

Procedural Basics of Special Education Hearings

by Joseph R. Morano

Representing a party in an administrative hearing before the New Jersey Office of Administrative Law (OAL) requires a special understanding of that forum's unique procedural oddities. While certain specific procedural requirements vary from agency to agency, for the uninitiated the streamlined procedures and liberal rules of evidence seem to beckon the unsuspecting practitioner into certain danger - like sirens luring eager sailors into the rocks.

While practitioners may more easily navigate past those rocks armed with the general understanding of administrative procedures in most agency matters, it is almost impossible to be successful in the area of special education practice without specific knowledge of the rules imposed on the OAL by the federal government through the New Jersey Office of Special Education Programs.¹

The UAPR and Title 6A

Generally, many of the hearing and evidence rules applied in judicial proceedings simply are not applicable under the Administrative Procedure Act (APA) and Uniform Administrative Procedure Rules (UAPR).² Both the APA and the UAPR impose streamlined procedures on the conduct of administrative hearing practice. For instance, formal discovery and motion practice is limited, and all relevant evidence is admissible, although more traditional evidence rules such as privileges will still apply.³ The procedures set forth for special education hearings go even further. Chapter 6A of the UAPR, which sets forth specific procedures for special education hearings, superimposes an even more stringent set of standards on the already streamlined discovery and hearing process.⁴ Moreover, unlike most other agencies, the decision that an administrative law judge (ALJ) makes in a special education matter is final, and is appealable to the superior court or federal district court.⁵

Chapter 6A

Established as the implementation of federal law, specifically including the IDEA, Chapter 6A does not duplicate each provision of federal law, but highlights some of the key federal provisions which form the source of its authority.⁶ Consistent with the spirit of the IDEA and federal special education dispute resolution procedures, the special education rules include specific provisions for mediation and resolution of disputed matters.⁷ Perhaps more importantly, Chapter 6A also provides for substantial lightning-like discovery exchanges and prompt scheduling of hearings should a dispute persist.⁸

Learning to apply the special education rules is important. To the extent that the special education rules are inconsistent with the UAPR, they supercede the UAPR. Further, any aspect of notice and hearing not covered by 6A is governed by the UAPR.⁹ It is therefore important for the practitioner to be familiar with the differences between the UAPR and Title 6A.

Pre-Trial Discover

Generally, under 6A, discovery is highly informal. Discovery consists "to the greatest extent possible" of the informal exchange of questions, answers and other information. As a result, unlike the UAPR, the use of more formal discovery devices such as interrogatories, request for admissions and depositions, are prohibited.¹⁰ Accordingly, practitioners must be mindful they should immediately start requesting information upon the initiation of a due process complaint.

Pleadings

While the UAPR provides for very liberal pleading requirements, the Office of Special Education Programs has set forth its own simple procedures for filing a petition.¹¹ These procedures essentially anticipate the filing of a *pro se* pleading by parents against a school district, called a petition for due process.

On the most basic level, the petition is required to contain: 1) the name and age of the child; 2) the child's address; 3) the school the child attends; 4) the issue and basic facts relating to the issue; and 5) a demand for relief. Further, the parent must show that a copy of the request was mailed to the school district. Of course, since there are a great number of practitioners who are dedicated to the representation of parents, due process petitions prepared by attorneys resemble formal pleadings.

The receipt of the petition is the start of the informal pre-trial discovery process, which differs substantially from the pre-trial discovery procedures set forth in the UAPR.¹²

Due Process Mediation

After the filing of the petition, the first major phase of pre-trial discovery occurs through the mediation process. Upon receipt of a petition for due process by a parent, the Department of Education must promptly contact the parties to determine whether mediation is requested. Mediation is not mandatory. If both parties consent to mediation, a mediation conference is held before an impartial state mediator within 10 days of the request.¹³ The mediator, who is usually an expert in the area of special education, is assigned by the Department of Education to facilitate a settlement; or, if no settlement is successful, to send the matter along to the ALJ with some basic documentation regarding the issues involved.

Quite often, the mediation conference is the first best opportunity for a party to engage in pre-trial discovery and to size up the general facts of his or her case. The conference allows an informal questioning of witnesses and the exchange of discovery, usually the key documents related to the issue surrounding a child's program.

Aside from the possibility that a matter could settle amicably, the use of mediation is advantageous for the representative of the school district to get substantial information on the case. The parent's attitude and expectations, as well as the potential adverse witnesses that a district may face, can all be gleaned from the items informally discussed at mediation. Similarly, a parent's attorney may be able to meet and question the director of special services or some of the child study team members, all of whom will be important to their case. But for practitioners who represent parents, mediation also presents some drawbacks - the board's attorney gets a good look at their case and gets to ask some pointed questions. At this stage, both parties are encouraged to exchange discovery, including expert reports and other matters related to the child study team file.¹⁴ The parties may even agree upon a schedule for document exchanges.

If the mediation conference results in a settlement, the terms are reduced to writing and signed by the parties and the representative of the Department of Education.¹⁵ If the mediation conference does not result in a settlement, however, the Department of Education representative must prepare a written document at the mediation that specifies the issues in dispute, any stipulations, and evidence and witness lists for each party. This document is included with the transmittal form, and should be forwarded immediately to the Office of Administrative Law. Copies of the written document and of the transmittal form are also sent to the parties. Any exhibits that both parties agree are admissible may be attached to the document.¹⁶ The Department of Education includes with the transmittal any unsettled jurisdictional matters, notice problems, or other preliminary motions from the parties.

An ALJ also may grant an adjournment of the mediation conference upon the written consent of both parties to an extension of the deadline for decision. There is no limit on the number of mediation sessions if the parties consent in writing.

Bypass of Mediation

Of course if mediation is declined by either party, the Department of Education must prepare a written document that specifies the issues in dispute (to the extent that they have been listed), any stipulations, and evidence and witness lists for each party. This document is included with the transmittal form, and is immediately forwarded to the OAL for a hearing. Copies of the written document and transmittal form must also be sent to both parties. This is where discovery becomes accelerated.

Unlike the discovery rules under the UAPR, the special education regulations maintain a relatively hardline rule – all discovery must be completed no later than five business days before the date of the hearing. This hard and fast rule requires that one party disclose to the other any documentary evidence intended to be introduced at a hearing. This includes any documents, all witnesses who will testify, a summary of their

proposed testimony, and, in the case of experts, their professional background as listed in a curriculum vitae or resume.¹⁷ Most importantly, upon the application of a party, an ALJ may exclude any evidence at hearing that has not been disclosed to a party at least five business days before a hearing, unless the judge determines the evidence could not reasonably have been disclosed within that time.¹⁸ As a result, practitioners must be careful to disclose all documents related to their case, including all evaluations and expert reports.

Simply put, any documents that may possibly be utilized by a party should be disclosed to the adversary. Failure to do so could put a case at risk, especially if an ALJ determines the document could have been disclosed earlier. Better safe than sorry.

Presentation of Evidence During the Hearing

Special education hearings have basic scheduling rules, and 6A requires that they be generally conducted at a time and place convenient to the parents or guardians. The parent also has the right to open the hearing to the public. Like other hearings conducted at the OAL, an ALJ's decision in a special education matter must be based upon "a preponderance of the credible evidence."¹⁹ As will be discussed further in more detail, the evidence rules from the UAPR also generally apply. Nevertheless, the biggest difference (and biggest challenge for a new practitioner) is the order in which a case is presented. Unlike most judicial or administrative proceedings known to the general practice attorney, in special education proceedings the board or public agency has the burden of going forward on a case, even though the parent has filed the complaint. Again, this is based upon the federal regulations and the spirit of the IDEA, which takes into account the fact that the board or public agency is presumed to have a greater expertise than the individual parent.²⁰

To make matters more interesting, despite the IDEA's acknowledgment of a board's expertise, the proposed board action is not accorded any presumption of correctness.²¹ As a result, the board or agency must essentially first attempt to prove in a *de novo* hearing that everything it has proposed, or has done with respect to a child's program, has been proper. The parent's attorney then has the opportunity to sit back and probe the board's cases for weaknesses. Taking into account that even the most efficient public agencies and programs may make procedural errors or may be second guessed regarding their individual educational philosophies, the practitioner representing the parent has a distinct advantage in being a Monday morning quarterback. Overcoming this hurdle is made more difficult when considering the ALJ's treatment of the evidence under the UAPR.

OAL's Rule 4 - Admissibility of Evidence

Once a special education hearing begins, the practitioner may be guided by the evidence rules of the UAPR. Parties are not bound by statutory or common law rules of evidence or court rules of procedure in administrative hearings, except where specifically provided in the UAPR. All relevant evidence is therefore admissible.²² Relevancy is a "logical relation between the evidence offered and a material fact. The evidence offered, if relevant, will render a desired inference more probable than it would be without the evidence."²³ The test of relevancy is "whether the evidence had any tendency in reason to prove any material or legally consequential fact."²⁴

Aside from relevancy, UAPR provides other basis for a party to object to the introduction of evidence. For instance, a party challenging offered evidence may argue for the exclusion of even relevant evidence if its probative value is substantially outweighed by the risk that its admission will necessitate undue consumption of time, or create substantial danger of prejudice or confusion.²⁵

While the UAPR borrow some provisions from the New Jersey Rules of Evidence, the vast majority of the Rules of Evidence are conspicuous by their absence.²⁶ For instance, the UAPR does not address evidence of character, habit, custom and conduct.²⁷ No specific UAPR provision permits a respondent to impeach a petitioner's primary witness. As a result, a party could seek to introduce impeachment evidence at an administrative hearing, although such evidence might be ruled inadmissible under N.J.A.C. 1:1-15.l(c) if its probative value were adjudged to be substantially outweighed by the risk that its admission would create a substantial danger of undue prejudice or confusion.

Since many of the omitted evidence rules can be similarly approached, ALJs will have a tendency to exclude the same types of evidence, which might be excluded in a judicial forum. If fairness is the standard for

admissibility, an argument based on the Rules of Evidence, which are themselves based in fairness, often will prevail. The advice to the practitioner: Don't leave your Rules of Evidence in the office.

The Admission of Hearsay

Perhaps the other major difference between the treatment of evidence in a judicial forum and in a special education proceeding involves the admission of hearsay. The APA does not specifically declare that hearsay is admissible: It merely provides that the "party shall not be bound by rules of evidence, whether statutory, common law, or adopted formally by a court. All relevant evidence is admissible."²⁸ Under the UAPR, hearsay is expressly admissible in contested cases. The ALJ is directed to focus instead on the appropriated weight to be given to such evidence.

Hearsay is accorded whatever weight the ALJ deems appropriate, considering "the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability."²⁹ Evidence that responsible persons are accustomed to rely upon in the course of important affairs may be given competent evidence, even if it is technically hearsay.³⁰ Outrageous, wild, improbable or unsupported assertions by a party, even if admitted, are likely to be given little weight. Thus, while unreliable hearsay evidence ultimately may be admitted by an ALJ, it will likely be given minimal weight.

The Residuum Rule

Moreover, the admission of hearsay in administrative proceedings is tempered by the *residuum* rule, which controls the use and weight of such evidence. The New Jersey Supreme Court first enunciated the *residuum* rule in *Weston v. State* as follows:

It is common practice for administrative agencies to receive hearsay evidence at their hearings ... However, in our State ... a fact finding or legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence to support it.

Under the rule, hearsay may be used to corroborate or add probative force to competent evidence. But a court will not sustain an administrative decision unless a *residuum* of competent evidence supports the ultimate findings in the case."³¹

Privileges

There are occasions where privileges such as psychiatrist-patient or doctor-patient will be part of a special education case. A practitioner should therefore recognize that all evidentiary privileges, such as self-incrimination or lawyer-client and patient-physician privileges, are applicable in a special education hearing.³² Privileges will be applied to the extent permitted by the context and similarity of the circumstances.³³

Expert Witnesses

The determination of an ALJ in a special education hearing often hinges on the consideration of the reports and testimony by experts. As a result, the practitioner should be mindful of the procedures for the introduction of experts and expert testimony. Expert testimony must be based upon "facts or data which are perceived by or made known to the witnesses before or at the hearing." The facts and data relied upon by the expert need not be admissible in evidence if they are the type that are reasonably relied upon by experts in the field in forming opinions and inferences. Before testifying, an expert witness may be examined concerning the data upon which his or her opinion or inference is based. Further, questions posed to a proposed expert need not be in a hypothetical form unless directed by the ALJ, and testimony which embraces the ultimate issues before the ALJ is not objectionable on that basis.³⁴

The above bases are the only exclusionary provisions considered by an ALJ when determining: 1) whether a witness is qualified to testify; 2) whether evidence is admissible; or 3) whether a privilege is validly asserted.³⁵

Motions

As part of a hearing request, or at any time after a hearing is requested, an affected parent, guardian, board or public agency may apply in writing for emergency relief pending a settlement or decision on the matter. An emergency relief application must set forth the specific relief sought and the specific circumstances the

applicant contends justifies the relief sought. Each application must also be supported by an affidavit prepared by, someone with personal knowledge of the facts and, if an expert's opinion is included, the affidavit shall specify the expert's qualifications.³⁶

Prior to the transmittal of the hearing request to the OAL, applications for emergency relief must be addressed to the state director of the Office of Special Education Programs, with a copy to the other party. The department then forwards them to the OAL by the end of the next business day. After transmittal, applications for emergency relief must be made to the OAL, with a copy to the other party. Emergency relief applications which show no right to be processed by the department in accordance with N.J.A.C. 1:6A-4.2 are not transmitted.

The OAL must then schedule an emergency relief application hearing on the earliest date possible, and shall notify all parties of the date. Except for extraordinary circumstances established by good cause, no adjournments are granted, but an opponent to an emergency relief application may be heard by telephone on the date of the emergency relief hearing. If emergency relief is granted without all parties being heard, provision shall be made in the order for the absent parties to move for dissolution or modification on two days' notice. Such an order, granted without all parties being heard, may also provide for a continuation of the order up to 10 days.³⁷

At the emergency relief hearing, the judge may allow the affidavits to be supplemented by testimony and/or oral argument. The judge may order emergency relief pending issuance of the decision in the matter or, for those issues specified in N.J.A.C. 1:6A-14.2(a), order a change in the placement of a student to an interim alternative educational setting for not more than 45 days in accordance with 20 V.S.C. 1415(k)(2). This may take place if the judge determined from the proofs that: 1) the petitioner will suffer irreparable hardship if the requested relief is not granted; 2) the legal right underlying the petitioner's claim is settled; 3) the petitioner has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.³⁸

ALJs may decide emergency relief applications orally on the record, and may direct the prevailing party to prepare an order embodying the decision. If so directed, the prevailing party must promptly present the order to the judge, and mail copies to every other party in the case. Unless a party notifies the judge and the prevailing party of his or her specific objections to the order within five days after service, the judge may sign the order. After granting or denying the requested relief, the judge shall either return the parties to the Department of Education for a mediation conference if both parties consent to mediation, or schedule hearing dates.³⁹

Post-Hearing Submissions

Upon the completion of a special education hearing, the ALJ must move quickly to issue a final decision. The decision is based exclusively upon evidence and arguments presented during the hearing. The decision is made part of the record along with stipulations of fact and matters officially noticed. Technically, an ALJ must issue this decision and mail it no later than 45 days from the date of the hearing request. Of course, this rule is subject to any adjournments granted by the ALJ.⁴⁰

Finally, in a special education matter, an ALJ issues a highly detailed decision, which reads more like an Appellate Division opinion. A statement of the case, procedural history, statement of the issues, factual discussion, factual findings, legal discussions and conclusions of law are all included in the decision. Once a decision is issued, it is appealable to either the New Jersey Superior Court, pursuant to the rules governing the courts of the state of New Jersey, or to a United States District Court, pursuant to 20 U.S.C.A. 1415(e)(2).

Conclusion

Although the UAPR generally is applied in special education proceedings, practitioners new to the area should keep in mind the limited, yet specialized, special education rules superimposed on administrative procedure. Knowledge of the unique and streamlined discovery requirements in 6A will be invaluable to the practitioner in preparing and trying a special education hearing.

Endnotes

1. N.J.A.C. 1:6A-1.1; U.S.C.A. 1415 *et seq.*; 34 C.F.R. 300 *et seq.*
2. N.J.S.A. 52:14B; N.J.A.C. 1:1.15.1(c).
3. N.J.A.C. 1:1-15.4.
4. N.J.A.C. 6A:1.1 *et seq.*
5. N.J.A.C. 1:6A-18.3.
6. Of course, in any case where these rules could be construed as conflicting with federal requirements, the federal requirements apply. See 20 U.S.C.A. 1415 *et seq.* and 34 C.F.R. 300 *et seq.*
7. N.J.A.C. 1:6A-4.1.
8. N.J.A.C. 1:6A-1.1.
9. *Id.*
10. N.J.A.C. 1:1-10.
11. N.J.A.C. 1:1-2.1.
12. Compare discovery under N.J.A.C. 1:1-10.
13. N.J.A.C. 1:6A-4.1(a)(1). N.J.A.C. 1:6A-4.1.
14. N.J.A.C. 1:6A-4.1(c).
15. N.J.A.C. 1:6A-4.1(b).
16. *Id.*
17. N.J.A.C. 1:6A-10.1(d).
18. N.J.A.C. 1:6A-10.1(c).
19. N.J.A.C. 1:6A-14.1(d).
20. With the advent of many knowledgeable parent advocacy groups and an experienced cadre of special education attorneys and educational experts who exclusively represent parents, this *assumption* should perhaps be reexamined.
21. N.J.A.C. 1:6A-14.1(d).
22. N.J.A.C. 1:1-15.
23. *Id.*
24. Lefelt, 37 *New Jersey Practice*, Sec. 203.
25. N.J.A.C. 1:1-15.1.
26. Compare N.J.A.C. 1:1-15.1(c) with N.J.R.E. 403; N.J.A.C. 1:15.1(e) with N.J.R.E. 104.
27. N.J.R.E. and 607 and 608.
28. N.J.S.A. 52:14B-10(a).
29. N.J.A.C. 1:1-15.5(a).
30. *Weston v. State*, 60 NJ 36. 51 (1972).
31. For a more detailed discussion of the *residuum* rule see author's article "Approaching Hearsay at Administrative Hearings: Hearsay Evidence and the Residuum Rule," *New Jersey Lawyer Magazine*, Vol. 180, p.22, October/November 1996).
32. N.J.S.A. 2A:84-22.1 *et seq.*
33. N.J.S.A. 52:14B-10-(a); N.J.A.C. 1:1-15.4.
34. N.J.A.C. 1:1-15.1.
35. N.J.A.C. 1:1-15.1(e).
36. N.J.A.C. 1:6A-12.1.
37. N.J.A.C. 1:6A-12.1(d).
38. N.J.A.C. 1:6A-12.1 (e).
39. N.J.A.C. 1:6A-12.1(f).
40. N.J.A.C. 1:6A-18.1.

Joseph R. Morano is a partner at Viola, Benedetti, Azzolini & Morano, LLC, in Florham Park. He specializes in the representation of boards of education and other public agencies in legal and labor matters, including special education and administrative hearings before the OAL and Public Employment Relations Commission, as well as state and federal courts. He is a former two-time chair and current trustee of the Administrative Law Section of the NJSBA, and frequently serves as an instructor of administrative law for JCLE.