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**To:** Dakarai Thompson

**From:** Gail ImObersteg

**Date:** January 7, 2008

**Subject:** Report on the Review of Administrative Records and Hearing Officer Determinations

**Introduction**

This Report summarizes the findings of the Contractor's review of administrative records and Hearing Officer Determinations. This Report is required in the Scope of Work (SOW) related to the qualifications of Hearing Officers (SOW I-B) and Organization of the Files (SOW I-D) and is designed to identify impediments to the function of the Student Hearing Office in those areas and to provide observations of the hearing system generally. All of the observations are either being addressed by the short-term reforms or will be addressed during Phase II of the contract.

**Conclusion**

The Contractor's review of random administrative records and at least one Hearing Officer Determination (HOD) for each Hearing Officer revealed serious fundamental deficiencies in the current special education hearing system. The systemic issues that impede the hearing system and the SHO from being high performing are numerous and have been previously provided to you. It is the Contractor's belief that this is not a system that can be refined to become high performing. It is a system that requires a fundamental culture change.

**Evidentiary Basis**

The most significant deficiency is the apparent perception that this hearing system is designed to resolve disputes over procedural deficiencies rather than to resolve substantive educational disputes between a parent and the local educational agency. In accordance with the Individual with Disabilities Education Act (20 U.S.C. §1400 et seq.; 34 C.F.R. Part 300), a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies—a (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making

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process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. (34 CFR Section 300.513)

Therefore, it is clear that the hearings in these matters must include the evidence necessary to allow the Hearing Officer to reach the above findings and to reach a final decision to resolve the issues in the due process complaint. Based on the review of administrative records and HODs, these hearings generally focus on the procedural violations in the complaint, not the substantive issue in dispute.<sup>1</sup>

The following quote from a recent decision in the U.S. District Court in the District of Columbia aptly describes the absence of necessary findings of fact and conclusions of law in some of the HODs appealed to Court. Citing four D.C. courts that remanded matters back to the Hearing Officer, the Judge in *Options Public Charter School v. Howe, ex rel. A.H.* (48 IDELR 282 (D.D.C 2007)) held that:

“Common to all four opinions was a determination that the Hearing Officer's Decision provided an incomplete basis for review by the court in accordance with IDEA, and recognition of "the admonition that reviewing courts not substitute their assessment of the evidence for that of hearing officers[.]" *Hammond*, 2001 WL 34360429 (citing *Board of Education v. Rowley*, 458 U.S. 176, 207 (1982)). Here, the undersigned, as the other judges who exercised their discretion to remand an IDEA action for further consideration, findings and conclusions, is unable to determine the degree of deference to accord the Hearing Officer's Decision. In this action, the impediment to meaningful review stems largely from the absence from the decision of virtually any findings. For example, the hearing officer refers to "[t]he credible testimony of Paris Adon" and the "compelling[,] "logical and credible" testimony of "Dr. [Cranford][,]" [sic], but makes no findings with respect to the basis upon which she credited their testimony. See Hearing Officer's Decision at 3. Elsewhere in the decision, the hearing officer relies upon speculation, and offers no findings of fact or conclusions of law: "it is entirely conceivable ... that the mother's participation in the IEP meetings should have alerted ... Options that more comprehensive evaluations were warranted[ ]"; "it is most probable that the provision of a FAPE to this Petitioner might have required ... Options to alert ... DCPS to file a due process hearing complaint once the mother insisted on a change of special education instruction hours." See Hearing Officer's Decision at 3 (emphasis omitted). Even the hearing officer's statement of the issues presented at the hearing is ambiguous. See Hearing Officer's Decision at 3 (emphasis omitted) ("Frankly, Respondent Options['] good faith effort to appease the parent backfired and perhaps escalated to a claim which

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<sup>1</sup> For example, if a parent requested an initial evaluation because the parent suspected the child had a disability, the inquiry is not only whether the local educational agency issued a prior written notice on a refusal to evaluate, but whether there should have been a suspicion that the child may be disabled and, therefore, should have been provided an initial evaluation.

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now includes an allegation of insufficient evaluations due to respondent's willingness to change the [student's] programming at the whim of the parent."). Finally, the hearing officer did not articulate the burden of proof which she applied, or identify the party on which the burden was rested. See Hearing Officer's Decision at 3 ("Dr. [Cranford's] deduction that the psycho-educational was sufficient given the non-predominant display of emotional triggers lends reason to the [school's] decision not to immediately employ clinical assessments.").

In this circumstance, the undersigned cannot determine what findings and conclusions the hearing officer made, and on what evidence in the record any such findings and conclusions were based. Because the undersigned is precluded from "substitut[ing] [her] assessment of the evidence for that of [the] hearing [officer][,]" a remand for further consideration of the evidence, and for further findings of fact and conclusions of law, is the only vehicle by which review consistent with the applicable statutory scheme can be accomplished.”

### **Meetings, Meetings, Meetings**

There is a maxim that the hearing you hold is the decision you write. Unfortunately, this system proves that maxim correct. The absence of the evidentiary basis in most cases for the Hearing Officer to resolve the substantive dispute leads to a plethora of orders directing the parties back to a meeting to resolve the issue of dispute, rather than deciding the issue with finality. In several records reviewed, even when adequate evidence seemed to be before the Hearing Officers to decide the matter, the dispute was still not resolved, but rather sent back to a meeting. This practice improperly defers the decision making to another body, prolongs the conflict between the parent and the school, and delays the resolution for the child.

In addition, the Hearing Officers' orders for the parties to meet to resolve these substantive educational matters generally require the continued participation of the parent's attorney. As observed by the recently configured Timeliness Assistance Group for the District of Columbia, this can be problematic.<sup>2</sup> It should also be noted that this perpetuation of the involvement of the attorney in meetings also affects attorneys' fees in that the IDEA does not authorize the award of attorney fees relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding or judicial action.(34 C.F.R. 300.517(c)(2)(C)(ii)).

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<sup>2</sup> In one case it was noted by the Group that the parent's attorney did not appear at scheduled meetings 18 times.

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**To:** Jo Ann Smoak

**From:** Gail ImObersteg

**Date:** December 31, 2007

**Subject:** Hearing Officer Qualifications, Functions, and Responsibilities

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**Question:** You have asked for a recommendation on whether the qualifications, functions, and responsibilities for the Hearing Officers should be modified.

**Conclusion:**

Neither the current Hearing Officers' qualifications nor their functions and responsibilities are an impediment to high performing Hearing Officers with the authority to conduct fair, impartial, efficient, and effective hearings.

**Qualifications**

Taking the SOP and the 2006 Request for Proposal (RFP) into consideration, the current qualifications for Hearing Officers for special education hearings in the District of Columbia are higher than required by the IDEA and those in effect in most other states. Therefore, additional qualifications are not necessary to have a high performing hearing system consistent with standard and best legal standards.

In fact, the more stringent qualifications such as some of the conflict of interest requirements, the required consecutive time period for the active practice of law before recruitment and the designated areas for the practice of law may actually eliminate otherwise qualified individuals. It is recommended that the more stringent qualifications be reexamined prior to the issuance of a new RFP to determine whether they should be maintained as mandatory requirements.

**Functions and Responsibilities**

Taking the SOP and the 2006 RFP into consideration, the current functions and responsibilities of the Hearing Officers are consistent with other states and, in some regards, provide specific additional authority. Therefore, the establishment of additional functions and responsibilities for Hearing Officers is not necessary to have a high performing hearing system consistent with standard and best legal standards. It is the absence of the consistent exercise of such authority that is an impediment in this hearing system.

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It is recommended that the Hearing Officers be trained with regard to the nature and scope of their authority, functions, and responsibilities, including the careful exercise of such authority in this unique administrative hearing process. Such training should include a component on the practical application of this authority with consideration of the independence of Hearing Officers as decision makers and the fact-specific nature of these cases.

A system of technical assistance and evaluation must also be established and implemented to support Hearing Officers in the exercise of these important responsibilities. (See related memorandum on the role of a Chief Hearing Officer.) In addition, when the District of Columbia Code of Regulations is revised, it is recommended that some of the functions and responsibilities such as the consolidation of cases should be considered for inclusion in the regulations to ensure disputed orders are enforceable.

**Introduction**

At the outset, it must be noted that the District of Columbia Hearing Officers' qualifications, functions, and responsibilities are located in a variety of documents, including the SOP, current Hearing Officers' contracts, and the 2006 RFP. Although there is general commonality, the 2006 RFP and current contracts significantly expand upon the qualifications, functions, and responsibilities in the SOP. It is recognized that the reiteration of these provisions in this memorandum is tedious, but the absence of a comprehensive analysis is a deterrent to a complete understanding of the breadth of these requirements and the Hearing Officers' discretion. Therefore, the existing provisions are set forth in the analyses.

**A. Hearing Officers' Qualifications**

**Analysis:**

The qualifications for Hearing Officers under the IDEA (20 U.S.C. §1415(f)(3)(A);34 C.F.R. §300.511(c)), the SOP, and the 2006 RFP require a Hearing Officer to be independent and impartial and set forth the following specific qualifications for Hearing Officers:

1. A Hearing Officer shall not be an employee of the State Education Agency or the Local Education Agency that is involved in the education or care of the child or be an employee of the DCPS, Public Charter Schools, or Private Schools that a DCPS student has been placed or any public agency

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that is involved in the education or care of the student who may be the subject of the hearing;<sup>3</sup>

2. A Hearing Officer may not be employed by or represent schools or parents in any manner in any jurisdiction, nor be an employee of any parent rights or disability rights agency or organization. A Hearing Officer shall not , represent, contract with, be employed by or accept any remuneration from any individual or entity (including, without limitation, any child, parent, teacher, administrator, school district, charter school or regional education service center) in connection with any matter relating to or involving public education (including, without limitation, any matter arising under or relating to the IDEA, Section 504 of the Rehabilitation Act of 1973, and any other federal or D.C. law, rule or regulation relating to education);<sup>4</sup>
3. The Hearing Officer shall not have engaged in the practice of law that primarily represented or been associated with a firm or organization that has primarily (more than 50%) represented parents, students, D.C. public schools or charter schools, or other District of Columbia K-12 educational agencies in disputes over educational services, student activities, or student discipline for the two (2) years preceding the submission of proposal;
4. A Hearing Officer shall not be a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;
5. A Hearing Officer shall possess knowledge of, and the ability to understand, the provisions of the IDEA, Federal and State regulations pertaining to the IDEA, and legal interpretations of the IDEA by Federal and State courts, and knowledge of Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and administrative law<sup>5</sup>;
6. A Hearing Officer shall possess good legal research skills;

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<sup>3</sup> A person who otherwise qualifies to conduct a hearing is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

<sup>4</sup> The current qualifications provide that accepting compensation or remuneration from a school district or other party for serving as a Hearing Officer in a Section 504 hearing, as a Case Review Officer for the State Complaint Office, and for acting as a mediator in educational disputes (provided, however, that a Hearing Officer may not serve as a Section 504 Hearing Officer, an Case Review Officer with the State Complaint Office, or as a mediator in any case or matter involving a student who has been the subject of a due process hearing over which the Hearing Officer has presided).

<sup>5</sup> It should be noted that it is unclear in current policy and practice that this hearing system is the hearing system to be utilized for hearing requests filed solely under Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act. If it is, initial and ongoing training must include Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act.

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7. A Hearing Officer shall possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice;
8. A Hearing Officer shall possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice;
9. All Hearing Officers shall be members in good standing of the District of Columbia Bar, have at least five years of active legal experience as an attorney. The active practice of law shall have been for at least five (5) consecutive years before recruitment with a minimum of 2 years of practice in the areas of special education, disability law, administrative law, or civil rights.

At the time of this writing, proposed revisions to the SOP for short term reforms, include two proposals related to the qualifications of the Hearing Officers:

- One proposal is to specifically add judicial temperament consistent with the core competencies in the Hearing Officer's contract and the SOP inclusion of "personal qualities". This specific qualification is recommended to ensure that an otherwise qualified individual who does not possess judicial temperament and is unable, for example, to conduct himself/herself in a patient, dignified, and courteous manner with appropriate decorum is not selected to serve in this important capacity.
- The second proposal to revise the SOP would expand the qualifications for Hearing Officers to include those individuals who have submitted an application to waive into the District of Columbia Bar consistent with the recruitment of attorneys for other District of Columbia agencies such as the Office of the Attorney General. Based on the stringent qualifications outlined above, it is clear that the pool of qualified Hearing Officer candidates is going to be smaller than that for other states. Therefore, this recommendation is particularly important if the requirements in the RFP are maintained as the mandatory qualifications.

**Conclusion:**

The above qualifications for a special education Hearing Officer in the District of Columbia set forth in the 2006 RFP, the SOP and the IDEA are actually more comprehensive and stringent than other states, particularly with regard to the specific areas and time for the required active practice of law and the conflict of interest prohibitions with regard to previous employment. (See Appendix for the requirements in the states of Illinois and New York for examples)

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Due to the litigious environment and culture of distrust in which the District of Columbia hearing system operates, the stringent conflict of interest provisions that eliminate not only an actual conflict of interest, but the appearance of one, is understandable and may indeed be warranted at this time. However, the “active practice of law” requirement for at least five consecutive years before recruitment may actually eliminate individuals who may be eminently qualified such as retired judges and some nationally recognized experts in the conduct of special education hearings whose practice is now limited to training and technical assistance. It must be noted that the expansive conflict of interest requirements and the recent consecutive “active practice of law” are only in the 2006 RFP.

Upon the revision of the SOP to establish the long term reforms of the SHO and the hearing system, it is recommended that the SOP expressly include the IDEA qualifications in Title 34 C.F.R. §300.511(c) and those 2006 RFP requirements that are limiting qualifications that will outlive the duration of the Blackman-Jones Consent Decree and, hopefully, the heightened distrust of this system. In addition, it is recommended that prior to the issuance of another RFP to recruit Hearing Officers, the expanded qualifications be reexamined. At that time, if it is determined that any of these RFP qualifications have unintended results, the expansive qualifications can be eliminated or converted to preferred qualifications or areas requiring additional certification or submissions.

**B. Hearing Officers’ Functions and Responsibilities**

**Analysis:**

The functions and responsibilities for Hearing Officers under the IDEA (20 U.S.C. §1415(f)(3)(A);34 C.F.R. §300.511(c)), the SOP, and the 2006 RFP include the following specific functions and responsibilities for Hearing Officer in the conduct of hearings under the IDEA:

- To conduct the hearing with integrity and dignity; (§600.1)
- Ensure the rights of all parties are protected; (§600.1)
- Rule on procedural and substantive matters, including motions to dismiss or withdraw the case, dismiss a party, stay-put, admissibility of evidence, discovery \*, amendments to pleadings, prospective witnesses to remain outside

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\* Discovery is only referenced in the 2006 RFP and current Hearing Officer contract. Although there are some states such as Texas, Massachusetts, and Nebraska that permit discovery, there is no right to discovery provided under the IDEA, except for the right of the parent to inspect and review education records and the exchange of evidence and evaluations prior to the hearing. (34 C.F.R. Sections 300.512 and 300.613) As noted in the SOP, a special education hearing is not governed by the formal rules of procedure

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the hearing room while other witnesses are testifying, determine good cause and grant continuances, consolidate multiple cases, recuse the Hearing Officer, and sufficiency challenges; (§§400.1, 401, 402, 600.1, 600.4, 800.1, 2006 RFP)

- Take actions necessary to complete the hearing in an efficient and expeditious manner; (§§600.1, 700.4)
- To be fair and impartial; (§600.1)
- To order and hold pre-hearing conferences for the purposes of addressing preliminary matters including establishing ground rules, statement of the issues, including the formulation or simplification of the issues, admission of certain assertions of fact or stipulations, limitation of number of witnesses and time allocation to present the case, clarification of procedural matters and the discussion of any matter in controversy, setting the date and time for the hearing. Issue a pre-hearing order; (§304,401)
- To rule on a party's request to alter the time allotted for a hearing; (§400.1)
- To administer oaths or affirmations; (§600.1)
- To question a witness on the record and ask questions of counsel; (§§600.1, 700.4)
- With the consent of all parties to the hearing, request that conflicting experts discuss an issue with each other while on the record and allow expert witnesses to remain in the hearing room while other witnesses are testifying; (§§600.1, 800.1)
- Visit the proposed placement site when the physical attributes of the site are at issue; (§600.1)
- Call a witness to testify at the hearing if all parties to the hearing consent to the witness giving testimony, or if the hearing is continued for at least five days prior to the witness testifying; (§600.1)
- Order that an impartial assessment of the child be conducted (the cost of which will be paid by the school system); (§600.1)
- Restrict the number of witnesses and limit the length of their testimony, provided such limitations do not prohibit a party from introducing relevant

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or evidence. I believe that in this current system including procedures such as depositions and interrogatories would impede an effective, efficient, and timely process and deter a pro se parent from initiating a hearing.

It must be noted, however, that OSEP has opined that there is nothing in Part B that would prohibit or require use of discovery such as interrogatories. "Whether discovery is used in a Part B due process hearing and the nature and extent of discovery methods used are matters left to the discretion of the hearing officer, and could be subject to relevant State or local rules or procedures." (24 IDELR 973 (OSEP 1996)) If OSSE determines this system should allow for discovery beyond that authorized in the IDEA, it is recommended that such authority be provided in regulation and address the authority to compel discovery, motion to quash, motion for protective order and other discovery-related motions.

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- material and competent evidence; (§600.1)
- Ask questions of counsel and parties in order to fully develop an appropriate record; (§600.1)
- Take into consideration unjustifiable delays in determining how to proceed in a case (§700.4);
- Determine the order of presentation; (§700.4)
- Maintain civility and proper decorum; (2006 RFP)
- Make any other orders as the facts and justice require, including the application of sanctions as necessary to maintain an orderly process; (2006 RFP)
- Exclude any person, halt or suspend a hearing, consider a referral to Bar Counsel and/or summon appropriate law enforcement authorities to address any inappropriate conduct or misbehavior by any person that disrupts a hearing; (§206)
- Rule on the admission of evidence; (§§700.4 and 800.1)
- Use appropriate measures to ensure the taking of telephonic evidence is fair, appropriate, accurate and credible;
- Accommodate for the use of an interpreter when the primary language of a party is other than English;
- Assist an unrepresented parent in developing the record, without becoming an advocate; (§600.3)
- Make and ensure the integrity of the verbatim record of the hearing and ensure all evidence and exhibits admitted are preserved, protected and properly reflected in the hearing record; (§800.1, 2006 RFP)
- To dismiss the hearing if a hearing has been initiated for reasons outside the Hearing Officer's jurisdiction; (§1002.2)
- To render a final, timely, independent administrative decision setting forth findings of fact, conclusions of law, final order, and appeal rights.(§§600.1 and 1003; 2006 RFP);
- Render the decision orally\* at the conclusion of the hearing to be followed by the written final decision; (§1003);
- Rule on reconsideration of the hearing decision;(§1005)\*\*
- Maintain case files as directed; (2006 RFP)\*\*\*

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\* This procedure mitigates against a thoughtful and thorough decision and is not a best practice in special education hearings. It must also be noted that educational matters are particularly sensitive and important matters to the family involved.

\*\* The reconsideration procedure allowing the reopening of the record is in conflict with the required finality of a decision under the IDEA and D.C. law and regulation. This reconsideration process is not authorized by federal or state law or regulation and, upon the revision of the SOP for consistency with the IDEA, will be recommended for elimination.

\*\*\* The 2006 RFP states that a Hearing Officer shall maintain individual cases and hearing files for 3 years. This is not an advisable practice due to the requirements of confidentiality and the location of hearing files in multiple locations. It addition it conflicts with the SOP §1006.

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- Provide updates and docket information on case activity on a continuing and contemporaneous basis; (2006 RFP)

A special education hearing is not governed by the formal rules of procedure or evidence. Hearing Officers have broad authority and discretion to adjudicate disputes pursuant to the IDEA, including matters such as how closing statements will be made and whether legal briefs are necessary. (§700.4, 2006 RFP)

**Conclusion:**

Taking the SOP and the 2006 RFP into consideration, the established functions and responsibilities of the Hearing Officers are consistent with other states and, in some regards, provide specific additional authority for things such as consolidation of cases, restricting the number of witnesses and limiting the length of their testimony, and addressing inappropriate conduct or misbehavior, including sanctions. (See Appendix for examples of other states.) Therefore, the establishment of additional functions and responsibilities is not necessary to have a high performing hearing system consistent with standard and best legal standards. It is the absence of the consistent exercise of such authority that is an impediment in this hearing system.

It is recommended that the current Hearing Officers, and any new Hearing Officers recruited, be trained with regard to the nature and scope of their authority, functions, and responsibilities, including the careful exercise of such authority in this unique administrative hearing process. Such training should include a component on the practical application of this authority with consideration of the independence of Hearing Officers as decision makers and the fact-specific nature of these cases. A system of technical assistance and evaluation must also be established and implemented to support the Hearing Officers in the exercise of these important responsibilities. (See related memorandum on the role of a Chief Hearing Officer.)

When the District of Columbia Code of Regulations is revised for consistency with the IDEA, it is also recommended that some of the current functions and responsibilities, such as the consolidation of cases and restricting the number of witnesses and limiting the length of their testimony, should be considered for inclusion in the regulations to ensure disputed orders are enforceable. In addition, based on a review of the operation of the reformed hearing system in phase two of OSSE's reform efforts, it is recommended that SHO consider whether any additional specific regulatory authority for Hearing Officers is required to ensure this unique hearing system meets standard and best legal practices.

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**APPENDIX**

**I. Select Other States' Hearing Officers' Qualifications**

**Illinois**

Illinois 105 ILCS §14-8.02c(b) (b) Hearing officers must, at a minimum, (i) possess a master's or doctor's degree in education or another field related to disability issues or a juris doctor degree; (ii) have knowledge of and the ability to understand the requirements of the federal Individuals with Disabilities Education Act, Article 14 of this Code, the implementation of rules or regulations of these federal and State statutes, and the legal interpretation of the statutes, rules, and regulations by federal and State courts; (iii) have the knowledge and ability to conduct hearings in accordance with appropriate, standard, legal practice; and (iv) have the knowledge and ability to render and write decisions in accordance with appropriate, standard, legal practice. Current employees of the State Board of Education, school districts, special education cooperatives, regional service areas or centers, regional educational cooperatives, State-operated elementary and secondary schools, or private providers of special education facilities or programs may not serve as hearing officers.

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**New York**

Regulations of the Commissioner of Education, Part 201 Section 200.1(x)  
“*Impartial hearing officer* means an individual assigned by a board of education pursuant to Education Law, section 4404(1), or by the commissioner in accordance with section 200.7(d)(1)(i) of this Part, to conduct a hearing and render a decision. No individual employed by a school district, school or program serving students with disabilities placed there by a school district committee on special education may serve as an impartial hearing officer and no individual employed by such schools or programs may serve as an impartial hearing officer for two years following the termination of such employment, provided that a person who otherwise qualifies to conduct a hearing under this section shall not be deemed an employee of the school district, school or program serving students with disabilities solely because he or she is paid by such schools or programs to serve as an impartial hearing officer. An impartial hearing officer shall:

- (1) be an individual admitted to the practice of law in the State of New York who is currently in good standing and who has a minimum of two years practice and/or experience in the areas of education, special education, disability rights or civil rights; or be an individual certified by the State of New York as an impartial hearing officer on September 1, 2001;
- (2) have access to the support and equipment necessary to perform the duties of an impartial hearing officer;
- (3) be independent, shall not be an officer, employee or agent of the school district or of the board of cooperative educational services of which such school district is a component, or an employee of the Education Department, shall not have a personal or professional interest which would conflict with his or her objectivity in the hearing, and shall not have participated in any manner in the formulation of the recommendation sought to be reviewed; and
- (4) be certified by the commissioner as an impartial hearing officer eligible to conduct hearings pursuant to Education Law, section 4404(1) and subject to suspension or revocation of such certification by the commissioner for good cause in accordance with the provisions of section 200.21 of this Part. In order to obtain and retain such a certificate, an individual shall:
  - (i) successfully complete a training program, conducted by the department, which program provides information regarding State and Federal laws and regulations relating to the education of students with disabilities, the needs of such students, and the procedures involved in conducting a hearing, and in reaching and writing a decision;
  - (ii) attend such periodic update programs as may be scheduled by the commissioner;

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(iii) annually submit, in a format and by a date prescribed by the commissioner, a certification that the impartial hearing officer meets the requirements of paragraphs (1), (2) and (3) of this subdivision;

(iv) possess knowledge of, and the ability to understand, the provisions of Federal and State law and regulations pertaining to the Individuals with Disabilities Education Act and legal interpretations of such law and regulations by Federal and State courts; and

(v) possess knowledge of, and the ability to conduct hearings in accordance with appropriate, standard legal practice and to render and write decisions in accordance with appropriate standard legal practice.

## **II. Select Other States' Hearing Officers' Functions and Responsibilities**

### **Massachusetts-Manual**

#### **B. Hearing Officer Duties and Powers**

The Hearing Officer shall have the duty to conduct a fair hearing; to ensure that the rights of all parties are protected; to define issues; to receive and consider all relevant and reliable evidence; to ensure an orderly presentation of the evidence and issues; to ensure a record is made of the proceedings; and to reach a fair, independent and impartial decision based on the issues and evidence presented at the hearing and in accordance with the law. In furtherance of these duties, the Hearing Officer may:

1. Issue subpoenas sua sponte or upon the request of any party to secure the presentation of evidence or testimony;
2. Administer the oath or affirmation to witnesses testifying at the hearing;
3. Request a statement of the issues and define the issues;
4. Rule on any requests or motions that may be made during the course of the due process proceedings;
5. After consultation with the parties and consideration of the proposed evidence, place reasonable limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence;
6. Assist all those present in making a full and free statement of the facts in order to bring out all the information necessary to decide the issues involved and to ascertain the rights of the parties;
7. Ensure that each party has a full opportunity to present its case orally, or in writing, and to secure witnesses and evidence to establish its claims;
8. Regulate the presentation of the evidence and the participation of the parties for the purpose of ensuring an adequate and comprehensible record of the proceedings;

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9. Examine witnesses and ensure that relevant evidence is secured and introduced;
10. Receive, rule on, or exclude evidence;
11. Introduce into the record any regulations, statutes, memoranda, or other materials relevant to the issues at the hearing;
12. Continue the hearing to a subsequent date to permit either party to produce additional evidence, witnesses, and other information;
13. Order additional evaluations at public expense;
14. Order written briefs to be submitted by the parties, establish the issues to be addressed by the briefs and set the deadline for their submission;
15. Reconvene the hearing at any time prior to the issuance of a decision for any purpose or pursuant to a post-hearing motion; and
16. Censure, reprimand, or otherwise ensure that all participants conduct themselves in an appropriate manner.

**C. Evidence**

The Hearing Officer shall not be bound by the rules of evidence applicable to courts, but shall observe the rules of privilege recognized by law.

Evidence shall be admitted only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs.

1. *Documents.* The parties may offer as evidence written documents that they have exchanged prior to the hearing in accordance with these rules. At the hearing, the Hearing Officer may permit or request the introduction of additional documentary evidence where no prejudice would result to either party.

2. *Oral Testimony.* Oral testimony shall be given under oath or affirmation, subject to the pains and penalties of perjury. Witnesses shall be available for examination and cross-examination.

3. *Regulations and Statutes.* Regulations and statutes may be put into evidence by reference to the citation or by submitting a copy of the pertinent regulation or statute.

4. *Stipulations.* Stipulations of fact, or stipulations as to the testimony that would have been given by an absent witness, may be used as evidence at the hearing. The Hearing Officer may require evidence in addition to the stipulations offered by the parties.

5. *Administrative Notice.* The Hearing Officer may take administrative notice of any fact of which judicial notice could be taken, and in addition may take administrative notice of statutes, regulations, and general, technical or scientific facts within the specialized knowledge of the Hearing Officer. Parties shall be notified of the facts so noticed and they shall be afforded an opportunity to contest the substance or materiality of the facts noticed. Facts officially noticed shall be included and indicated as such in the record.

6. *Additional Evidence.* The Hearing Officer may require any party to submit additional evidence on any relevant matter.

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**D. Evidentiary Standard**

In reaching a decision, a Hearing Officer will assess the weight, credibility and probative value of the evidence admitted into the record. Hearing Officers may use their experience, technical competence and specialized knowledge in evaluating the evidence. The Hearing Officer's decision will be based upon a preponderance of the evidence presented.

**E. Close of the Hearing**

At the conclusion of all testimony, the Hearing Officer has the discretion to permit or require the parties to make oral or written closing arguments. A request to submit written closing arguments shall constitute a postponement request which must be documented and acted upon in accordance with Rule III above. If the Hearing Officer allows the submission of written closing arguments, they shall be submitted no later than seven (7) business days after the last day of hearing *unless the parties jointly request, and the Hearing Officer allows, a different time period.* The Hearing Officer has the discretion to limit the number of pages and font size contained within the arguments. The record is formally closed when any additional documents permitted by the Hearing Officer are added to the record, or when written closing arguments, if any, are received by the Hearing Officer, or upon the date such documents or arguments are due, whichever comes first. A decision will be issued within twenty-five (25) days of the close of the record.

**F. Failure to Appear**

If a party fails to appear at the scheduled hearing, the Hearing Officer may take evidence and issue such orders as may be necessary including, but not limited to, ordering an educational program or placement for the student or defaulting the absent party.

**New York**  
**§§200.5**

Regulations

Impartial due process hearings....

(iv) The impartial hearing officer shall be authorized to administer oaths and to issue subpoenas in connection with the administrative proceedings before him/her.

(v) A written or, at the option of the parents, electronic verbatim record of the proceedings before the impartial hearing officer shall be maintained and made available to the parties.

(vi) At all stages of the proceeding, where required, interpreters of the deaf, or interpreters fluent in the native language of the student's parent, shall be provided at district expense.

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(vii) The parties to the proceeding may be accompanied and advised by legal counsel and by individuals with special knowledge or training with respect to the problems of students with disabilities. At all stages of the proceeding, the impartial hearing officer may assist an unrepresented party by providing information relating only to the hearing process. Nothing contained in this subparagraph shall be construed to impair or limit the authority of an impartial hearing officer to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record.

(viii) In the event the impartial hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(ix) In the event the impartial hearing officer determines that the interests of the parent are opposed to or are inconsistent with those of the student, or that for any other reason the interests of the student would best be protected by appointment of a guardian ad litem, the impartial hearing officer shall appoint a guardian ad litem to protect the interests of such student, unless a surrogate parent shall have previously been assigned. The impartial hearing officer shall ensure that the procedural due process rights afforded to the student's parent pursuant to this section are preserved throughout the hearing whenever a guardian ad litem is appointed.

(x) The hearing shall be conducted at a time and place which is reasonably convenient to the parent and student involved and shall be closed to the public unless the parent requests an open hearing.

(xi) A prehearing conference with the parties may be scheduled. Such conference may be conducted by telephone. A transcript or a written summary of the prehearing conference shall be entered into the record by the impartial hearing officer. A prehearing conference is for the purposes of:

- (a) simplifying or clarifying the issues;
- (b) establishing date(s) for the completion of the hearing;
- (c) identifying evidence to be entered into the record;
- (d) identifying witnesses expected to provide testimony; and/or
- (e) addressing other administrative matters as the impartial hearing officer deems necessary to complete a timely hearing.

(xii) The parents, school authorities, and their respective counsel or representative, shall have an opportunity to present evidence, compel the attendance of witnesses and to confront and question all witnesses at the hearing. Each party shall have the right to prohibit the introduction of any evidence the substance of which has not been disclosed to such party at least five business days before the hearing.

85 200.5

(a) Additional disclosure of information. Not less than five business

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days prior to a hearing, each party shall 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. An impartial hearing officer may bar any party that fails to comply with this requirement from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(b) The impartial hearing officer, wherever practicable, shall enter into the record a stipulation of facts and/or joint exhibits agreed to by the parties.

(c) The impartial hearing officer may receive any oral, documentary or tangible evidence except that the impartial hearing officer shall exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious. The impartial hearing officer may receive testimony by telephone, provided that such testimony shall be made under oath and shall be subject to cross-examination.

(d) The impartial hearing officer may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious.

(e) The impartial hearing officer may limit the number of additional witnesses to avoid unduly repetitious testimony.

(f) The impartial hearing officer may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination.

(g) The impartial hearing officer may receive memoranda of law from the parties not to exceed 30 pages in length, with typed material in minimum 12-point type (footnotes minimum 10 point type) and not exceeding 6 1/2 by 9 1/2 inches on each page.

(xiii) Each party shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision. Additional hearing days, if required, shall be scheduled on consecutive days wherever practicable....

**Minnesota -Regulations**

**§3525.4110 PREHEARING CONFERENCE.**

Subpart 1. Generally. A prehearing conference must be held within five business days of the date the department appoints the hearing officer. The hearing officer will initiate the prehearing conference which may be conducted by telephone or in person at a location within the district. The hearing officer will have a written verbatim record of

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the prehearing conference created which must be made available to both parties if either party requests the record.

Subp. 2. Purpose. The hearing officer has the following duties at a prehearing conference:

A. The hearing officer must establish the management, control, and location of the hearing to ensure its fair, efficient, and effective disposition including, but not limited to: (1) informing the parties of their rights should the dispute proceed; (2) ensuring parents have been provided access to or copies of all education records and ensuring all required notices, information on the pupil's educational progress, and any information requested by the hearing officer has been shared between the parties with copies provided to the hearing officer; (3) determining the necessity for participation of appropriate districts, issuing orders to join agencies not already participating and consolidating cases pursuant to part 3525.4350; (4) determining the amount of time parties will have to present their cases by balancing the due process rights of the parties with the need for administrative efficiency and limited public resources; and (5) requiring and assisting the parties in establishing lists of written exhibits and witnesses necessary for each party to make its case, such as responding to requests to hearing officers to compel the attendance of witnesses, determining the necessity of telephone testimony, and stipulating to undisputed facts. A hearing officer may permit a witness to testify via telephone if such a procedure would not prejudice either party.

B. The hearing officer must clearly identify the questions the hearing officer must answer to resolve the dispute and eliminate claims and complaints that are frivolous or beyond a statute of limitations period. If necessary, the hearing officer must assist the parties in identifying the issues for hearing.

C. The hearing officer must set a scheduling order for the hearing and for any additional prehearing activities including requests for extensions to the 45-day timeline in which to dispose of the matter. A hearing officer may only grant an extension for a period of up to 30 calendar days if the requesting party shows good cause on the record. Extensions may last longer than 30 calendar days if both parties agree and the hearing officer approves. All written orders granting or denying motions must be filed with the department. All orders granting or denying motions to extend the 45-day timeline must be in writing. The hearing officer may require an independent education evaluation be conducted at district expense.

D. The hearing officer must determine if the hearing may be disposed of without an evidentiary hearing and set the schedule and procedure accordingly. The hearing officer may dispose of any issue without an evidentiary hearing if there are no material facts in dispute. The hearing officer may facilitate a settlement, if possible, including suggesting the parties participate in mediation or another alternative dispute resolution option.

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Subp. 3. Hearing officer authority. The hearing officer has the authority to take any actions necessary to ensure the compliance with all requirements of law and may dismiss the matter, with or without prejudice, if the party requesting the hearing fails to provide information required or ordered by the hearing officer.

Subp. 4. Subpoenas. Parties may request subpoenas for witnesses from the hearing officer. A subpoena must include a statement that federal law gives parties to a special education due process hearing the right to compel the attendance of witnesses. A hearing officer may refuse to issue a subpoena for a proposed witness who is to offer evidence the hearing officer determines will be incompetent, irrelevant, immaterial, or unduly repetitious.

**3525.4300 HEARING PROCEDURES.**

Subpart 1. Generally. The hearing officer shall preside over and conduct the hearing and shall rule on procedural and evidentiary matters. The hearing officer must ensure that issues for hearing are appropriately identified and that evidence is limited to that which is relevant to the issues and not cumulative. The hearing officer must limit the hearing to the amount of time necessary for each party to present its case and must establish the means for doing so. The hearing officer has authority to question witnesses and request information. A written record of the hearing shall be made.

Subp. 2. Protective orders. When a party is asked to reveal data that the opposing party is not privileged to see, the party from whom the data is requested may bring the matter to the attention of the hearing officer who will review the data in camera and make protective orders that are reasonable and necessary or as otherwise provided by law. The hearing officer may refer the in camera review to another hearing officer if requested to do so by a party.

Subp. 3. Responding to orders. If the hearing officer orders that parties do an act or not do an act, the parties must comply with the order. Objections to orders must be made as part of the record as promptly as possible.

Subp. 4. Copies. The hearing officer must send copies of all orders or decisions to all parties simultaneously. Any party sending a letter, exhibit, brief, memorandum, subpoena request, or other document to the hearing officer must simultaneously send a copy to all other parties.

Subp. 5. Representation by attorney. A party need not be represented by an attorney. If a party is represented by an attorney and notifies the other parties of such representation, all communications pertaining to the hearing must be directed to that attorney.

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Subp. 6. Communication with hearing officer. No party or attorney may communicate with the hearing officer on the merits of the case unless all parties have the opportunity to participate.

Subp. 7. Witnesses. Any party may be a witness and may present witnesses on the party's behalf at the hearing. All oral testimony at the hearing must be under oath or affirmation. At the request of a party or upon the hearing officer's own motion, the hearing officer may exclude witnesses from the hearing room so that they cannot hear the testimony of other witnesses. The hearing officer has authority to question witnesses and request information.

**California - Regulations**

5 CCR 3082 - Due Process Hearing Procedures

§3082. (a) A parent or public education agency may initiate a hearing pursuant to Education Code Sections 56500 through 56507 and Title 34, Code of Federal Regulations, Sections 300.506 through 300.514 on any of the matters described in Education Code Section 56501. The hearing shall be conducted by a hearing officer knowledgeable in administrative hearings and under contract with the State Department of Education.

(b) The hearings conducted pursuant to this section shall not be conducted according to the technical rules of evidence and those related to witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. All testimony shall be under oath or affirmation which the hearing officer is empowered to administer.

(c) In addition to the rights afforded both parties to the hearing pursuant to Education Code Sections 56500-56507 and Title 34, Code of Federal Regulations, Section 300.514, the parties shall also have the following rights:

(1) To call witnesses, including adverse witnesses, and to cross examine witnesses for the other party.

(2) To compel the attendance of witnesses. The hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and Subpoenas Duces Tecum (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party).

(3) Absent compelling circumstances to the contrary, and upon motion to the hearing officer to have witnesses excluded from the hearing.

(d) Hearings shall be conducted in the English language; when the primary language of a party to a hearing is other than English, or other mode of communication, an interpreter

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shall be provided who is competent as determined by the hearing officer. Cost for an interpreter shall be borne by the State Department of Education. Interpreters shall take an oath to interpret fully and accurately.

(e) If either the school district or the parents have an attorney present as an observer, the attorney may watch the proceedings to advise his party at a later date, but the attorney may not present oral argument, written argument or evidence, or consult in any manner in or out of the room, during the due process hearing.

(f) Notwithstanding Government Code section 11425.10(a)(3) of the Administrative Procedure Act, special education due process hearings are open/closed to the public at the discretion of the parent.

(g) Notwithstanding Government Code section 11440.30 of the Administrative Procedure Act, the hearing officer may conduct all or part of a hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits.

§3088. Sanctions. (a) Provisions for contempt sanctions, order to show cause, and expenses contained in Government Code sections 11455.10-11455.30 of the Administrative Procedure Act apply to special education due process hearing procedures except as modified by (b) through (e) of this section.

(b) Only the presiding hearing officers may initiate contempt sanctions and/or place expenses at issue.

(c) Prior to initiating contempt sanctions with the court, the presiding hearing officer shall obtain approval from the General Counsel of the California Department of Education.

(d) The failure to initiate contempt sanctions and/or impose expenses is not appealable.

(e) The presiding hearing officer may, with approval from the General Counsel of the California Department of Education, order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel, to the California Special Education Hearing Office for the reasons set forth in Government Code section 11455.30(a).

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**To:** Jo Ann Smoak

**From:** Gail ImObersteg

**Date:** January 27, 2008

**Subject: Evaluation of the Special Education Hearing Officers for the District of Columbia**

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**Question:**

You have asked for a recommendation on policies, procedures, and criteria for the evaluation of the special education Hearing Officers for the District of Columbia.

**Conclusion:**

The 2006 special education Hearing Officers' Contract and the 2006 Request for Proposal (RFP) include: performance requirements and standards in core competency areas; "surveillance" evaluation methods and frequency; and "incentives/disincentives", that is, disciplinary action, including termination. This memorandum recommends revisions to the core competency areas and criteria set forth in the contract and RFP to align them with standard and best legal practices. In addition, the data collection methods and the disciplinary action in the contract and RFP should be supplemented to provide comprehensive data collection, remedial action, and additional sanctions for noncompliance.

It must be noted that the primary impediment to an effective evaluation system for special education Hearing Officers in the District of Columbia is not the inadequacy of the current policy, procedures, and criteria, but the absence of its implementation. A primary cause of this failure to implement the designated evaluation system may be the absence of an independent individual with the requisite knowledge and experience to evaluate the performance of the Hearing Officers. (See report on the Chief Hearing Officer's functions and responsibilities for the assignment of this function.)

**Introduction: Evaluation Process**

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*“Summative evaluation is the judgment of the merits of the work.” “The other half of the distinction is formative evaluation, a judgment designed to improve the work of the student involved”<sup>6</sup>*

The overall objective of the evaluation of Hearing Officers is to improve the hearing system and, if necessary, to remediate or eliminate performance issues for individual Hearing Officers. Therefore, the evaluation process described below has a two-fold purpose:

- To facilitate professional development throughout the contract year for individual Hearing Officers and the cadre of Hearing Officers as a whole; and
- To provide definitive data on the performance of individual Hearing Officers and to determine the continued suitability of the individual to serve as a Hearing Officer.

In order to meet the purpose of timely professional development, it is recommended that the data collection for each Hearing Officer’s performance be conducted at multiple times during the contract term and reflect work products throughout the course of the term. The identification of deficiencies in core competency areas for individual Hearing Officers and systemic deficiencies among the Hearing Officers throughout the contract term allows for appropriate intervention to avoid perpetuation of an identified substandard legal practice.

In addition to ongoing data collection, an annual evaluation of each Hearing Officer should also be conducted toward the end of the contract term. This annual evaluation would, at minimum, embody a compilation of the data collected throughout the term of the contract in the core competency areas and a recommendation on the reappointment of the Hearing Officer for the subsequent contract term.

To ensure a fair, accurate, and comprehensive evaluation of all Hearing Officers, it is recommended that the evaluation system include:

- A comprehensive criterion referenced system of evaluation for measuring Hearing Officers’ performance.
- All stages of the hearing process (pre-hearing, hearing and decision writing), case management, judicial temperament, and preparation and return of an administrative record.
- A methodology for data collection with multiple methods and sources of data collection.

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<sup>6</sup> The Experience of Quality in Higher Education: Papers from the Experience of Quality in Higher Education Symposium, Brisbane, July 1994, Griffith University, 1995 Michael Jackson

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- An opportunity after the conduct of an evaluation for an individual Hearing Officer to provide contextual information or documentation to refute any perceived inaccuracy in the data collected or conclusions reached.

**If the current performance criteria and deliverables in the 2006 Hearing Officers' contract are revised based on the recommendations in this report, the Hearing Officers should be informed of the modified evaluation process, the independent evaluator, and the criteria and measurements upon which their performance will be evaluated. This notice should be in advance of the implementation of the modified evaluation system.**

**The Evaluation System**

**I. Performance Criteria and Measurements<sup>7</sup>**

In order to evaluate individual Hearing Officers, it must be determined whether the Hearing Officer complies with the following basic standards:

- The established qualifications, conditions of service, and bases for termination for Hearing Officers in the IDEA (20 U.S.C. §1415(f); 34 C.F.R. §300.511); the Standard Operating Procedures (SOP); the Blackman/Jones Consent Decree; and the Hearing Officers' contracts;<sup>8</sup>
- The mandates in the IDEA (20 U.S.C. §1400 et seq and 34 C.F.R. Part 300); District of Columbia law and regulations; the SOP; Blackman/Jones Consent Decree; and the Hearing Officer's contract on the standards and timelines for the conduct of hearings, including specially set and expedited hearings; the conduct of a pre-hearing; and the issuance of written decisions that are clear, concise and founded in case law and fact.

The following performance criteria and measurements are recommended to determine compliance with the above basic standards and appropriate, standard legal practices:

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<sup>7</sup> Although the 2006 RFP references Section 504 and the Americans with Disabilities Act, they are not included as a source for the evaluation criteria. However, a decision must be made by OSSE in the near future whether these Hearing Officers also serve as the Hearing Officers in Section 504 cases and whether the responsible entity for Section 504 hearings is OSSE or DCPS.

<sup>8</sup> It must be noted that some of the measurements in this report are based on the current SOP only and the measurements should be revised, as appropriate, when the SOP is revised.

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1. The Hearing Officer must demonstrate knowledge of Federal and State requirements governing special education and related services for students with disabilities, including legal interpretations of the IDEA and District of Columbia laws and regulations by Federal and State courts

The evaluation of each Hearing Officer should include this criterion, and measurements such as the following should be examined:

Whether in the conduct of status/pre-hearing conferences and the hearing; rulings on motions, including continuances, and objections at the hearing; and the issuance of the hearing decision; the Hearing Officer has demonstrated knowledge of:

- The IDEA (20 U.S.C. §1400 et seq; 34 C.F.R. Part 300); District of Columbia laws and regulations; the Blackman/Jones Consent Decree; and the SOP.
- Relevant opinion letters/policies of the OSSE and United States Department of Education and weight accorded by Federal and State courts; and
- Relevant case law applicable to the jurisdiction and, persuasive authority of other courts on standards of law not resolved in the jurisdiction.

- 2. The Hearing Officer must conduct pre-hearings in accordance with appropriate, standard legal practice and in accordance with the procedures and requirements set forth in the SOP.**

The evaluation of each Hearing Officer should include this criterion, and measurements such as the following should be examined:

The Hearing Officer must:

- Schedule status/pre-hearing conferences in a timely manner, including the expeditious resolution of scheduling conflicts;
- Provide the parties a timely notice of time, date, location and a description of the conference agenda;
- Ensure the matter/issues in dispute and the relief being sought are clear prior to the date for the exchange of evidence;
- Identify specially set and expedited hearings in a timely manner and schedule the hearings accordingly;
- Rule on sufficiency challenges in a timely manner;
- Ensure amendments, when allowed, are consistent with the IDEA;
- Determine jurisdiction over parties and issues in a timely manner prior to the date for the exchange of evidence;

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- Determine the need and relevance of subpoenas requested;
- Determine the order of presentation at the hearing;
- Determine the applicable burden of proof;
- Determine personal or professional conflicts of interest warranting recusal of the Hearing Officer;
- Rule on all objections and motions raised at the pre- hearing stage in a timely manner, including the relevance and materiality of documents or witnesses, after providing an opportunity for response for disputed motions;
- Make a record of motions and party response, if any; clearly and timely rule;
- Issue rulings/orders that rule on the motion/dispute, reflect the application of law to facts and are made a part of the record; and
- Prepare a written record of pre-hearing conferences, and issue clear pre-hearing orders to the parties.

**3. The Hearing Officer must conduct hearings in accordance with appropriate, standard legal practice and in accordance with the procedures and requirements in the IDEA law and regulations; District of Columbia law and regulations; the Blackman/Jones Consent Decree; and the SOP.**

The evaluation of each Hearing Officer should include this criterion, and measurements such as the following should be examined:

The Hearing Officer must:

- Set the date and time for the hearing, including the amount of time required, in a timely manner;
- Comply with the timelines to conduct the hearing or specially set/expedited hearing and to render and mail the decision, under the IDEA; District of Columbia law and regulations; the Blackman/Jones Consent Decree; and the SOP;
- Take charge of the hearing, including articulating and carrying out expectations, establishing ground rules, and regulating the orderly course of the hearing;
- Conduct the hearing effectively and efficiently, including the appropriate handling of cumulative, and irrelevant testimonial and documentary evidence while balancing the parties' right to be heard;
- Rule on the admissibility of evidence, and properly mark and include the admitted documentary evidence in the record;
- Rule on all objections and motions raised at the hearing in a timely manner, providing an opportunity for response for disputed motions, and a clear record;

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- Ensure the testimony of witness is under oath properly administered;
- Safeguard the parties' right to due process, including a full and fair opportunity to be heard;
- Limit the scope of the hearing to identified issues properly raised;
- Employ the applicable legal standards for the burden of proof, burden of going forward, and the standard of proof; and
- **Ensure an accurate verbatim record is made of the proceeding.**

4. The Hearing Officer must demonstrate efficient case-management strategies.

The evaluation of each Hearing Officer should include this criterion, and measurements such as the following should be examined:

Whether the Hearing Officer has:

- Monitored the course of the hearing. Demonstrated appropriate follow-up, including procedures to monitor the progress of resolution sessions to anticipate/schedule hearing timelines;
- Demonstrated planning/organization, including setting priorities, and anticipating probable occurrences and the actions and resources needed to deal with them;
- Contacted the parties in a timely manner, if necessary, when events ordered or agreed upon do not occur;
- Complied with all timelines from appointment to return of the administrative record, including; the timeline for the conduct of a hearing or specially set/expedited hearing;
- Complied with the requirement that the decision be signed, dated and issued within 10 days following the hearing;
- Ensured all continuances were authorized, date-certain, and limited to the time period necessary;
- Complied with the procedures for continuances, including those set forth in the Blackman/Jones Consent Decree and the SOP.

5. **The Hearing Officer must render written decisions that are clear, concise and founded in case law and fact.**

The evaluation of each Hearing Officer should include this criterion, and measurements such as the following should be examined:

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- Whether the decisions include the essential components of a well-reasoned decision, including a clear statement of the issues; clear, coherent, and relevant findings of fact based on the evidence taken; resolution of conflicting evidence/testimony, including credibility determinations; the application of the law to the facts, including how well the Hearing Officer was able to articulate the applicable law; and relied on federal and state statutory and regulatory provisions and judicial decisions binding in the District of Columbia;
- Whether the decision is based on the documentary and testimonial evidence admitted, including stipulated facts/agreements;
- Whether Orders are clear, precise, implement the decision, and are verifiable, including what the parties must do to carry out the decision;
- Whether the decision includes the identification of who prevailed on what issue;
- Whether the appeal rights are included in the decision; and
- Whether all issues are decided, with finality.

6. The Hearing Officer must demonstrate judicial temperament and professional behavior.

**Judicial Temperament**

The Hearing Officer must comply with the standards of neutrality, confidentiality, and conduct required by the IDEA; FERPA; District of Columbia law and regulation; the SOP; and the American Bar Association's Code of Judicial Conduct<sup>9</sup>. Therefore, the evaluation of each Hearing Officer should include this criterion, and measurements such as the following should be examined:

Whether the Hearing Officer:

- a) Conducts himself/herself in a temperate, patient, dignified, and courteous manner that promotes confidence in the integrity, impartiality, and efficiency of the hearing process;
- b) Affords parties the right to be heard;
- c) Conducts himself/herself in an independent and impartial manner, including:
  - Avoiding impropriety and the appearance of impropriety;
  - Presiding without bias or prejudice and without discrimination on any prohibited basis against any

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<sup>9</sup> Adherence to the Code of Judicial Conduct is required by the SOP. The Administrator of the SHO has also indicated a preference for adherence to the Model Code of Ethics from the National Association of Hearing Officers as a performance requirement.

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- person involved in the proceeding, and controlling the proceedings to prevent such;
- Maintaining impartiality in words and conduct; and
  - Treating all participants with equal courtesy and dignity;
- d) Requires order and decorum in the hearing process;
  - e) Promptly discloses to the parties any prior personal knowledge of or involvement in the matter;
  - f) Recuses himself/herself from any proceeding in which the Hearing Officers impartiality might be reasonably questioned;
  - g) Disregards all prejudicial influence;
  - h) Avoids impermissible *ex parte* communications with parties to an individual complaint, counsel for parties, witnesses, or anyone else involved in hearings over which they are presiding;<sup>10</sup>
  - i) If an *ex parte* communication occurred, promptly notifies all other parties of the substance of the *ex parte* communication and allows an opportunity to respond and notes the occurrence for the record;
  - j) Withdraws from any proceeding in which their impartiality becomes compromised;
  - k) Upholds the integrity and impartiality of the process and promotes ethical norms, dignity and decorum throughout the hearing process; and
  - l) Uses and discloses any confidential student or other information obtained by reason of official position or authority in accordance with federal and state confidentiality requirements.

**Professional Behavior**

The evaluation of each Hearing Officer should include this criterion of professional behavior, and measurements such as the following should be examined:

Whether the Hearing Officer:

- Performs the duties of a Hearing Officer diligently;
- Takes cases upon reasonable notice consistent with the terms of the Hearing Officer's employment;
- Reports for assigned hearings and other required events at the designated time;

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<sup>10</sup> Scheduling is specifically excluded from the prohibition of *ex parte* communications and a Hearing Officer may consult with the independent Chief Hearing Officer whose function is to assist the Hearing Officer in carrying out the adjudicative responsibilities.

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- Works/functions well with staff, co-workers or peers; and
- Displays no hostile or demeaning behavior with staff, co-workers, peers or others.

**7. The Hearing Officer must ensure a complete and accurate administrative record is made of the proceedings.**

The evaluation of each Hearing Officer should include this criterion and measurements such as the following should be examined. The Hearing Officer must:

- Document and maintain a clear record of all proceedings from appointment to final disposition;
- Timely provide the SHO an organized record in the manner prescribed after the case is closed; and
- Certify the record in the manner prescribed.

**II. Data Sources**

To ensure a comprehensive evaluation of each Hearing Officer, the evaluation process should employ observations; review of work products; participant survey data; and other available data sources.

**Review of Hearing Records**

The work products of the hearing system, including the verbatim record of the hearing, the hearing decision and orders, and other components of an individual hearing record are integral to the special education hearing system and are fundamental to the collection of data on a Hearing Officer's performance.

Sources of data collection of work products reviewed will include:

- The review of at least two administrative hearing records in their entirety solely for the purpose of the evaluation of the Hearing Officer's performance, including timely documentation and maintenance of a record of all proceedings from appointment to final disposition, pre-hearing and status conference notices and agendas, other pre-hearing correspondence, pre-hearing and status conference summaries and orders; ruling on motions; and organization and certification of the record in the manner prescribed;
- Written decisions on an ongoing basis during the contract term;

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- Requests for reconsideration of hearing decisions and orders pursuant to the SOP Section 1005 and responses to the requests<sup>11</sup>;
- Reported judicial decisions resulting from the appeal of hearing decisions with judicial comments regarding deference to Hearing Officer's findings of fact and soundness of the decisions or other matters reflecting on the Hearing Officer's conduct of the administrative hearing; and
- Review of case management records, including adherence to timelines and procedures for continuances.

**3. Observation and/or review of verbatim written or electronic records**

The evaluation of each Hearing Officer should include at least one observation of the Hearing Officer conducting a pre-hearing conference or hearing and, preferably, both. Such observation may include a review of relevant transcripts or electronic verbatim recordings in lieu of on-site observations.

**4. Parent and Local Educational Agency Satisfaction Survey**

The evaluations should include a review of all satisfaction surveys that are completed by parties and their representatives on the conduct of status/pre-hearing conferences and hearings.

**5. Other**

Other sources of data collection should include:

- Review of statistical data on individual Hearing Officers, including warnings issued;
- Consideration of any written Hearing Officer complaints submitted to the SHO during the contract term;
- Attendance at mandatory Hearing Officers' trainings;
- Evidence of the completion of mandatory individualized staff development and/or other contractual conditions.

**III. Unsatisfactory Performance**

Every Hearing Officer must maintain a satisfactory performance rating in each of the core competency areas during the term of contractual engagement and to be considered for reappointment as a Hearing Officer. If unsatisfactory performance is determined as a

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<sup>11</sup> This is premised on the reconsideration process being maintained in the SOP.

**SPECIAL EDUCATION LAW ASSOCIATES**

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result of the evaluation of the Hearing Officer at any time during the course of the contract term, sanctions will be applied, which may include any of the following options:

- Compliance with a mandatory individualized professional development plan, including remedial activities;
- Suspension of the Hearing Officer from the appointment list for a prescribed period of time during which remedial activities would be required;
- Removal from the appointment list for failure to complete remedial activities in the prescribed time;
- The assessment of a penalty of \$100 per day for each day a decision is late;
- Permanent removal from the list of qualified Hearing Officers which may include reassignment of all cases pending before the Hearing Officer; and
- Referral to Bar Counsel for inappropriate conduct or misbehavior.