

**RESPONSE TO NJDOE/OAL PROPOSED SPECIAL EDUCATION DUE  
PROCESS PREHEARING GUIDELINES  
Issued January 17, 2020**

**Comments by Rebecca Spar, Esq. on behalf of New Jersey Special Education  
Practitioners  
February 18, 2020  
[rspar44@gmail.com](mailto:rspar44@gmail.com)  
914-261-3918**

**New Jersey Special Education Practitioners (NJSEP) is a statewide association, facilitated by Education Law Center (ELC), of approximately 100 professional attorneys and advocates from private law firms and public interest advocacy organizations who represent parents and their students with disabilities in New Jersey special education cases.**

**Rebecca Spar, Esq., a founding member of NJSEP, represented New Jersey families in countless special education cases for over three decades, litigating cases from OAL through the Third Circuit Court of Appeals, and establishing important precedent under the Individuals with Disabilities Education Act (IDEA). Ms. Spar is currently a trustee of ELC and is active in several *pro bono* projects.**

**Background:**

Page 1, 1<sup>st</sup> paragraph, first sentence:

Students and their families are not entitled to procedural protections only for education placement, programs, and/or services. IDEA provides that parents are entitled to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child. 20 U.S.C. Sec. 1415(b)(6).

Page 1, 2d paragraph, second sentence:

Due process hearings are not limited to whether the the student is receiving a free appropriate public education. (FAPE). Issues include but are not limited to whether the child should be evaluated for eligibility for IDEA services, whether the parent is entitled to an independent evaluation at the district’s expense, if the child is eligible for services under IDEA, whether the child could receive the FAPE in a less restrictive environment, did procedural violations significantly impede the parent’s participation in the decision making process and is the parent entitled to reimbursement for a unilateral placement.

Page 1, 4<sup>th</sup> paragraph, last sentence:

The last sentence in paragraph 4 claims that the reason due process hearings last an entire school year, if not longer is “because parties regularly seek and are granted adjournments thereby extending the hearing timelines. “It is true that it is not uncommon for due process hearings to last an entire school year, if not longer.” In our collective experience, however, the primary reason that this happens is not because the *parties* regularly seek adjournments from scheduled hearing dates. Instead, the reason for the delay is more often because OAL does not offer sufficient hearing dates within the 45-day period to conduct the hearing and/or allows the parties to decline proposed hearing dates without giving any reasons. Indeed, it has been common practice over many years for the ALJs conducting settlement conferences at OAL to offer hearing dates that are several months, if not a year, into the future. Once hearing dates are scheduled, most go forward without requests for adjournment by the parties.

Page 1, 6<sup>th</sup> paragraph and Memorandum of Agreement:

It appears that the statement that a Memorandum of Agreement has been executed is not true. Public records requests were made by a NJSEP member to both NJDOE and OAL for a copy of the Memorandum of Agreement and both agencies responded that it had not been executed and, thus, would not be provided.

## **Uniform Prehearing Guidelines**

### **Purpose**

As is set forth below, requiring ALJs to implement the procedures in the proposed guidelines in all special education due process hearings would violate IDEA and its implementing regulations as well as N.J.A.C. 1:6A-1.1 to 12.1.

First, NJDOE/OAL intends to implement these Guidelines without complying with IDEA’s requirement that “[p]rior to the adoption of any policies and procedures needed to comply with [IDEA].1.”there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities. 20 U.S.C. Sec. 1412(a)(19); 34 CFR 300.165(a). Here, there have been no public hearings at all, and the proposed guidelines were disseminated to school districts rather than to individuals with disabilities and parents of children with disabilities.

Other IDEA violations as well as violations of OAL regulations concerning special education hearings are discussed below.

In addition, as discussed more fully below, NJSEP disputes that most of these procedures will lead to compliance with the 45-day rule.

## **Prehearing Matters**

### **1. Hearing Dates**

The first paragraph says that the first hearing date will be a settlement conference. This paragraph omits, however, how soon after transmittal to OAL, the first hearing date will be scheduled.

This omission is significant in that any delay in scheduling the first hearing date increases the likelihood that a final decision will not be issued within 45 days of transmittal. If OAL continues to schedule first hearing day/settlement conference on alternate Thursdays in Trenton and Newark, then the first hearing date/settlement conference should take place on the next scheduled settlement conference day following transmittal.

In addition, the written notice to Petitioners for the first hearing date must say that it will be a settlement conference and that Petitioners are not required to submit evidence they plan to use in the hearing five days in advance of the settlement conference but rather five days before the first hearing date when testimony will be taken. Parents who are represented by attorneys who regularly appear in special education hearings know that the first hearing day is a settlement conference and 5-day disclosures are not required. Parents and Attorneys who do not regularly appear do not know this and it is wrong to not clearly inform them in writing.

The second paragraph should say that if a case is not settled that day, jurisdiction will be retained by the ALJ only with consent of the parties. NJSEP is aware of at least one recent occasion where the parties did not settle but over the objection of counsel the settlement judge said he would still retain jurisdiction.

The third paragraph states that the settlement judge will discuss with the parties “all the matters listed in the regulation for preparing a prehearing order, N.J.A.C. 1:1-13.2,” and the settlement judge will relay this information to the ALJ assigned to hear the case. N.J.A.C. 1:1-13.2 (a) contains 14 provisions and no settlement judge has the time to go through all these provisions with the litigants and then accurately relay the discussion to the hearing judge.

More importantly, in deciding to convert the first hearing date to a settlement conference, OAL has repeatedly emphasized that what takes place in the settlement conferences will be totally separate from and not shared with the hearing judge. Representations are made that any notes taken will be torn up. Requiring the

settlement judge to now collect information and report this information to the hearing judge will violate that promised separation.

The fourth paragraph states that the hearing judge will hold a prehearing conference and issue a prehearing order within 10 days after the case is assigned to the hearing judge. This is a violation of N.J.A.C. 6A:9.1 which requires that a preemptory hearing date be scheduled no later than 10 days from the date when NJDOE's Office of Special Education Policy and Dispute Resolution contacts OAL at the conclusion of unsuccessful resolution or mediation.

With the time taken to convert the first hearing date to a settlement conference (approximately 10 days) and now adding up to another 10 days just to schedule hearing dates (not hold any actual hearings), 20 of the 45-days will be used and with no requirement as to when an actual hearing will take place.

Further, even if not a direct violation of IDEA and state regulations, using 10 out of the 45 days to do nothing more than schedule what is usually a brief telephone conference and issue a prehearing order is excessive. When possible, the prehearing conference should be scheduled with the ALJ assigned to hear the case the same day that the parties appear for the settlement conference. If that is not possible, the prehearing conference should be scheduled and a prehearing order issued within no more than 48 hours. The prehearing conference could be expedited if the parties are asked to complete a form prior to the conference as occurs in federal court.

This section is unclear as to the process for assignment of hearing dates. The proposed Guidelines say that there will be "a discussion of the dates for hearing" with the settlement judge. Since it is doubtful that the settlement judge will have access to the hearing judge's calendar, this wouldn't appear to be productive.

IDEA requires that "time and place" of due process hearings be "reasonably convenient to parents." See 34 CFR 300. 15. This provision applies to all hearing dates, including the first hearing date which New Jersey has converted to a settlement conference.

OAL special education regulations state that the hearing date "shall, to the greatest extent possible, be convenient to all parties but shall be approximately 10 days from the date of the scheduling call." N.J.A.C. 1:6A-9.1(a).

Usually ALJs offer several dates when they are available and counsel either say they, the parent/s and district representative are available or not available. Generally, ALJs do not inquire why someone is not available on the offered dates and multiple possible hearing dates may be rejected without explanation. This is not an effective system for moving scheduling of hearings forward.

Counsel for both sides as well as the school district representative should make themselves available on proposed hearing dates unless they are scheduled to appear in other OAL or judicial proceedings, have previously scheduled vacations or medical procedures. In compliance with IDEA, more leeway should be given for parents in order that the hearing date is “reasonably convenient” to them. In addition to the above reasons, parents may have difficulty arranging affordable or available child-care or getting off work on particular days or time periods. In our experience, though, it has generally not been parents who have slowed down the scheduling of hearings.

The last paragraph on page 2 says that the ALJ “will grant requests for adjournment of settlement conference, the initial prehearing conference, or any other hearing date only in extraordinary circumstances...” This provision as applied to parents violates IDEA’s requirement that the “time and place of hearings” be “reasonably convenient to parents.”

Typically, OAL has been very reluctant to grant any requests for adjournment of the settlement conference, including requests by parents. It is, however, a hearing date and parents are entitled to a hearing date that is “reasonably convenient.” When a parent requests an adjournment of the settlement conference because the date is not reasonably convenient for the parent, it needs to be adjourned. In contrast, both counsel and the school district’s representative know they need to be available on Thursdays when needed for settlement conferences and should not be granted adjournments except in extraordinary circumstances.

As for a parent’s requests for adjournment of other scheduled hearing dates, if their request shows that the date is no longer “reasonably convenient” then it should be granted. For example, if a parent agrees to a proposed date and is later told by their boss that they cannot take the day off or the family member who watches their severely disabled child for free is no longer available that day, then the scheduled day is no longer “reasonably convenient.”

As for requests for adjournment due to the unavailability of counsel for either party or the school district representative, the proposed Guidelines should state that all requests for adjournments should be in writing. In addition, the proposed Guidelines should include examples of “extraordinary circumstances” such as medical procedures that cannot be delayed, death of family member or illness.

## **2. Scope of the Claim**

Referring to a dispute over the timeliness of the filing of the petition and saying that an offer of proof or evidence will be taken regarding the date on which the petitioner knew or should have known (KSHK) of the basis for his or her claims

appears to be referring to a statute of limitation issue. It is unclear to me, though, what is meant by the “scope of the claim.” Does it mean only that once the KSHK date is determined for each claim, the parties will know how far back each claim can go?

### **3. Decision Due Dates**

According to this provision, the ALJ can extend the 45-day deadline for issuing a decision “due to the grant of adjournments, the scheduling of hearing dates, the submission of closing briefs or other reasons.”

NJSEP’s proposed revisions to how adjournments requested by either party should be granted is covered in Part 1 above. Even if those revisions are adopted, NJSEP objects to proposed Guideline 3 because it impermissibly expands the authority of an ALJ to extend the 45-day timeline in violation of IDEA. It is important to point out that IDEA does not allow an ALJ to unilaterally extend the 45-day deadline. Rather, an ALJ only has authority to extend the 45-day deadline at the request of a party. In this regard, IDEA requires that a decision be issued no later than 45 days after the expiration of the 30-day [resolution] period unless the court, grants a “specific extension of time... *at the request of either party.*” 34 C.F.R. 300.515(c) (emphasis added).

In addition to violating IDEA by allowing the ALJ to unilaterally adjourn a hearing, proposed Guideline 3 also permits judges to unilaterally delay the decision due to the scheduling of hearing dates, the submission of closing briefs or any “other reasons” in the judge’s discretion. IDEA only allows hearing decisions to be extended due to requests by a party. 34 CFR 300.515. It does not allow the ALJ to unilaterally delay completing the hearing within the 45-day requirement because the ALJ has no available hearing dates until two to six months after the case arrives in OAL. This is what has happened up to this date and is the primary reason why hearings have not even been held within the 45-day deadline much less decided. ALJs cannot be permitted to continue to use the OAL’s inability to timely schedule hearing dates as an excuse for extending the 45-day deadline.

As for extending the 45-day deadline in order to submit closing briefs, IDEA does not give an ALJ the authority to unilaterally extend the deadline for this purpose. There should be an extension of the 45-day deadline for closing briefs only when both parties request to extend the time for closing briefs and are in agreement as to the additional days to be added. In addition, either of the parties can submit legal briefs at any point. If there are unique legal issues that the ALJ wants briefed, the ALJ can always ask the parties to brief one or more legal issues at any point after assignment of the case.

The purpose of the proposed Guidelines is to increase the timeliness of decisions. Instead of doing this, NJDOE/OAL now proposes allowing ALJs to unilaterally extend the 45-day deadline for decisions for any “other reason.” Again, IDEA does not allow an ALJ to unilaterally extend the 45-day deadline for any reason, much less for a catch-all provision. Even if the Guidelines were changed to say that, at the request of either party, an ALJ could extend the 45-day deadline for “any other reason,” such an open-ended provision should require consent of both parties.

Finally, the proposed Guidelines do not address delays by ALJs in issuing decisions. Proposed procedures need to be developed on how NJDOE/OAL will ensure that decisions are issued in compliance with the 45-day requirement.

**4. Expedited Hearings:** No comments

**Exhibits**

**5. Notice for Disclosure of Witnesses and Exhibits:**

According to proposed Guideline 5, “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.”

Proposed Guideline 5 does not comply with either IDEA or with OAL regulations governing the admission of evidence as well as the admission of reports in special education hearings.

IDEA states that any party to a hearing has the right to *prohibit* the introduction of any evidence at the hearing that the other party failed to disclose at least five business days before the hearing. 34 CFR 300.512(a)(5).

In addition, IDEA provides as follows with respect to the disclosure of additional information:

(b) (1) At least five business days prior to a hearing conducted pursuant to Sec. 300.511(a), each party must disclose to all other parties all evaluations *completed by that date and recommendations* based on the offering party’s evaluations that the party intends to use at the hearing; (2) A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation

and recommendation at the hearing without the consent of the other party. 34 CFR 300.512(b)

Read together, these two federal provisions provide that both parties are required to produce to the other party any evidence in their possession no later than five business days before the first hearing date (not before the settlement conference, as proposed Guideline 5 acknowledges). Contrary to the proposed Guidelines, though, if a party does not produce evidence and then later tries to use it in a hearing, it is not within the hearing officer's discretion to override a party's objection to the admission of the evidence. Rather, if the other party objects to admission of the evidence, it is to be barred. By the clear terms of subsection (a)(5), the hearing officer is not given discretion to override a party's objection and admit evidence that was in one party's possession five business days before the hearing but not produced.

The hearing officer's only discretion under IDEA is with respect to subsection (b)(1) which concerns completed evaluations, and recommendations based on the completed evaluations, that the party intends to use at the hearing. In that case and where one party does not produce a completed evaluation and recommendations within five business days of the hearing and the other party does not consent to the admittance of that report, the ALJ in his/her discretion may grant or bar admission of *relevant* completed reports.

OAL's administrative code governing special education hearings also addresses the exclusion of evidence that was not disclosed five business days before the date of the hearing. OAL's regulation says that "upon application of a party, the judge *shall* exclude any evidence at the hearing that has not been disclosed to the party at least five business days before the hearing, unless the judge determines that the evidence could not reasonably have been disclosed within that time." N.J.A.C. 6A:10.1.

State regulations can enhance the protection provided by IDEA but cannot provide less protection. To interpret N.J.A.C. 6A:10.1 to allow the ALJ full discretion to decide when evidence not disclosed within five business day is to be admitted would conflict with IDEA regulations which gives a hearing officer some discretion but only with respect to completed reports and recommendations that were not produced within five business days.

In addition, the state regulation also allows the ALJ to admit evidence not previously disclosed within the five days when the evidence "could not reasonably have been disclosed within that time." Reports which were not completed within five business days before the hearing could not have been reasonably disclosed. Similarly, evidence that a party didn't possess at the five-day deadline could not reasonably have been disclosed.



In summary, to be consistent with federal and state regulations, Guideline 5 needs to be revised to say:

- 1) all evidence and completed reports, and recommendations based on the completed reports, that the party intends to use in the hearing must be disclosed to the opposing party no later than five business days before the first hearing date (excluding the hearing date used as a settlement conference);
- 2) Upon application of a party, evidence not produced by the opposing party within five business days of the first hearing date shall not be admitted in the hearing;
- 3) With regard to completed reports, and recommendations based on the completed reports, that are not produced within five business days, unless the other party consents to the admission, the ALJ may exercise its discretion and bar admission of the completed reports and recommendations.
- 4) In exercising its discretion with respect to admission of completed reports and recommendations available at the time of the five business day deadline but not produced, the ALJ may consider: a) materiality and relevance of the report; b) the reason it was not timely disclosed; c) the absence of prejudice to the adverse party and in all cases, the adverse party shall be given an opportunity to examine the evidence in advance of any ruling on admitting the reports and recommendations.
- 5) As for evidence not in the party's possession five business days before the hearing, including reports not completed at that time, the ALJ shall admit the evidence if it could not "reasonably have been disclosed within" the five-day requirement.

## **6. Joint Exhibits**

It is unclear to NJSEP what the proposed Guidelines are asking the parties to do by saying the parties should confer and "designate one set of exhibits of record..." By "exhibits of record," are the proposed Guidelines asking that the parties confer and agree, for example, to the documents that are contained in the student's file such as what the child's current IEP is or what the most recent educational evaluation is or what the child's report cards were for each school year? The student's record would also include evaluations obtained by the parents and provided to the school district. If this is what is meant here, we think this is useful in that sometimes IEPs and other documents introduced by the parties are missing pages, are drafts rather than the final document or are in the student's file but never shared with the parent. The only efficient way to do this, however, is if the parties share the actual documents they believe are "of record" before the first day of the hearing and then communicate and resolve any issues. NJSEP members have done this and found it does reduce hearing time needed to resolve these kind of issues.

With regard to Joint Exhibits, NJSEP proposes that it should be explicitly stated that by agreeing to Joint Exhibits, the parties are agreeing that the document is authentic but not to the truth of what the document says.

As for the last paragraph in which 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,” NJSEP is in full agreement that the same document should *never* be admitted as a Petitioner’s and a Respondent’s exhibit, unless there is a dispute over which document is the authentic document of record. Duplicate copies of the same document produces a confusing record both at trial and in any appeal. Rather than saying that the parties are “encouraged” to designate a single copy as the exhibit, this provision should say that under no circumstances should the same document be admitted as a Petitioner’s exhibit and as a Respondent’s exhibit, except in cases where the authenticity of a document is at issue.

## **7. Exchange of Exhibits**

Proposed Guideline 7 says that the parties must exchange a complete set of their respective exhibits at or before the first actual hearing date. Proposed Guideline 5 says that the parties must exchange all potential witnesses and exhibits at least 5 business days before the first hearing date. NJSEP understands Guideline 7 to govern the exchange by the parties of their actual, rather than potential, exhibits before the first hearing date. When a parent is represented by counsel, it is also more efficient to premark the actual exhibits for identification and put the exhibits in a notebook with numbered tabs and a proposed exhibit list.

With regard to “expert reports,” the proposed Guidelines should state that no witness shall be allowed to testify as an expert unless the witness submits an expert report setting out each expert opinion and the facts upon which the expert witness is relying for each opinion. The expert report shall be provided to the other party and to the ALJ at least five business days in advance of the hearing.

All parent witnesses who testify as experts are required to submit an expert report at least five business days before the hearing begins. In contrast, school district witnesses are allowed to testify as experts and to give expert opinions without preparing a written report. This discrepancy has been repeatedly raised by parent advocates and the only response has been that it would cost time and money for district staff who testify as experts to prepare expert reports. This response is simply not persuasive when parents have to locate and pay expert witnesses to prepare written reports in order to have any chance of succeeding on their claims.

All witnesses who testify as experts should be required to produce written expert reports and curriculum vitae five business days in advance of the hearing. If school

district witnesses who testify as experts are not required to produce written expert reports, then parent experts should not be required to do so either.

## **8. Presentation of Evidence**

NJSEP concurs that the parties can agree to change the order of the presentation of evidence and this could include the parties agreeing that a parent witness would testify out of order. We further agree that a school district need not put on every possible district witness just as a parent should not put on every possible witness. We are opposed, however, to any implication of proposed Guideline 8 that the ALJ can order either party to take a witness out of order. Each party to a hearing has a right to present evidence and part of the right to present evidence includes determining the order in which that evidence will be presented. The ALJ or opposing counsel can suggest taking a witness out of order but it should be up to each party's counsel to decide whether to do this, after considering how it will impact the presentation of their client's case.

NJSEP is very concerned about the following statement by NJDOE/OAL: "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."

It goes without saying that not every member of a child study team needs to testify. It is incredible, however, that NJDOE/OAL is blatantly telling school districts to only put on one or two witnesses and after the parent puts on all of its witnesses, the ALJ will allow the school district to put on the rest of its witnesses or recall some witnesses who had already briefly testified in a rebuttal case. This is clearly contrary to the intent of the New Jersey Supreme Court and New Jersey legislature when they placed the burden of production and persuasion on the school district. See N.J.S.A. 18A:46-1.1. It is also contrary to what rebuttal cases are for which is to allow a party to respond to testimony that could not have been anticipated.

New Jersey has a long history of placing the burden of production and persuasion on the school district, initially through case law and then codified in state statute. See *Lascari v. Bd. Of Educ. Ramapo Indian Hills Regional High School Dist.*, 116 N.J. 30 (1989); N.J.S.A. 18A:46-1.1. Neither the New Jersey Supreme Court or the New Jersey Legislature contemplated that the school district's only obligation was to put on minimal evidence in its case in chief and it would then be allowed to provide the rest of its evidence on rebuttal.

For example, if the parent claims that the proposed IEP will not offer the student an appropriate education, then the school district is obligated in its case-in-chief to put on all evidence that it believes shows that the IEP does offer the student an appropriate education. The school district should not be allowed to hold back evidence or witness testimony in its case-in-chief and then allowed to introduce that evidence or testimony in a rebuttal case. As one court put it, the function of rebuttal testimony or evidence is not to give a party a “second nibble at the cherry.” *Daly v. Far Eastern Shipping Co. PLC*, 38 F. Supp. 2d 1231, 1238 (W.D. Wash. 2003).

Some school district counsel have argued they are not always clear as to what issues a parent is raising in their due process petition. There are multiple opportunities for the parties to clarify the issues to be resolved at the hearing, including with the prehearing conference with the hearing judge and the preparation and issuance of the prehearing order. If either party is still unclear as to what issues will be resolved in the hearing, they may ask for one or more additional prehearing conferences. In addition, as discussed in proposed Guideline 5 above, federal and state regulations require the parties to produce witness lists and evidence to be used in the hearing at least 5 business days before the first hearing date as well as completed reports.

## **9. Reports as Evidence**

It is unclear to NJSEP what NJDOE/OAL is saying in the first paragraph of proposed Guideline 9. Is NJDOE/OAL saying that if the author of a report testifies, there will be direct examination only as to “matters that are important to establishing its evidentiary weight or relevance or to fostering a better understanding of the report?” If this is what is meant by this paragraph, it is inconsistent with IDEA which gives the parties a right to present evidence, not to have the hearing officer mandate how that evidence is to be presented. 34 CFR 300.512(a)(2). If NJDOE/OAL intends something else, it needs to be clearer.

The second paragraph in proposed Guideline 9 pertains to the admission of “expert reports addressing the ultimate issue or issues to be decided.” The first issue that needs to be clarified here is how NJDOE is defining an “expert report.” For example, do the evaluations, re-evaluations or other reports discussed in the first paragraph become “expert reports” when the reports address the ultimate issue or issues to be decided?

Second, IDEA refers to three types of Independent evaluations: evaluations provided by parents at the parent’s expense; evaluations paid by the school district when a parent disagrees with a district evaluator; or evaluations ordered for “good cause” by an ALJ. 34 CFR 300.502. Federal regulations state that either party may present any independent evaluation as evidence at a due process hearing. 34 CFR

300.502(c)(2). The regulations do not say that an independent evaluation is admissible only if the author of the report is made available for cross examination. Thus, it would violate IDEA to exclude an independent evaluation as evidence because the report addressed one or more ultimate issues and the preparer of the independent evaluation does not testify.

Third, the second and third sentences of the second paragraph set out how much time will be allowed for direct and cross examination of each witness who addresses one or more ultimate issues. It would appear that there are no time limits when the author of a report referred to in the first paragraph testifies but there will be a time limit when a witness testifies regarding a report that addresses the ultimate issue or issues to be decided. This makes no sense.

In addition, as discussed in proposed Guideline 7 above, all witnesses who testify as experts, whether appearing on behalf of a parent or the school district, should be required to provide written expert reports at least five days in advance of the hearing. In the alternative, if school district witnesses who testify as experts are not required to prepare expert reports, then parent experts should not be required to submit expert reports either.

## **10. Number of Hearing Dates**

Proposed Guideline 10 says that “absent strong justification, hearings will be concluded within two full days with consecutive days whenever feasible.”

Based on experience, a full hearing day is usually no more than 5 ½ hours. It is simply unreasonable to expect that most due process hearings can be concluded in 11 hours or 2 “full” days. One can read New Jersey hearing decisions in special education cases to know that only allowing one day for each party to present evidence and cross-examine witnesses would mean that neither side would be able to fully present their case.

IDEA gives a parent the right to present evidence and confront, cross-examine and compel the attendance of witnesses pertaining to the issues in the case. 34 CFR 300.512. Due process petitions that aren’t settled at mediation or in the OAL settlement conference are often more complicated and contain multiple issues. Even single-issue petitions may take more than one day for each side to fully present their case.

Rather than violating IDEA and establishing an arbitrary and unrealistic requirement that hearings be concluded within two full hearing days, the ALJ should manage the hearing by, among other things, working with the parties to determine the hearing days required, to eliminate duplicative or unnecessary witnesses and to ensure

that to the extent possible, no hearing time is taken in discovery disputes or evidentiary disputes and that hearings start on time and continue for the full day.

### **Important Issue Not Addressed in the Proposed Guidelines**

Discovery is an important issue, particularly for those representing parents. With the exception of some expert reports obtained by parents (that are given to school districts at least five business days before the first hearing date), school districts possess virtually all documents that pertain to the issues raised in the hearing. Although depositions and interrogatories are not allowed in special education proceedings, discovery is allowed. N.J.A.C. 1:6A-10.1. When the parents or their counsel request documents in the school district's custody, school districts, if they provide the documents at all, often say they need not do so until five business days before the hearing.

OAL regulations pertaining to special education hearings say that discovery is to be *completed* no later than five business days before the date of the hearing. N.J.A.C. 1:6A-10.1 (a). Everyone who has ever engaged in document production knows that the first document production is only the beginning of discovery, not the completion. To wait to respond to discovery requests until 5 business days before the hearing, doesn't allow the party requesting the discovery to review the documents, determine what, if any, documents he/she intends to use, to request other documents referred to in the provided documents or to contend that some requests for documents were ignored. Discovery, including time-lines for initial requests, production and how to handle any disputes, should be fully addressed in the prehearing order.

Thank you for your consideration of these comments. We request that implementation of the proposed Guidelines be postponed until there has been adequate opportunity for family-side input and until that input has been fully considered and responded to.