THE PRO SE PARENT:
AN ALJ/HO GUIDE TO WORKING WITH AN UNREPRESENTED PARENT

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
IDEA ADMINISTRATIVE LAW JUDGE TRAINING
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DEUSDEDI MERCED, ESQ.

SPECIAL EDUCATION SOLUTIONS, LLC
(203) 557-6050
DMERCED@SPEDSOLUTIONS.COM
WWW.SPEDSOLUTIONS.COM

I. INTRODUCTION

A. The biggest challenge most IDEA administrative law judges (ALJ) and hearing officers (HO) face in fulfilling the role and responsibilities as an ALJ/HO is addressing the needs of *pro se* (i.e., unrepresented) parents during the hearing process. While a few parents possess the skills and emotional control to cogently and professionally present their case to an ALJ/HO, most understandably do not.

B. The number of *pro se* parents in IDEA cases seems on the rise, probably for many reasons. First, though IDEA provides that parents must be notified of any free or low cost legal services,[1] in reality such services are either non-existent or the agencies providing them are overwhelmed by the demand. Second, since 1986 IDEA has provided that parents may be reimbursed for attorneys' fees if found to be a prevailing party.[2] But, many attorneys require a substantial retainer to mitigate their risk and most parents just cannot afford it. Finally, a few parents dislike/distrust attorneys or consider representing themselves and their child kind of a do-it-yourself project.[3]

C. The increase in persons representing themselves appears to be occurring not just in IDEA cases but generally, including the courts. The trend has prompted more discussion on the extent and manner

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[1] 34 C.F.R. § 300.507(b).
[2] *See* 34 C.F.R. § 300.517.
[3] *See* Memorandum to Erlichman, et. al from Wamsley, *Judges, Administrative Law Judges, and Hearing Officers Ability, Extent, and Duty to Question Witnesses to Develop the Record with Pro Se Litigants* (July 23, 2012) (on file with The Massachusetts Bureau of Special Education Appeals) at 1.

in which a decision maker may or must assist an unrepresented party in an adversarial proceeding, and if so, the appropriate manner to do so.[4] One factor in the discussion is the nature and purpose of the proceeding.

D. If the primary goal of the IDEA hearing process is to ensure that the educational rights of a child with a disability are upheld,[5] then to what extent, if any, does the ALJ/HO have a responsibility to take some steps to mitigate the potential adverse effect the lack of representation may have on the process while also achieving the IDEA's primary goal? And, if the ALJ/HO has a responsibility to ensure that the educational rights of a child with a disability are upheld, is an affirmative duty to develop the record created?[6] Or, is the role of an ALJ/HO just to sit back and act as an umpire calling balls and strike but not overly intruding into the process of completing the record?[7]

E. If an ALJ/HO agrees that the very nature of the IDEA hearing process places upon us the responsibility to take some steps, the concern often then is how to balance maintaining impartiality while participating in the completion of the record. But, the two dimensions are not mutually exclusive.[8] Rather, ALJs/HOs must strike the balance between them by determining the extent, if any,

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[4] *See*, *e.g.*, Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant,* 27 J. Nat'l Ass'n Admin. L. Judiciary 447 (2007).

[5] 34 C.F.R. § 300.1.

[6] At least one court has found than an IHO has an affirmative duty to develop the record if mandated by enabling law. *See Lizotte v. Johnson,* 777 N.Y.S.2d 580 (2004). In *Lizotte*, the court held that a New York City Administration for Children's Services ("ACS") hearing officer "should have inquired into the relevant facts to provide a more complete record, especially considering the petitioner's *pro se* appearance and her inability to speak English." The ACS regulations require hearing officers to develop a full record. Arguably, the IDEA implicitly requires an IHO to develop the record. First, an IHO's "determination of whether a child received a FAPE must be made on substantive grounds." *See* 34 C.F.R. § 300.513(a). Further, an IHO is given the authority to request an independent educational evaluation. *See* 34 C.F.R. § 300.502(d). Missouri regulations, though not as explicit as the ACS regulations in *Lizotte*, provide that Hearing Commissioners have the "authority to question witnesses and request information." *See* Missouri State Plan for Special Education, Part B 2019, Regulation V – Procedural Safeguards/Discipline (State Plan), ¶ H (Hearing Procedures, Witnesses), pp. 80, 81.

[7] *But see Logue v. Dore,* 103 F.3d 1040, 1045 (1st Cir. 1997) (stating it is "well-established that a judge is not a mere umpire"). *See also Quercia v. U.S.,* 289 U.S. 466, 469 (1933).

[8] Memorandum, *supra*, at 5.

each step will assist and/or accommodate the unrepresented parent in making a record for the ALJ/HO to render an informed decision on the issues presented.

F. Clearly, ALJs/HOs cannot give an unrepresented parent legal advice. But, it is also well settled that more leniency is also dictated on procedural matters.[9] There are a host of accommodations and assistance that an ALJ/HO can provide a *pro se* parent.[10] And, there are additional measures an ALJ/HO can take to develop the record. This outline offers a variety of suggestions in both of these regards to help ensure that the process achieves its primary goal of upholding the educational rights of the child. Whether an ALJ/HO chooses to implement any of them will depend on how the ALJ/HO perceives his/her role and responsibilities as an ALJ/HO and assesses the particular circumstances in each case.

G. Whether an ALJ/HO under IDEA has the authority to engage more fully in the hearing process appears clear. The IDEA sets forth the specific rights accorded to any party in a due process hearing.[11] A hearing officer is charged with the specific responsibility "to accord each party a meaningful opportunity to exercise these rights during the course of the hearing." It is further expected that the hearing officer "ensure that the due process hearing serves as an effective mechanism for resolving disputes between parents" and the school district. In this regard, apart from the hearing rights set forth in IDEA, "decisions regarding the conduct of due process hearings are left to the discretion of the hearing officer," subject to appellate

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[9] *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Merritt v. Faulkner*, 697 F.2d 761, 769 (7th Cir. 1983). *See also Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents with Children with Disabilities*, 52 IDELR 266 (OSERS 2009) (although the comments to the regulations permit a state agency to dismiss complaints that are unsigned or do not contain the parent's contact information, OSERS notes that the better practice might be to notify the parents of the defects in their complaints and allow the parent to remedy the deficiencies); *In re Student with Disabilities*, 112 LRP 36509 (SEA NY 2010) (stating that an IHO "should deal flexibly with, liberally to, and with understanding towards a *pro se* parent with respect to matters relating to procedures").

[10] Providing a reasonable accommodation to a *pro* se parent is not necessarily an ethical violation. *See*, *e.g.*, *ABA Model Code of Judicial Conduct R.* 22 (2007), Comment 4 (stating that a judge can make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard).

[11] *See*, *e.g.*, 34 C.F.R. § 300.512.

review.[12] And, the generally applicable standard of review is abuse of discretion, which typically favors the hearing officer.[13]

H. While not the focus of this presentation, often problems similar to those presented by a pro se parent arise with certain non-attorney advocates. In as much as there is no certification/licensure-type process for non-attorney advocates, the range of advocacy skills and professionalism they exhibit varies widely. Some non-attorney advocates present themselves in a manner very similar to the parents who do not have the emotional control or skills to provide the ALJ/HO with a complete record from which the ALJ/HO can make an informed decision. On the other hand, other non-attorney advocates exhibit advocacy skills and professionalism comparable to excellent special education attorneys. Accordingly, there can be no "hard and fast" ground rules in handling the involvement of a non-attorney advocate in the hearing process.[14]

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[12] *Letter to Anonymous,* 23 IDELR 1073 (OSEP 1995). *See also Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, pages 46704-46706 (stating, in pertinent part, "the specific application of those procedures [regarding prehearing and decisions] to particular cases generally should be left to the discretion of hearing officers who have knowledge and ability to conduct hearings in accordance with standard legal practice. There is nothing in the Act or these regulations that would prohibit a hearing officer from making determinations on procedural matters not addressed in the Act so long as such determinations are made in a manner that is consistent with a parent's or a public agency's right to a timely due process hearing.").

[13] *See*, *e.g.*, *O'Toole v. Olathe Unified Sch. Dist. No. 233*, 144 F.3d 692,709 (10th Cir. 1998); *D.Z. v. Bethlehem Area Sch. Dist.*, 2 A.3d 712 (Pa. Commw. Ct. 2010). *Cf. J.W. v. Fresno Unified Sch. Dist.,* 611 F. Supp. 2d 1097, 1109 (E.D. Cal. 2009) *aff'd* 626 F.3d 431 (9th Cir. 2010) (court gave "due weight to ALJ's decision" after "ALJ questioned many witnesses, both to clarify responses as well as to elicit follow up responses"); *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942 (9th Cir. 2007) (court treated "hearing officers findings as 'thorough and careful' when the hearing officer participate[d] in the questioning of witnesses"); *M.M. v. Lafayette Sch. Dist.*, No. CV 09-4624, 2012 WL 398773 (N.D. Cal. Feb. 7, 2012) (court in deferring to ALJ's fact findings noted the ALJ was "thoroughly engaged … asking numerous follow-up and clarifying questions of the witnesses though out"); *S.A. v. Exeter Union Sch. Dist.*, No. CV F 10-347 LJO SMS, 2010 WL 4942539 (E.D. Cal. Nov. 24, 2010) (court finding that "although the ALJ actively questioned [the superintendent] for a lengthy period of time, there [was] no evidence that the ALJ inappropriately credited her responses").

[14] The IDEA permits a non-attorney advocate to *accompany* and *advise* a party at a hearing. *See* 20 U.S.C. § 1415(h)(1); 34 C.F.R. § 300.512(a)(1). However, the IDEA does not address whether non-attorney advocates who have "special knowledge or training with respect to the problems of children with

The ALJ/HO will have to assess each situation in terms of whether the non-attorney advocate presents himself or herself more like an unsophisticated *pro se* parent or a competent special education attorney. Usually the participation of the non-attorney advocate in the prehearing conference ("PHC") will give the ALJ/HO a fairly good indication of what can be expected in the hearing and further provide the ALJ/HO with a chance to consider various options. To the extent the situation presented more closely reflects the former, the ALJ/HO may elect to limit the involvement of the non-advocate and implement some of the strategies suggested here for an unrepresented parent.

I. An awkward situation for an ALJ/HO is presented when the parent is also an attorney but not experienced/familiar with hearing and/or special education procedures. Again, an ALJ/HO must assess each situation presented to determine the extent an ALJ/HO should become more engaged in the process to help ensure the IDEA's goal is achieved. The PHC will usually provide some insight of what to expect at the hearing and prepare for it.

II. UPON APPOINTMENT

A. An ALJ/HO cannot start too early in helping the parent understand that with the right to go to hearing under the IDEA comes responsibilities in exercising that right. An ALJ/HO might provide to the parties a letter of introduction, (s*ee* Attachments 1a and 1b), that includes Hearing Process Guidelines, (*see* Attachment 2). This approach can accomplish several purposes, including:

1. Alerting the ALJ/HO that the parent needs an interpreter to participate in future proceedings.

2. Encouraging the parties to raise any concerns about a possible conflict of interest immediately to avoid possible delays.

3. Providing the parent with a written understanding of the initial procedural obligations of the parties.

4. Granting the ALJ/HO an opportunity to request a copy of the IEP, which can often be very helpful in understanding the

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disabilities" can *represent* parties at hearings. The issue of whether non-attorney advocates may *represent* parties to a due process hearing is a matter that is left to each State to decide. *Analysis and Comments to the Regulations*, Federal Register, Vol. 73, No. 156, Page 73017 (December 1, 2008).

parent's concerns/issues/proposed resolutions.

5. Affording the IHO the opportunity to provide the parent Hearing Process Guidelines. (*See* Attachment 2.)

B. The Hearing Process Guidelines document attempts to set forth in plain language some expectations and standards of conduct that most ALJs/HOs would expect of any party, advocate and attorney. But, understandably, most unrepresented parents are not acquainted with them. Too many ALJs/HOs only deal with these "ground rules" as the need for them arises. With a *pro se* parent, it would be fairer to the parent to establish the "ground rules" at the outset and give the parent notice of them, which will enable the parent to ask questions during the PHC.[15] Moreover, as a general rule, good practice dictates that whatever an ALJ/HO tells an unrepresented parent in terms of the process should be confirmed in writing. Doing so will not only make sure that what the ALJ/HO said is clear, and on the record, but also provide the parent with a confirmation of the information or directive for future reference.

C. Holding a PHC with an unrepresented parent can be the most helpful strategy an ALJ/HO can implement. If the ALJ/HO calls to set up the date and time for the PHC, often the parent will want to tell the ALJ/HO about his/her situation at length, not understanding such discussions are improper. The ALJ/HO should quickly, yet nicely, cut the parent off but explain why. The conversation may go something like this:

> The purpose for this call is solely to set up the date and time for the PHC. The time for you to tell me about your view as to what has happened with your child and what you believe your child needs is at the hearing. While you probably are not aware of this [referring to the Guideline if the ALJ/HO sent it out], it is not proper or ethical for me to listen to one party without the other being present to hear it. I think you, too, would be upset if I listened to the school district or its attorney without you being present, and I assure you I won't, telling them the same thing I have told you here.

D. Provide a written notice regarding the PHC as well as an agenda (or "Subjects to be Considered"). (*See* Attachments 3 and 4, respectively.)

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[15] Though in Missouri the prehearing conference is optional (*see* State Plan, ¶ H (Prehearing Conference), p. 80), Hearing Commissioners should hold one, especially when working with *pro se* parents.

E. The likelihood of a notice of insufficiency being filed is no doubt higher with a *pro se* parent. But, with a *pro se* parent, the complaint can be read more liberally.[16] Should the ALJ/HO agree that the complaint is insufficient, the ALJ/HO must notify the parties in writing of that determination and identify how the complaint is insufficient.[17] This provides the ALJ/HO with an appropriate opportunity to provide the parent with information regarding how the complaint may be amended.[18]

III. THE PREHEARING CONFERENCE

A. It cannot be over emphasized that for many reasons the PHC is usually the most important strategy an ALJ/HO can use to help the unrepresented parent understand and navigate the hearing process.

B. The ALJ/HO should hold the PHC in person, if reasonably possible and taking into consideration how quickly it can be held (for it will typically take far longer than the usual PHC) and the distance/difficulties in all the parties getting there.[19] It's always better to discuss things face-to-face, particularly where the ALJ/HO is trying to provide explanations and may have difficulty in maintaining control of the discussion. Plus, the parent will likely feel more comfortable and less rushed.

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[16] *See In re Student with Disabilities*, 111 LRP 61694 (SEA NY 2011) (noting that the due process notice may be reasonably read to include the issue of whether the student should be provided with compensatory education despite the fact that the *pro se* parent did not use the exact terminology); *In re: Student with Disabilities*, 111 LRP 48732 (SEA NY 2011) (similar).

[17] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46698 (August 13, 2006).

[18] *Id*. at 46699 ("With regard to parents who file a due process complaint without the assistance of an attorney or for minor deficiencies or omissions in complaints, we would expect that hearing officers would exercise appropriate discretion in considering requests for amendments."). *See also Sudbury Pub. Sch. v. Mass. Dept. of Elementary and Secondary Educ.,* 762 F. Supp. 2d 254 (D. Mass. 2010) (where the school district's challenge to the IHO's impartiality, for among other things, suggesting that the *pro se* parent amend her complaint to request "an additional year of retroactive reimbursement" was rejected. The court found that the efforts of the IHO "reflect a commendable effort to assure that all contentions were fully developed and evaluated").

[19] If an in person PHC is not an option, the ALJ/HO should consider using a video conferencing service like Skype or GoToMeeting. Any costs, however, should not be borne by the parent.

C. It may also be helpful to the parent, and the ALJ/HO, to record the PHC, possibly providing the parties with a copy of the recording.

D. As to certain matters normally covered in a PHC (as noted in the "Subjects to be Considered" document, Attachment 3), the ALJ/HO should consider the following:

1. Clarify, and gain agreement, with the parties as to how communications will be handled (e.g., telephone, regular mail or email). Maybe request of the parties to confirm receipt of messages. Also, if concerns arise that the use of email may be abused, set clear guidelines as to the purposes for which email may, and may not, be used.

2. Ask the parent if s/he is comfortable with you serving as the ALJ/HO, and if not, why not. Responding to any concern may help reduce the parent's anxiety and/or establish your attempt to be fair.

3. Avoid using legal jargon, or if the ALJ/HO must, explain what it means in plain language.

4. Regarding possible representation, encourage the parent to obtain an advocate or attorney and check on whether the parent is considering such. If not, ask if the school district informed the parent of any free or low cost legal services that might be available,[20] as well as sources to contact to obtain assistance in understanding the IDEA.[21] If such were not provided, or the parent lost/cannot find them, ask the school district if another copy could be sent to the parent.

5. Confirm the results of the resolution meeting, if held, or any mediation, particularly any complaint issues that may have been resolved.

6. The typical due process complaint includes a myriad of concerns the parent has regarding his/her child's education. Presenting these concerns in an understandable and logical sequence can be difficult for any individual let alone an unrepresented parent.

   Nonetheless, the importance of the ALJ/HO having a comprehensive understanding of the precise question(s) that s/he must answer after the record has been closed cannot be

[20] 34 C.F.R. § 300.507(b).
[21] 34 C.F.R. § 300.503(b)(5).

overstated. When the ALJ/HO understands what it is that is being asked of him/her, the ALJ/HO is in a better position to extract the necessary evidence that will enable him/her to decide an issue/defense and to craft an appropriate remedy, when necessary. The PHC affords the ALJ/HO an early opportunity to confirm his/her understanding of the issue(s) to be decided (i.e., the precise question(s) to be answered) and the proposed remedies being requested.

When clarification is necessary, obtaining it must be done with great care, and the ALJ/HO should first explain to both the school district and the parent how the requested information will help the ALJ/HO with understanding what s/he is being asked to do. The ALJ/HO should further explain to the school district and the parent that the PHC is not the time for the presentation of evidence.

If an issue is the alleged inappropriateness of the IEP or that some part of it was allegedly violated, the ALJ/HO should confirm with the parent what aspects s/he believe are inappropriate or have been violated. To assist the ALJ/HO, the ALJ/HO should consider reviewing the actual IEP with the parties during the PHC, which would necessitate requesting it beforehand, (*see* Attachment 3). This exercise will also assist the ALJ/HO in understanding what relief it is the parent is asking the ALJ/HO to award, should the ALJ/HO determine that the child has been denied FAPE.

7. The discussion regarding clarification of the issues has other benefits. It allows the ALJ/HO to lead a discussion on what needs to be shown/presented for the ALJ/HO to be able to determine the issue(s). [Is advising the parent solely what the legal standard or law is regarding an issue giving the parent legal advice (e.g., *Rowley/Endrew F.*, the *Burlington/Carter* three prong test, or the two approaches for determining compensatory educational services)?] This discussion is extremely important in helping to ensure a complete record and can be of assistance to the unrepresented parent in properly preparing for the hearing.

8. While in no way asking the parent (or school district) to present their case, some general discussion regarding who the parties might call as witnesses and what documents they might submit offers the ALJ/HO the opportunity to explain to the parent how the submission of evidence will work and generally what the parent will need to present regarding the

issues to be decided and relief requested.

9. In order to make it easier and more orderly to take the testimony of the parent one option is to suggest the parties agree that the parent's opening statement will be considered testimony with the school district being able to cross-examine the parent. Another is to ask/direct the parent to write out the questions s/he will ask her/himself on cards with either someone who accompanies them or the ALJ/HO reading the parent the questions at the hearing. It not only helps the parent get their testimony organized but provides some structure to it. Finally, if the discussion of issues and witnesses suggests to the ALJ/HO that the parent intends to introduce an assessment or other document prepared by a professional who is not expected to testify, the ALJ/HO might advise the parent of other options (e.g., have the preparer testify by telephone at an arranged time during the hearing).

10. Estimating the time it will take to hear the case is sometimes difficult but usually more so with an unrepresented parent.

    Consider also the extent to which the ALJ/HO may become involved in the hearing process, e.g., taking over the questioning of certain witnesses (and other strategies noted and to be discussed in Part IV of this outline regarding the hearing below) and the format. Other than the right to "confront and cross-examine" witnesses,[22] the IDEA does not set forth any requirements regarding the format of the actual hearing. For several years after the IDEA became law in 1975, hearings in many parts of the country were held in an informal meeting-like format with the ALJ/HO leading a discussion with the witnesses and attorneys. Everyone was sworn in and parties were given the opportunity to cross-examine. This format can be very effective with an unrepresented parent. It is quicker, less acrimonious and usually provides the ALJ/HO with a far better record to decide the issues and determine appropriate relief. The ALJ/HO might suggest using this format if s/he feels comfortable in leading the discussion – and the school district's attorney is as well. [Local rules or procedures might restrict or prohibit this more relaxed hearing format.]

    Alternatively, the ALJ/HO may consider having the school district go first at the hearing to provide structure to the

[22] 34 C.F.R. § 300.512(a)(2).

proceeding while allowing the parent to react.

11. Go over the Hearing Process Guidelines and determine whether the parent has questions. If the ALJ/HO did not use the guidelines, the ALJ/HO should nonetheless go over the matters it addresses that the ALJ/HO finds appropriate/necessary given the situation.

12. If the ALJ/HO cannot control a parent's talking and the PHC's purposes are not being achieved, the ALJ/HO should direct both parties to speak only when asked a question or permission is granted by the ALJ/HO. The parties should also be given a final opportunity at the end of the PHC to share anything that has not been addressed earlier in the PHC.

13. Typically, an unrepresented parent will have process questions after the PHC as s/he prepares for the hearing. The ALJ/HO might discuss and determine how the parent will present such questions to the ALJ/HO, e.g., by conference call (possibly recorded), letter or email, with a copy to the school district.

14. The ALJ/HO will usually need to spend a good deal of time explaining the many details of the process that ALJs/HOs and attorneys all take for granted but are understandably totally foreign to most parents, e.g., the five day rule[23] and its importance, the possible option of telephone testimony, the right to subpoena witnesses and how and when to do it, requests regarding problems or concerns (really motions), the right to an open or closed hearing[24], having the child present[25], the format of the hearing, the burden of proof (i.e., production/persuasion), the election regarding a written/electronic decision[26] and the need for the parties to let you know if problems arise before the hearing. All explanations should be confirmed in a PHO (possibly also providing the parties with a recording of the PHC).

15. Preparing written documents is often difficult for parents. To the extent verbal agreement can be achieved on a matter/issue (e.g., if the parent requests an extension, agrees to amend/clarify her/his request for hearing, or requests a

[23] 34 C.F.R. § 300.512(b).
[24] 34 C.F.R. § 300.512(c)(2).
[25] 34C.F.R. § 300.512(c)(1).
[26] 34 C.F.R. § 300.512(a)(5).

subpoena) and confirmed in the prehearing conference summary/order, this problem and possible delays are avoided.

16. Typically, ALJs/HOs are hesitant to wade into the party's prior efforts to resolve the dispute save ascertaining the result of the resolution meeting. But, when the ALJ/HO believes the parent may not have been advised of the option of mediation, or was advised but did not seriously consider or understood the process, the ALJ/HO might check on whether mediation was considered, explain the mediation process, encourage the parent to try it, and if agreement to try it is reached, help the parties make arrangements.

IV. THE HEARING

A. Whether an ALJ/HO has a court reporter and/or is recording the hearing, the ALJ/HO should explain to the parent why it is being done and how it works, e.g., what it means to be going on and off the record, speaking up to be heard by the reporter, the need to use any mic provided, and not talking over someone else so that the reporter or recording device accurately captures what is said.

B. After the ALJ's/HO's opening statement, possibly in addition to what an ALJ/HO might normally do, the ALJ/HO should take a moment to ask the parties if they have any problems or questions about going ahead with the hearing. Often the parent will want to go over the format again, have questions about a witness getting there or an exhibit, or what they can do versus their advocate, if an advocate is present.

C. The ALJ/HO should again explain to the parent the purpose of an opening statement versus testifying. But, even when this is done, the parent will often stray into testimony. The ALJ/HO might consider allowing the parent's opening statement to be considered testimony and allow the school district to cross-examine the parent.

D. Prior to the hearing, the ALJ/HO should review the results of the PHC (and 5-business day disclosures, if requested ahead of the hearing) in order to be prepared and engaged in the questioning of witnesses. Here are some strategies to consider:

1. When a witness is called to the stand (for either party), ask of the parent/school district attorney what things/points they intend to question the witness about. This gives an ALJ/HO the chance to rule on irrelevant areas and subtly inquire if other areas were going to be addressed. In short, this

approach assists the parent in providing only possibly relevant testimony.

2. The ALJ/HO should have the parent write down questions s/he would ask himself/herself (i.e., the parent) through either a friend of the family or family member or the ALJ/HO reading the questions.

3. The ALJ/HO may have the responsibility to question a witness when the unrepresented parent is struggling to conduct a meaningful examination of the witness. If a parent is struggling, the ALJ/HO may ask the parent what information s/he thinks the witness can provide (maybe dismissing the witness from the hearing room during the discussion) and suggest the form of the question(s). Or, ask the parties if the ALJ/HO might ask the question(s).[27] Often there will be no objection. In any event, the ALJ's/HO's assistance should be directed towards accomplishing the party's own strategy, not in suggesting a different or better strategy.

4. The ALJ/HO could lead the questioning of a particular witness, giving each party a chance to ask follow-up questions.

5. A problem unique to non-attorney advocates is the potential for them being called as a witness. The issue involves whether a non-attorney advocate/client privilege exists

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[27] *See Oko v. Rogers*, 466 N.E.2d 658 (Ill. App. 3d 1984). In *Oko*, the appellate court upheld a trial judge who stopped a *pro se* defendant's narrative testimony and directly questioned the *pro se* defendant and directed the defendant on how to properly form a question on cross examination. After the plaintiff objected several times to the *pro se* litigant's questions, the *pro se* litigant asked, "Is there any way I can accomplish that?" The trial judge advised the *pro se* litigant, "Ask him what is customary." The appellate court, in upholding the trial judge's actions, stated, "As any judge or lawyer knows, the conduct of a jury trial with a *pro se* litigant who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge.... Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides." *Id.* at 661. The dissent, while sympathetic, nonetheless disagreed, stating, in part: "To condone such actions of the trial court here is to invite *pro se* representation in difficult trials which would make a mockery of the judicial process, even though to fully inform a jury is a commendable purpose." *Id.* at 662.

analogous to the attorney/client privilege.[28] If so, there is the potential the parent might waive the privilege should the advocate voluntarily take the stand or, if called to the stand, the non-attorney advocate may invoke the privilege. It is advisable that the ALJ/HO speak to the parties and get their thoughts on this matter ahead of the advocate being called to the stand.

E. A problem that is far more likely to arise with an unrepresented parent is the lack of a record to determine the issue(s) presented. Whether, and to what extent, an IDEA ALJ/HO has the duty or obligation to develop an incomplete record was discussed above.[29] How the ALJ/HO does it, is as important as if the ALJ/HO does do it.

Initially, when faced with an incomplete record, the ALJ/HO should give the parties an opportunity to further develop the record by highlighting gaps in the record (e.g., "You've requested compensatory education but I've not received any information regarding what you think would be appropriate should I find there has been a denial of FAPE"). If the ALJ/HO must pursue a line of questions, care should be taken that the questions are unbiased and presented in a manner that does not reveal the ALJ's/HO's concerns for a particular witness' credibility or the merits of the case. Also, whether the ALJ/HO is considering asking a question/line of questions,[30] requests to review certain documents or even call a witness,[31] the ALJ/HO should explain why s/he thinks such is necessary/relevant and should get the party's reaction. A party will often agree to the ALJ's/HO's request once it understands why the ALJ/HO has made the request. Should the party not agree and objects, the ALJ/HO may proceed but should explain that s/he is doing so in order to complete the record to determine an issue and not to reflect an opinion or be an advocate for a party. The ALJ/HO should also allow each party the opportunity to object to the question(s) or respond to what the ALJ/HO has done by way of cross or additional testimony.

Another possible option to complete the record in some situations

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[28] *See Woods v. New Jersey Dept. of Educ.*, 19 IDELR 1092 (D.C. NJ 1993) (stating in the context of the IDEA hearing, policy supports recognition of a lay advocate privilege).

[29] *See supra* note 6 and accompanying text.

[30] *See* Fed. R. Evid. 614(b) (allowing a judge to examine "a witness regardless of who calls the witness"). Reference to the Federal Rules of Evidence is by way of analogy.

[31] *Id.* (also permitting a judge to call a witness).

is for the ALJ/HO to order an independent educational evaluation ("IEE").[32] But, usually to do so presents problems in meeting the 45-day timeline even if previously extended because an ALJ/HO cannot initiate his/her own additional extension.[33]

F. During the course of the hearing, the ALJ/HO should be sensitive to offering the parent breaks to collect his/her thoughts and get organized. It can sometimes actually speed things up.

G. The day before the hearing will end, the ALJ/HO should explain again to the parent the purpose of a closing statement or written argument and discuss what might work best for the parties under the circumstances. Doing so will give the parties, particularly the parent, a chance to get their thoughts organized. The ALJ/HO should be ready to ask some questions of the parent/school district regarding what each thinks has or has not been shown.

H. If the parent in the closing statement or written argument brings up new alleged facts or issues, the ALJ/HO should not ignore the new information. Rather, the ALJ/HO should explain why s/he will not consider it and why doing so would be unfair. (If the new information is provided after the hearing is concluded, the ALJ/HO might consider addressing it with the parties via correspondence or a telephone conference call.)

V. THE DECISION

A. When writing a decision in a case with an unrepresented parent:

1. Remember to whom you are writing, and keep the language plain and understandable.

2. Avoid use of legal jargon, or if the ALJ/HO feels the need to use it, the ALJ/HO should offer an explanation in plain English.

3. In fashioning an appropriate remedy, do not "split the baby" by giving each party some of the programs/services and accommodations they believe are appropriate. That approach shortchanges the child. Rather, use words to show the ALJ/HO heard and appreciated their positions/requests and note the ALJ's/HO's understanding/agreement/disagreement.

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[32] 34 C.F.R. § 300.502(d).

[33] *See* 34 C.F.R. § 300.515(c). *See also Letter to Kerr*, 22 IDELR 364 (OSEP 1994).

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THIS OUTLINE IS INTENDED TO PROVIDE WORKSHOP PARTICIPANTS WITH A SUMMARY OF SELECTED STATUTORY PROVISIONS AND SELECTED JUDICIAL INTERPRETATIONS OF THE LAW. IN USING THIS OUTLINE, THE PRESENTER IS NOT RENDERING LEGAL ADVICE TO THE PARTICIPANTS.