINE

AT THE TIME A CASE IS ACCEPTED

Get the initial information needed to move forward with the case

- Request that a copy of the due process hearing request be faxed or e-mailed to you.
- Request phone numbers, fax numbers, e-mail, and addresses for each party and counsel.
- Determine whether the case is expedited.
- Determine whether resolution is waived in writing.
- Determine whether mediation is to occur or has been rejected.

Manage mediation within timelines

- The 30-day resolution session period applies, unless the parents and LEA agree in writing to waive the resolution session meeting, or after the resolution or mediation meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible. 20 U.S.C. § 1415(f)(1)(B)(i); 34 C.F.R. § 300.510(c).
- In the event that the parties agree to mediate, the 30-day resolution period begins but may be extended by a written agreement among the parties. However, should one of the parties withdraw from the extended mediation, then the 45-day period would begin at that point in time. 34 C.F.R. § 300.510(c)(3). The parties must agree to keep the hearing officer informed of any agreement to extend the resolution period and any concerns or withdrawal from the mediation process.
- Mediation should not normally affect the 45-day hearing period. 8 VAC 20-80-76(J)(8). In the event that the parties do agree to mediate, the hearing officer should monitor the process and request that the parties keep him/her informed concerning the status of the

⁶ OSEP issued guidance on calculating the resolution period and the expedited hearing dates. Different from the non-expedited hearing, the hearing timeline and resolution period run together in an expedited hearing. Both the 20-day and 15-day timelines are triggered from the date of receipt of the request for a hearing. *Letter to Gerl*, May 1, 2008.

mediation, namely whether the parties have successfully resolved their differences or not. The hearing officer should make sure the parties explore the possibility of mediation early in the resolution period so that no delay is occasioned as a result of mediation. Should mediation successfully resolve all of the disputed issues, the hearing officer must receive written confirmation that the party requesting the hearing is withdrawing her/his request before dismissing the hearing.

- In the event that any party requests a continuance to allow more time, the hearing officer can only grant the continuance if s/he makes a finding that it is in the best interests of the child. Furthermore, **the length of any continuance must be carefully limited so that it does not exceed a reasonable time**. It may be assumed that a 60-day extension would be, in itself, unreasonable.
- **Get the case moving.** Contact the parties on the day of your appointment or as soon as possible to:
 - ✓ Set up the initial pre-hearing telephone conference within a day or two of your appointment.
 - ✓ Set the hearing date, time, and location.
 - ✓ If a party seeks to secure an attorney, stress the need to start immediately.
 - ✓ If you cannot contact one or both parties within two or three business days of appointment:
 - 1) Notify the parties in writing of contact efforts, the inability to contact, and the need to comply with time requirements by setting the pre-hearing conference and due process hearing.
 - 2) Send notices of pre-hearing conference and due process hearing by certified mail return receipt requested.
 - 3) Notify the parties that failure of a party to comply with reasonable requests of the hearing officer may lead to the case being dismissed or other actions taken.
- Immediately send a letter to the parties. *See* Appendix E. Set expectations, boundaries, and establish your desire to keep matters moving forward. This is especially important if one party does not have an attorney. State in the letter:
 - ✓ You have been appointed to be the hearing officer.
 - ✓ You are neutral, do not represent either party, and cannot give legal advice to either party. Explain that your function is to hear evidence and to make decisions based on

facts presented to you after you make your findings and consult relevant legal authority.

- ✓ You cannot discuss matters of any substance without presence of the other party.
- ✓ All matters communicated to the hearing officer must be communicated to the other party.
- ✓ Mediation rights, appeal rights, and implementation plan requirements should be provided. A hearing officer is required to provide this information.
- ✓ Communicate the requirements that documents and list of witnesses be exchanged (with a copy to hearing officer) at least 5 business days before the hearing.⁷
- ✓ Communicate the timeline, final decision due date, and settings.
- ✓ Communicate that a pre-hearing conference is needed and the anticipated topics for discussion include:
 - Timeline for actions
 - Issues for determination and relief requested
 - Burden of proof and which party will proceed first at the hearing
 - Right of the parent to determine if the hearing is open or closed
 - Estimated length of the hearing
 - Rights to a transcript
 - Parties desire oral or written closing arguments
 - Date of exchange of documents and list of witnesses
 - Exhibits & identifying documents by page number or exhibit number
 - Suggestion of numbering documents by page or exhibit number (with pages numbered) and placing them in a binder (it is useful to have at least four binders)

⁷A state regulation may not change the 5-day disclosure period included in 34 C.F.R. § 300.512(a) and (b). *See* Analysis, p. 46726 of the Federal Register, Vol. 71. However, in the commentary the USDOE stated there is nothing in the Act or the regulations that would prevent the parties from agreeing to disclose relevant information to all other parties less than five business days prior to a due process hearing. *See* Analysis, p. 46706 of the Federal Register, Vol. 71.

[or copies of the exhibit] at the hearing so each party may have one, the hearing officer can follow in one and the witness has one copy to refer to)

- Motions to decide after an opportunity to respond is given the other party
- Discussion of any procedural questions or other questions of either party

AT THE FIRST PRE-HEARING CONFERENCE

- Be prepared and have a checklist of questions and matters you want to address with space to write notes.
- Be prepared to generate a report of matters covered. Do not rely on memory alone. Take notes.
- Draft a pre-hearing report (*see* Appendices for different models) and mail it to the VDOE and parties/counsel indicating:
 - ✓ Your understanding of matters discussed at the conference.
 - ✓ The timeline of events.
 - ✓ Any item that you or a party is required to complete and by what date it is to be done.
 - ✓ Your determination of any motion or request.
- Determine if a second pre-hearing conference is needed.
- **At the pre-hearing conference, use this or similar type of checklist:**

✓	Unless given a name of counsel for a party, ask whether there is an attorney/presenter
✓	Confirm the 5-day rule for the exchange of documents and list of witnesses
✓	Ask whether the parent wants an open or closed hearing and whether the parents choose to have the student present at the hearing. If closed, discuss who will be present in the hearing.
✓	Ask whether mediation is possible and provide an explanation of mediation and its availability
✓	State the timeline for hearing
✓	Set expectations for the due process hearing
✓	Discuss the location of the hearing to ensure that it is held in an accessible location that provides a reasonable level of privacy
✓	Discuss when the hearing day is to begin and end and set subsequent hearing days, if

	needed
✓	Discuss that only the evidence admitted into the record at the hearing forms the basis for deciding the case. Explain that evidence not admitted into the record at the hearing will not be considered.
✓	Confirm your expectation that there would be no need for extensions of the 45-day rule
✓	Confirm you will decide all motions after opportunity to respond is given the other party
✓	Ask if there are any questions from either party
✓	Ask the parties if any stipulations are possible and discuss how this could be accomplished with unrepresented parties
✓	Set additional pre-hearing conferences, as needed
✓	Request the exhibits be organized with either exhibit numbers (if exhibit numbers are used suggest internal page numbers in the exhibit) or page numbers
✓	Request a chronology of IEPs, IEP addenda, and eligibility determinations or a statement of their respective position on the chronology of events. (Explain this is not an agreement as to content.)
✓	Ask the parties if any accommodations (such as interpreters, special seating, sound amplification, etc.) will be necessary for parties or witnesses
✓	In one of the later pre-hearing conferences, the timing of witnesses should be discussed. This preliminary estimate of the time of the witness presentation should be considered in scheduling witness attendance and the length of the hearing

AT THE DUE PROCESS HEARING

To expedite the hearing, schedule a short meeting with the parties to occur prior to the beginning of the hearing.

- A. Discuss any matters that may have occurred at the last minute.
- B. Ask if all witnesses are present or are on call to appear. Discuss any lead-time needed.
- C. Discuss any time constraints for parties, hearing room, witnesses, or the court reporter.
- D. Ask if the parties want to use opening remarks and/or closing arguments.
- E. Ask the court reporter when the transcript will be available.
- F. State again the issues for determination and relief requested.
- G. Discuss physical arrangements of the room and make sure parties and the hearing officer will be comfortable in their area. It will be helpful to the parties if they are not too close

to one another and they should not be too close to the hearing officer.

- H. Review the order of presentation, the handling of exhibits, procedure for presenting witnesses, rulings on objections, timing of breaks, etc.
- I. When the hearing begins, make sure that stipulated findings of fact and/or joint exhibits are entered in the administrative record. The hearing officer should also enter pre-hearing conference orders and decisions in the administrative record.
- J. Introduce the Hearing Officer Evaluator. The evaluator will explain his/her role as observing the process.

Make the process less stressful on yourself, the parties, and witnesses.

- A. Before the hearing, insure the hearing room is large enough and is free of outside distractions. Verify the duration of the room's availability.
- B. Schedule short breaks for parties and witnesses to decompress.
- C. Set a tone of respect to preclude hostile or intimidating tactics.
- D. Control matters gently but firmly. Do not let either party take over the hearing.
- E. If necessary, ask questions to clarify matters and insure you have needed information.
- F. Explain that parties are to address you at all times and not other persons in the room. Explain that you will provide rulings on the evidence and your rulings will depend on meeting the proper legal standards in the case.
- G. Do not chat with either of the parties unnecessarily other than casual greetings of welcome and reasonable concern. Do not have lunch with either of the parties even if asked to join them. Do not remain in the room with a party without other persons present. Merely exit to the hall where other persons are present or go to a separate room during a break, if necessary.
- H. Make sure that witnesses will be directed to an area close to the hearing where they will be able to wait comfortably.

HINT:

During the hearing take notes. Taking notes also makes you seem more alert and interested in the parties. Do not rely on a transcript being available. If pushed for time, and concerned that you may not get a transcript before the decision is due, consider tape recording the hearing. If recording, correlate your notes to the tape recording via time notations in your notes, cassette numbering, and cassette side designation or a tape counter.



AT DECISION DRAFTING

- The receipt of a transcript is not a prerequisite to drafting a decision.
- Time to review matters, research, and draft can significantly affect the decision. Time constraints are not just a result of when the hearing is completed but are also affected by decisions made early in the scheduling process. Laxity in initial matters results in a tight drafting time.
- Know how long it will take you to draft the decision and include that amount of time in your planning of the timeline for your decision. If you need the transcript, then make necessary arrangements in your timeline. However, in most cases the necessity of a transcript cannot be supported when other options are available. You could discuss the possibility of an expedited transcript with the school division, and if they agree to fund this unusual procedure, it would be available under this alternative time frame. With hearing notes, submissions by the parties and other resources, a transcript is not considered an obstacle to completing a timely decision.

PRACTICAL CONSIDERATIONS

There are a number of practical considerations that can be helpful when considering the scheduling dilemmas that will confront you as a hearing officer. Considering some of these practical considerations in advance can lead to effective case management when complex scheduling problems are confronted. It is important to seek practical solutions that fit the tenor of the individual cases. Some of these important practical considerations and suggested responses are set forth below:

- **Time is a limited commodity.** Control the hearing timeline and hearing process from day one. When a case is accepted ask the LEA to fax or e-mail the request and contact information for all parties and attorneys. Initiate contacts on day one to set up a hearing and a pre-hearing conference. Make compliance with statutory and regulatory time limits a priority.

- **Meet expectations.** A hearing officer is charged with providing a fair hearing process in compliance with requirements of *law* and regulation. Not only do the parties have expectations but also the VDOE and the United States Department of Education have expectations for conducting the hearing process, including the timeframe for issuing a final decision.
- **Problems will arise.** Statutes, regulations, and case law may be convoluted and may even contradict themselves. Use available guidance to resolve matters citing the authority you have found helpful. Make the decision in a timely manner and move the proceeding forward.
- **Keep all the parties on the same path.** Keep in mind where you are in the hearing process and timeline. Regularly send the parties your understanding of matters, timelines, changes, and requirements⁸. Consider using the Pre-Hearing Report format to document and confirm matters. (*See* Appendices for various models). Pre-Hearing Reports may be used to keep parties and the VDOE apprised of timelines, case developments, and the current status of the case.
- **Be aware of the domino effect.** It is clear that a short delay at one point in the proceeding may be responsible for a longer delay down the road or even a failure to comply with timelines. Schedule matters to occur as early as possible. Build in opportunity to handle unexpected and unavoidable problems that may arise without having to automatically extend the final decision due date.
- **Try to reasonably accommodate the parties' schedules.** However, be aware of each party's obligation to comply with statutes and regulations, as well as the hearing officer's obligation. Scheduling this particular case may or may not be a high priority for a party, but it has to be paramount for the hearing officer.
- **Aggressively use the time provided by statute.** Use the 30-calendar day resolution period (if applicable) as an asset in time management. In essence, hearing officers have 75 days for a non-expedited case in which there is no written waiver of the resolution meeting. **Do not waste time. Use this 30-day time period to actively manage the hearing process.** While the due process hearing itself cannot be held during the *30-day* resolution period, almost everything else can. It is necessary to hold pre-trial conferences during this period to monitor resolution activities and to handle other procedural matters. It is important to encourage an unrepresented party to consider representation early in the process to minimize delay.

⁸ Parties may wish to communicate directly with you but keep in mind that you may not have *ex parte* communication with the parties regarding substantive matters. They may provide available dates to you directly but most other matters require the presence of the other party to avoid violating the *ex parte* communication prohibition.

- **Expect to schedule and hear matters as soon as possible.** Begin scheduling efforts the day of appointment and commence the due process hearing as early as possible. Request that the school division provide telephone numbers in their initial telephone call to you and request that written materials be faxed to you as soon as possible. By taking advantage of the 30-day resolution period, the due process hearing can generally be set within the first day or so of the 45-day period. Establish a policy of wanting to hold hearings and conferences as soon as possible.
- **Scheduling is a problem in almost all cases.** If necessary, telephone conferences can be scheduled for before 8:00 A.M. or after 5:00 P.M. and on weekends. Nothing prevents a due process hearing from being scheduled on weekends or holidays. Establishing a willingness to take advantage of all times and all days may often open up calendars that were initially closed for scheduling purposes.

CHALLENGES TO COMPLETING HEARINGS IN A TIMELY MANNER

Hearing Officers begin the hearing process with good intentions to complete the hearing within the time frame. However, the parties begin asking for additional time to complete specific tasks. Initially, the first request seems reasonable enough and even the second one seems necessary. Then matters can begin to spiral out of control. It is helpful if the hearing officer reviews some of the anticipated problems that can delay the hearing process during the course of early pre-hearings.

One of the first issues to be addressed is the request for the parents and the child to have counsel. It is often the case that if parents retain counsel, some time is needed for preparation. Moreover, it is likely that the attorney's calendar is filled with other commitments. These are merely facts to be understood and to be properly managed. Attorneys retained to represent parents and children in due process cases must be made aware of the time constraints early in the case. They will need to be prepared to go to hearing on weekend dates if other dates within the timeline cannot be provided.

If counsel is not prepared to go forward, it may be necessary to discuss the option of withdrawing the due process complaint with the understanding that a new request can be filed when the party is prepared to move forward with the hearing. Certainly, this discussion must be handled with care, since any decision must be made by the party without any coercion from the hearing officer. Other appropriate strategies may reasonably encourage counsel to cooperate in setting hearing dates in an efficient manner.

Other external challenges may require further creative scheduling to maintain a tight timeline. When school holidays interfere with the scheduling of witnesses, then the hearing officer may be required to consider the schedules of the various individuals involved in the case. For example, telephonic testimony may resolve the inability of a witness to attend when on holiday. It may be helpful to encourage the parties to consider compromise on resolution

of the scheduling dilemma. It may be wise to anticipate such school holidays, if possible, and take the witness's testimony before the holiday as a deposition or specially scheduled early testimony in the case. As a last option, it may be necessary to merely use subpoenas to move the process forward.

III. EXTENSIONS OF THE 45-DAY TIMELINE

When faced with the challenges to completing the hearing in a timely manner, there are unusual circumstances that require a hearing officer to consider granting an extension of the final decision date in a particular case. It is essential that proper planning be utilized to avoid the extensions as discussed above. All other options should be considered before granting an extension.

It is only after aggressively managing the hearing process and carefully considering the application of the timeline, that the hearing officer should give serious consideration to a requested extension. Eventually, when it is determined that an extension must be granted then the hearing officer must be aware of the proper procedures necessary for granting the extension.

WHEN MAY AN EXTENSION BE GRANTED

In expedited hearing: **No extension** to the final decision due date may be granted.

In non-expedited hearing: **Extension** of the *45-calendar* day timeline may be granted. Extension requires the **motion of a party, good cause** for granting the motion to extend, and the extension to be in the **best interest of the child. The extension must be to a specific final date (for a reasonable period).**

References to an extension are only applicable to non-expedited hearings.

Extensions must not be routine. It is important to understand that the United States Department of Education, Office of Special Education Programs (OSEP) has directed the VDOE to bring Virginia's due process system into compliance with the 45-day timeline requirement. OSEP requires the VDOE to insure that the 45-day timeline is met as soon as possible. Extensions are subject to increasing scrutiny by both OSEP and VDOE. The hearing officer's compliance with the 45-day timeline is analyzed as part VDOE's oversight of the hearing officer system. This heightened concern of the VDOE should be important to the hearing officer assigned a case as well.

USE OF THE RESOLUTION PERIOD

- The resolution period is an opportunity for easier and greater compliance with the *45-day* time limit imposed on hearing officers to render their decision. A due process hearing cannot be held within the 30-day resolution period but other preliminary steps can be completed within this period. One of the primary issues that can be dealt with is the parents' decision regarding their need for counsel. It is critical to use these 30 days to manage the hearing and move the case toward its conclusion. Hearing officers should use the resolution period to:
 - A. Schedule and hold pre-hearing conference(s).
 - B. Schedule the due process hearing.
 - C. Schedule preliminary motions for hearing.
 - D. Afford time for a party seeking to secure counsel.

- Schedule the due process hearing during the resolution period within 5 days of appointment. Set the date, shortly after the conclusion of the resolution period, on a day between day 1 and day 7 of the 45- calendar day period. This will allow you to comply with the 45-day timeline even if the parties eventually waive the resolution period. It also allows you to be more flexible in rescheduling the date for unexpected events. You will be able to:
 - A. Continue the hearing, if necessary, without extending the 45 day final decision due date.
 - B. Allow time to better address unexpected matters that may arise.
 - C. Provide for transcript availability.
 - D. Provide an opportunity for the parties to have a transcript before closing arguments.
 - E. Provide an opportunity to have the transcript and arguments before drafting a decision.
 - F. Meet your 45-day requirement with adequate time for a carefully developed decision.
 - G. Allow a decision to be rendered earlier that may be needed in the best interest of the child.

REQUIREMENTS FOR GRANTING AN EXTENSION

- The hearing officer has discretion to grant an extension of the final decision date under appropriate circumstances. 34 C.F.R. § 300.515(c); 8 VAC 20-80-76.K.8. However, the hearing officer must meet the requirements for granting the extension and document the facts and criteria met in granting the extension. To grant the motion to extend, it must be found that:
 - A. A motion for the extension was made by at least one party.
 - B. Good cause exists to grant the extension.
 - C. It is in the child's best interest to grant the extension.
 - D. The period of the extension is reasonable compared to the overall timeline applied in the case.

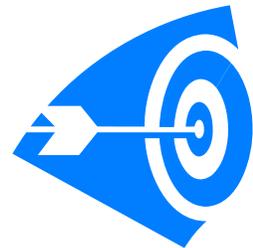
- If a motion for extension is granted, then report it in a Pre-Hearing Report within 5 days. A copy of this Pre-Hearing Report must be provided to the parties and the VDOE. Document the facts justifying the extension and that the hearing officer made specific findings regarding the following matters:
 - A. The motion was made by one or both parties.
 - B. The specific facts that indicated good cause existed to grant the motion to extend.
 - C. The specific facts that indicated the extension was in the best interest of the child.
 - D. The strong concerns expressed by the Virginia Department of Education that the 45-day timeline be met.
 - E. The specific hearing date extended and when the final decision will be issued.
 - F. Findings that the extension is for a reasonable period when considering the facts requiring the extension and the timeline applied to the case.

****It is absolutely essential that there be a finding that the extension is in the child's best interest WITH SUPPORTING REASONING.***

- If a motion for extension is denied, confirm the reason(s) for denial. Document the denial and reasoning supporting the denial in the Pre-Hearing Report. If an extension request is made after the pre-hearing report is issued, then an immediate written ruling on the request should be issued documenting the decision made on this request. Please provide copies of all rulings on extensions to the VDOE as soon as possible.
- A continuance of the hearing is **not** the same as an extension of the final decision due date. If aggressive time management is used, it may be possible to grant a continuance of the due process hearing without granting an extension of the final decision due date.

UTILIZE GOOD STRATEGIES

Early planning.....attentiveness at pre-..... well-written.....GOOD JOB!!!
 hearing/hearing decision



IV. FREQUENTLY ASKED QUESTIONS

Pre-hearing Reporting

Q. If a hearing officer decides that a pre-hearing conference is unnecessary, does the hearing officer need to submit a pre-hearing report to the VDOE? If yes, what must go in the pre-hearing report?

Answer: Yes, a detailed explanation of the reason for not holding the conference must be included in the report. Generally, pre-hearing conferences are essential to reasonably managing the timeline in due process cases.

Q. If a motion for extension is granted on a Wednesday, when must it be reported in a pre-hearing report?

Answer: The motion must be documented by the close of business on Wednesday of the next week (within 5 business days).

Setting Hearings

Q. In a non-expedited hearing, if the hearing officer received the appointment on a Tuesday, when must the hearing date, time, and location be set? Using the same facts, when must the hearing date, time, and location in an expedited hearing be set?

Answer: In a non-expedited hearing, the hearing officer must set the date, time, and location by the close of business on Tuesday of the next week (within 5 business days). In an expedited hearing, the hearing officer must set the date, time, and location by the close of business on Thursday (within 2 business days). The hearing officer also schedules the hearing at a time and place that is reasonably convenient to the parents and the child. 34 C.F.R. § 300.515(d).

Q. In a non-expedited hearing, if a hearing officer decides to change the hearing date, what must be done in addition to notifying the parties?

Answer: The hearing officer must document in writing within five business days the changes in hearing date and send documentation to all parties and the VDOE. This documentation should be reasonably detailed in its explanation of the basis for the change in hearing date and make a finding that it is in the best interest of the child. The hearing officer also needs to keep the assigned hearing officer evaluator informed.

Q. What date should be used when first scheduling a due process hearing?

Answer: The due process hearing should be scheduled between day 1 and day 7 of the 45-day timeline. This scheduling avoids the concern that the parties will unexpectedly waive the Resolution time period. In addition, when the parties seek a later hearing date, a short continuance may be granted while maintaining the 45-day timeline.

Expedited Hearings

Q. During the 20 school day expedited hearing period, one of the parties presents a motion for an extension of the hearing and final decision date. It is assumed that the party has demonstrated good cause and that the extension is in the best interest of the child. How many days can the hearing officer extend the hearing and final decision date?

Answer: None. There are no exceptions or extensions in an expedited case to the 20 school day hearing time limit.

Q. In an expedited hearing must the final decision always be rendered within 10 school days of the end of the 20 school day period?

Answer: No, the final decision must be rendered within 10 school days of the hearing. The hearing may have occurred prior to the end of the 20 school day period and so the decision would be due before 10 school days after the 20 school day period.

Q. In an expedited hearing, if the receiving party believes that the due process notice does not meet the requirements and would like to challenge the sufficiency of the notice, can that party present a sufficiency challenge?

Answer: A sufficiency challenge is not available in an expedited hearing. The party may request that the hearing officer further define the issue during the course of a pre-hearing conference in order to resolve any concerns regarding the issue to be considered at the hearing.

Adhering to the 45-day Timeline

Q. In non-expedited hearings, when does the 45-calendar day period for due process hearings start running?

Answer: If the parents and LEA do not waive in writing the resolution meeting (or extend the resolution period to complete mediation), then the 45-calendar day period starts running after the 30-day resolution period is concluded. There may also be some delay to the end of the Resolution period if the parent does not attend the Resolution meeting. 34 C.F.R. § 300.510(a)(3).

Q. In a non-expedited hearing, a hearing officer decides that a final decision cannot be rendered within the 45-day period and decides to extend the period. Is this a valid extension?

Answer: No. A motion for the extension must be made by at least one party.

Q. May a hearing officer, due to his/her own family emergency, ask the lawyer for one of the parties to move for an extension?⁹

Answer: No. The motion for an extension must be a motion of one of the parties and not merely coerced by the hearing officer. If the hearing officer has an unforeseen emergency that will prevent the timeline from being met, it would be essential that the hearing officer call and immediate teleconference to discuss the situation with the parties. A party may consider facts related to the hearing officer's situation and determine it is in their client's interest to request an extension. Should a motion be presented by a party, the hearing officer could then consider such an independent motion and based on the facts, make findings that support a reasonable extension being granted in the best interest of the child.

Q. If a hearing officer is not able to receive the transcript in time for the decision, would the hearing officer be able to extend the hearing period?

Answer: No. The hearing officer can only extend the time period if one of the parties moves for an extension, there is good cause for the motion, and granting the motion is in the best interest of the child. Any extension may be granted only for a definite reasonable period.

Q. What should the hearing officer do if the transcript is not received in time to assist in writing the decision?

Answer: The hearing officer should continue drafting the decision. The receipt of a transcript is not a prerequisite to drafting a decision. It is a good idea for a hearing officer to take notes during the hearing and even consider tape recording the hearing.

Q. If I do not have a complete transcript to review the facts of the case, how can I write the decision in a timely manner?

Answer: You need not recite all of the facts presented at the hearing but should only make factual findings for those facts helpful and necessary to your decision. It is also critical that you carefully document any credibility findings made. These detailed findings are important to the deference that your opinion may receive when reviewed. You should have these facts available in your notes or any recordings that you made during the course of the hearing. All of the facts are recited in the written transcript and this transcript is available to the parties.

⁹ Virginia's proposed revised regulations addresses this issue. Specifically, the provision contemplates mitigating circumstances that warrant a hearing officer issuing an extension following review of the circumstances with VDOE and VDOE's approval to the extension.

You may summarize the events in your findings but it is not necessary to provide a recitation of facts that are irrelevant to your findings. However, please be attentive to avoid typographical errors and incorrect references to the parties. You should also carefully edit the opinion to make sure essential findings are included in the opinion and factual references are correctly expressed in the opinion.

Q. What can a hearing officer do if a transcript is needed and there is a possibility that the transcript will not be ready in time to assist in drafting the opinion?

Answer: The hearing officer could discuss the possibility of an expedited transcript with the school division and determine if this unusual procedure could be funded. If not, the hearing officer must prepare the decision within the timeline without the transcript.

Q. A close relative of the father of the child is dying and has asked the father to come and see him/her for the last time. The father would not be able to do this without asking for an extension to the 45-day timeline. Should the hearing officer grant the extension?

Answer: In addition to humane considerations, the hearing officer should approach the situation with an understanding of the requirements necessary to grant a proper extension. Such an extension must be carefully documented with specific facts included in the record. The hearing officer should make well documented findings regarding the motion for the extension and that the extension is in the best interest of the child. The hearing officer should consider the timeline and plan carefully so that the extension does not violate the special education regulatory framework.

Q. Are there different considerations when a hearing officer grants an extension of the final decision due date then when a continuance of a hearing date is granted that does not change the final decision date?

Answer: Yes. A continuance of a hearing date that does not extend the final decision date may be granted in the hearing officer's general discretion. An extension of the final decision date requires the hearing officer to make detailed findings that there is good cause for the motion of the party and that the extension is in the best interest of the child.

Q. What should a hearing officer do if the lawyer for one of the parties has too many other commitments and probably would not be able to offer his/her services in a way that would comply with the 45-day timeline?

Answer: The lawyer and his client should be made aware of the time constraints. It should be made clear that aggressive strategies will be employed to move the hearing forward within the timelines, including setting weekend hearing dates.

Q. What happens to the 45-day hearing period when the parties agree to mediate?

Answer: The mediation process may take the place of the Resolution Meeting. In addition, the 30-day resolution period may be extended when the parties agree in writing. However, if one of the parties withdraws from the mediation, then the 45-day period begins at that point.

Q. If a hearing officer independently orders an independent educational evaluation (IEE) does this extend the 45-day timeline?

Answer: The timeline would not be extended since neither of the parties has requested an extension of the 45-day timeline. Even though the hearing officer has the authority to order an IEE at public expense, the hearing officer must act judiciously and ensure the IEE does not impact the timeline. Before ordering such an evaluation, it would be prudent to consult with the evaluator to determine the time frame for receiving the evaluation. Ordering an IEE is not typical and requires careful planning related to the timeline.

Alternatively, if the parties agree that an IEE is needed, then the hearing officer may dismiss the case because the issue is not ripe for hearing. It could be that based on the IEE, the disputable issue is resolved by the IEP team.

Q. May the 45-day timeline be extended when a witness becomes unavailable at a previously agreed upon time?

Answer: The 45-day timeline may be extended upon the request of a party and when the hearing officer determines that the extension is in the best interest of the child. So if a witness becomes unavailable suddenly and a party makes a request for an extension of the 45-day timeline, a hearing officer may consider the facts of that particular case to determine whether an extension could be granted. The hearing officer would be required to find that an extension for a short reasonable period of time would be in the best interest of the child based on the facts of that particular case.

Managing the Process

Q. Must the hearing officer wait until after the 30-day resolution period to commence work on the hearing?

Answer: No. The hearing officer should use this period to schedule and hold pre-hearing conferences, schedule the due process hearing, advise parties of hearing procedures, afford time for a party to secure counsel, and begin research on the issue(s).

Q. What activities are appropriate for the hearing officer during the 30-day resolution period?

Answer: The hearing officer must set the hearing date within 5 days of her/his appointment. The hearing officer is required to rule on sufficiency challenges within 5 days of receipt of the

sufficiency challenge and subsequently determine whether requested amendments to the notice will be authorized. The hearing officer needs to monitor the progress of the resolution meeting and any ongoing mediation. Requests for subpoenas may be presented to the hearing officer, as well as motions to quash requested subpoenas. By holding pre-hearing conferences during this period of time parties can be advised of procedures for the hearing and other preliminary issues can be resolved in an efficient manner.

Q. Should the hearing officer require the local school division to schedule and hold a resolution session when the school division suggests that the due process notice is insufficient?

Answer: The hearing officer should require the school division to schedule a resolution meeting on or before the fifteenth day after the due process request has been provided to the school division. The school division may be able to resolve the disagreement with the parent despite the fact that the request may be legally insufficient. If the challenge to sufficiency is made after the tenth day after receiving the due process request, then the ruling on sufficiency should occur after the resolution meeting has been held. In any case, the meeting presents another opportunity for the parties to resolve their disagreement.

Q. During a hearing, may one of the parties call additional witnesses who were not on the witness list exchanged by the parties and submitted to the hearing officer at least 5 business days before the hearing?

Answer: No, not in a party's case in chief. All witnesses must be on the witness list exchanged by the parties and submitted to the hearing officer at least 5 business days before the hearing. The only exception to this rule would be a true rebuttal witness who would be limited to testimony specifically in rebuttal of the other party's evidence.

Q. When should a hearing officer take additional steps such as sending notices of pre-hearing conferences and due process hearings by certified mail, return receipt requested, if contact with one or both parties is not successful?

Answer: If one or both parties cannot be contacted within two or three days of appointment, the hearing officer should take additional steps to provide notice to that party. If a party raises an ongoing issue of not receiving notice of meetings or is difficult to contact, this procedure should be continued. These additional notice efforts should be made part of the record so that it is clear that notice was reasonably provided to all parties.

APPENDICES

- A. Virginia Department of Education Performance Review
- B. Format for Granting an Extension
- C. Initial Pre-Hearing Report
[for when parent(s) is not represented]
- D. Initial Pre-Hearing Report
[for when parent(s) is represented]
- E. Agenda Letter
- F. Pre-Hearing Report

APPENDIX A

VIRGINIA DEPARTMENT OF EDUCATION PERFORMANCE REVIEW

The Virginia Department of Education continually monitors the hearings for compliance with the 45-day timeline. These monitoring records are reviewed when considering the annual recertification of hearing officers. Thus, communication of unusual matters with the VDOE is helpful to both the hearing officer and the VDOE. In addition, it is essential that hearing officers prepare clear documentation of their compliance with the 45-day timeline and provide VDOE with detailed documentation in a timely manner. VDOE's monitoring is based on documents provided to VDOE by the hearing officer. This communication can resolve timeline issues and facilitate the preparation of documentation updates if needed in specific cases.

The VDOE has the authority to take action to ensure that the hearing officer complies with the timelines. If the hearing officer does not meet the administrative responsibilities for management of the hearing procedures in a case, the Virginia Department of Education may take action in the best interest of the child to remove the hearing officer from the case. 8 VAC § 20-80-76.P.1 and 2.

If a special education complaint asserting errors by a hearing officer is received, the VDOE may require the hearing officer to respond to the complaint. If the VDOE determines that the complainant's allegations are valid, the VDOE may disallow any claim for compensation by the hearing officer for responding to the complaint. 8 VAC § 20-80-76.P.6.

Any hearing officer who exceeds the timelines as prescribed in this section for reasons unrelated to the best interest of the child and not properly documented prior to the mandated timelines is required by the VDOE to attend specialized training on these requirements before being assigned to another case. 8 VAC § 20-80-76.P.7.

The VDOE manages and monitors the due process hearing system through multiple tracking systems. Part of this analysis involves the management of the 45-day timeline. This is done in concert with VDOE's State Performance Plan and Annual Performance Report to the U.S. Department of Education's Office of Special Education Programs.

The VDOE analyzes special education hearing officer decisions and hearing system procedures that incorporate input from the parties to the hearing. 8 VAC § 20-80-76.Q.1. The VDOE maintains an ongoing hearing process evaluation project. One of the factors to be considered by the evaluators is the management of the timeline during the course of the hearing process. This evaluation data is factored into VDOE's certification review of the hearing officer.

APPENDIX B

A FORMAT FOR GRANTING AN EXTENSION

**COMMONWEALTH OF VIRGINIA
Special Education**

Re: _____

v.
_____ Public Schools

DECISION CONCERNING PARTIES' JOINT
MOTION FOR CONTINUANCE AND
SCHEDULING ORDER

Child & Parents:

Child's Attorney:

Administrative Hearing Officer:

() _____ - _____
() _____ - _____ (facsimile)

LEA's Attorney:

PARTIES' MOTION FOR CONTINUANCE

_____, _____, _____, and the hearing officer participated in a prehearing conference call at _____ a.m./p.m. on Month day, year. First, the parties, by counsel, jointly moved for a continuance of the hearing to allow them an opportunity to finalize their written settlement agreement. The parties have reached an agreement in principle to settle their differences, subject to execution of a written settlement agreement.

After hearing the arguments and representations of the parties on this issue, the hearing officer granted the parties' motion for a continuance finding that it is in the best interests of the child to allow the parties, at this time, to finalize the settlement agreement. A short continuance will not impact the delivery of educational services to the child. [The basis

for finding that the extension is in the best interests of the child must be based on facts that are detailed and included in the order.]

The Virginia Department of Education in the mandatory training it administers to hearing officers, continually stresses the importance of the 45-day federal mandate. However, in critical situations like this, where the resolution session has functioned as Congress intended, the hearing officer is vested with the discretion to permit a continuance if it is in the best interests of the child. The hearing officer finds that this extension is in the best interest of the child because _____.

DEADLINE FOR DECISION:

Accordingly, the Deadline for Decision is rescheduled as follows:

Deadline for Decision: _____, _____.

PRE-HEARING CONFERENCE CALL:

The parties may request another pre-hearing conference call to clarify any issues or procedures before the hearing date, and in an effort to streamline the hearing process. No such pre-hearing conference is presently scheduled.

ENTER: / /

_____, Hearing Officer

cc: Persons on the Attached Distribution List (by U.S. Mail and via facsimile or e-mail, where possible)

Comment: This template does not present significant detail regarding the reason for the continuance to be granted. In other circumstances, it would be necessary to provide more detail regarding the necessity for the extension. In addition, the amount of time included in the extension should be short and in most circumstances would require further explanation.

APPENDIX C
Initial Pre-Hearing Report for when Parent(s) is not represented

VIRGINIA DEPARTMENT OF EDUCATION

INITIAL PRE-HEARING REPORT

School Division:

Name of Legal Guardian:

Name of Child:

Counsel Representing LEA:

**Counsel Representing
Parent/Child:**

Hearing Officer:

Party Initiating Hearing:

ISSUE AND PURPOSE OF HEARING:

Mr. and Mrs. _____ requested an administrative due process hearing under the *Individuals with Disabilities Education Improvement Act of 2004* (“IDEA 2004”) as specified in their request for due process hearing dated _____, 20_____, which is incorporated herein by this reference.

BACKGROUND:

The Regulations Governing Special Education Programs for Children with Disabilities in Virginia (as amended, the “Virginia Regulations”) require that within five (5) business days after his appointment, the hearing officer secure a time, date and location for the hearing and notify the parties to the hearing and the Virginia Department of Education.

As he is required to do by the Virginia Regulations, the hearing officer strongly encouraged the parties to work on mutually resolving or, at least, narrowing their differences through formal means such as mediation or less formal means such as settlement negotiations. The request for a due process hearing was received by the LEA on _____, 2007.

The hearing officer’s legal assistant scheduled the first pre-hearing conference call at 3:00 p.m. on Friday, _____, 2007. Mr. and Mrs. _____, Mr. _____, Mr. _____ (the VDOE evaluator) and the hearing officer participated in the conference call. The parents are not yet represented by legal counsel and the hearing officer asked the parents to please inform him immediately if they retain an attorney or other representative.

APPENDIX D
Initial Pre-Hearing report when parent(s) is represented

VIRGINIA DEPARTMENT OF EDUCATION

INITIAL PRE-HEARING REPORT

School Division:

Name of Legal Guardian:

Name of Child:

Counsel Representing LEA:

**Counsel Representing
Parent/Child:**

Hearing Officer:

Party Initiating Hearing:

ISSUE AND PURPOSE OF HEARING:

Ms. _____, by counsel, requested an administrative due process hearing under the *Individuals with Disabilities Education Improvement Act of 2004* (“IDEA 2004”) as specified in her request for due process hearing dated _____, 2007, which is incorporated herein by this reference.

BACKGROUND:

The Regulations Governing Special Education Programs for Children with Disabilities in Virginia (as amended, the “Virginia Regulations”) require that within five (5) business days after his appointment, the hearing officer secure a time, date and location for the hearing and notify the parties to the hearing and the Virginia Department of Education.

As he is required to do by the Virginia Regulations, the hearing officer strongly encouraged the parties to work on mutually resolving or, at least, narrowing their differences through formal means such as mediation or less formal means such as settlement negotiations. The request for a due process hearing was received by the LEA on _____, 2007.

The hearing officer’s legal assistant scheduled the first pre-hearing conference call at 9:00 a.m. on Friday, _____, 2007. Ms. _____, Ms. _____ and the hearing officer participated in the conference call.

APPENDIX E
Agenda Letter¹⁰

VIA E-MAIL, FAX
AND U.S. MAIL

TO THE PERSONS ON THE
ATTACHED DISTRIBUTION LIST

v. County Public Schools

Ladies and Gentlemen:

The hearing officer's legal assistant contacted the parties to schedule the first pre-hearing conference call. The first pre-hearing conference call was duly held at 9:30 a.m. on Wednesday, _____, 2008. Ms. _____, Ms. _____, Ms. _____, Mr. _____ and the hearing officer participated in the call.

The hearing officer stresses to the parties that because of the new timelines under the recent reauthorization, it is imperative that the parties keep the hearing officer informed concerning certain matters, such as any mediation entered into between the parties, any written waiver of the mandated resolution session, etc.

As I said I would during the first pre-hearing conference call, I hereby send to the parties an agenda of items for discussion during the second pre-hearing conference call.

When I serve as a hearing officer, I often conduct a number of pre-hearing conference calls to facilitate preparation for the hearing and the smooth running of the hearing. The purpose of this second pre-hearing conference telephone call will be to discuss the following matters:

1. Determine if any party has any objections or concerns to my serving as the hearing officer in this proceeding.
2. A discussion of the requirements of the Individuals with Disabilities Education Improvement Act of 2004 (the "2004 Act") and our respective duties under the 2004 Act.
3. Whether the parents have received from the LEA the procedural safeguards notice and information concerning free or low cost legal services, etc.

¹⁰ We are grateful to John Robinson for sharing his firm's template letters in this regard.

4. Has settlement been explored through mediation or otherwise.
5. To the extent that these items have not already been addressed, your estimation of the length of the hearing, any problems in completing it if necessary during an evening session, as well as the date and location of the hearing. Whether the parents want the hearing to be open or closed. What time we start and end each day.
6. How the hearing will be handled by me as the hearing officer, i.e., the format? Who will proceed first and who has the burden of proof? A suggested format for the hearing is attached.
7. Any procedural items either party intends to raise such as problems with whether an issue is hearable (jurisdiction), other necessary parties, attendance of witnesses (including subpoena requests), sequestration of witnesses, telephone testimony, records, etc.
8. Agreement as to any facts and/or documents, including the possibility of preparing a brief statement regarding the student involved, his or her educational history and a chronological list of those events which procedurally led to this dispute being submitted to the hearing process.
9. How and when the parties will exchange information pursuant to 34 CFR 300.509(a)(3) and (6) regarding anticipated witnesses to be called (including the general thrust of their testimony) and the documents (including evaluations) intended to be introduced, i.e., the five business day rule deadline.

The parties will be requested to provide me with a copy of their witness list when provided to the opposing party. In addition, the parties will be requested to prepare a list of exhibits noting how each is marked (e.g., S-1 for District and P-1 for parent) with a copy of each exhibit so marked being attached to the list. Such a packet will then need to be provided to the opposing party under the five-business day rule as well as one to me. Of course, I encourage the parties to pursue the compilation of a joint exhibit notebook as they presently contemplate.

10. I encourage the parties to discuss their exhibits to avoid duplication and agree on which will be admitted without objection. Those where there is an objection can be dealt with at the time they are introduced during the hearing. I would like at the start of the hearing to admit into the record, any hearing officer exhibits (basically scheduling orders and any correspondence between me and the parties) and the parties' exhibits to which there is no objection.
11. I encourage the parties to discuss the order in which witnesses will be called and the approximate time each will take to avoid as much as possible witnesses wasting their time. Also to be discussed by the parties are any witnesses who must come (or be contacted by telephone) at a specific time, especially if they must be taken "out of order".
12. Determine if the parties desire to file briefs prior to or at the close of the hearing and, if so, establish filing dates.
13. Whether the parents desire an electronic or written decision.
14. Any other problems, issues, or matters which either party feels merit discussion or which would expedite the hearing process.

Subsequent to the conference, I will prepare a written summary, which may be in letter form, of what has been discussed and agreed upon during the conference. I shall most likely place these items on the record at the commencement of the hearing, but before doing so, give each of you an opportunity to correct, supplement, or object to my summary as you see fit.

If, prior to the hearing, either party should have a problem that cannot be mutually resolved and necessitates my involvement, I ask that one of you contact _____, my legal assistant, at my office. We will set up a conference telephone call as soon as possible to discuss and resolve the matter prior to the start of the hearing to hopefully avoid any delays.

Thank you for your cooperation.

Sincerely,

ATTACHMENT

FORMAT FOR HEARING

- I. Opening statement by hearing officer.
- II. Identification of parties and representatives on the record.
- III. Handle exhibits and other preliminary procedural matters.
- IV. Opening statements.
 - a. Party requesting hearing.
 - b. Party responding (or party may wait and give statement before its case is presented).
- V. Presentation of case of party requesting hearing.
- VI. Presentation of responding party's case.
- VII. Rebuttal testimony of party requesting hearing, if any.
- VIII. Rebuttal testimony of party responding to hearing, if any.
- IX. Closing statements (unless written statement/brief is to be provided).
 - a. Party requesting hearing.
 - b. Responding party.
- X. Closing statement by hearing officer.

**APPENDIX F
Pre-Hearing Report**

**VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

PRE-HEARING REPORT ¹¹

School Division

Name of Parent(s)

Name of Child

Counsel Representing LEA
Parent/Child

Counsel Representing

Hearing Officer

Party Initiating Hearing

ISSUES FOR DETERMINATION:

1.

_____.

2.

_____.

3.

_____.

PRE-HEARING CONFERENCE:

A pre-hearing telephone conference was held on _____ at _____ A.M. between _____, _____, and the hearing officer. _____ (S.E.A. monitor) monitored but did not actively participate in the conference. The following was discussed at the pre-hearing conference and I confirm that:

¹¹ VDOE is grateful to Lorin Costanzo for sharing this template form in this regard.

1. The due process hearing will be *closed* at the request of Parents.
2. Mediation was discussed. Mediation is voluntary and is a possibility in this cause. The hearing officer has requested to not be informed of any matters discussed in mediation but to be informed of the status of progress (or lack thereof) as to mediation and the dates of any scheduled mediation.
3. The status of resolution and the resolution session was discussed. The hearing officer has requested to not be informed of any matters discussed but to be informed of the status of progress (or lack thereof) as to resolution meetings and the dates of any scheduled resolution meetings.
4. A *second pre-hearing telephone conference is set for _____ at _____ a.m.* It is anticipated that motions of the parties and the status of mediation and/or timeline reconvening, if appropriate, will be discussed.
5. The anticipated length of the due process hearing and continuance of the hearing date was discussed. It is anticipated that 1 day of hearing is necessary.
6. Upon joint motion of the parties the due process hearing date was continued to _____ . The continuance hearing date is within the 45 day period.
7. The parties will exchange a copy of all documents to be admitted at hearing and a list of witnesses to be called at hearing (with a copy of each provided to the hearing officer) on or before _____ .
8. Clarification of issues was discussed at the pre-hearing conference. The hearing officer directed that counsel for Parents clarify the issues in writing (with a copy of the clarified issues provided to the other party and the hearing officer) by 5:00 P.M. on _____ .
9. The Virginia Department of Education has been charged with monitoring the hearing process. To this end, a monitor has been designated who will observe, but not actively participate in, all pre-hearing conferences and the due process hearing. _____ has been designated as the S.E.A. monitor.

DUE PROCESS HEARING:

The due process hearing in this cause is set for:

<i>Date:</i>	<i>Time:</i>	<i>Location:</i>
_____	_____ A.M.	_____

If an additional day of hearing is required the due process hearing will continue to _____ beginning at 9:00 A.M. at the same location.

The due process hearing may extend past 5:00 P.M. on any hearing date.

TIMELINE:

_____	Date Request for Due Process Hearing received by LEA.
_____	1 st Pre-Hearing telephone conference held.
_____	Parents’ counsel to provided clarification of issues for determination.
_____	Second Pre-Hearing telephone conference set.
_____	Last day of 30 day Resolution Period.
_____	First day of 45 day period for hearing to be held and final decision to be rendered.
_____	Initial Exchange due date (date amended on continuance of hearing dates granted).
_____	Initial setting of due process hearing (date vacated & hearing continued from this date).
_____	Exchange due date (parties to exchange list of witnesses and copy of documents to be admitted with a copy also provided to the hearing officer).
_____	1 st day of Due Process Hearing.
_____	Final Decision Due Date.

MISCELLANEOUS MATTERS:

Pre-Hearing Reports will be periodically sent to confirm hearing officer’s understanding of the matters. The parties will be copied all such reports and are directed to notify the hearing officer in writing, as soon as possible, if any matters stated therein are not correct.

APPEAL, MEDIATION, AND IMPLEMENTATION:

1. Appeal rights: The hearing officer’s decision is final and binding unless either party appeals in a Federal District Court within 90 calendar days of the date of the decision, or in a state circuit court within one year of the date of the decision.

2. Mediation Rights: The parties have rights regarding mediation and opportunity to settle the case. Mediation is an option that affords an opportunity to settle the case and is voluntary on the part of both the local educational agency and the parent or parents.

3. Implementation Plan: The local educational agency shall develop and submit an implementation plan within 45 calendar days of the rendering of a decision or the withdrawal of a hearing request with the following exception: the appeal or consideration of an appeal of the decision by the local school division and the decision is not an agreement by the hearing officer with the parent or parents of the child that a change in placement is appropriate.

45-DAY DECISION DUE DATE: _____

(date)

Hearing Officer

Copies mailed to:

- 1. Parents Counsel
- 2. LEA Counsel
- 3. SEA:
- 4. SEA Monitor