

ETHICALLY SPEAKING:
A Compendium of Ethical Considerations for Hearing Officers

HEARING OFFICER ORIENTATION – D.C.
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I. INTRODUCTION

A. The Individuals with Disabilities Education Act¹ (“IDEA”) recognizes the importance of an independent, fair and impartial hearing system.² However, IDEA does not establish standards for the ethical conduct of hearing officers.³

B. While States may add further impartiality requirements than what IDEA provides, not all do. For example, in some States, IDEA hearing officers may be governed by a specific judicial code of conduct⁴ and, in others, hearing officers may not be subject to any standard.⁵

C. The purpose of this presentation is to identify ethical conundrums that may arise in the course of the due process hearing and discuss how they might best be handled. While several situations are noted herein, participants are encouraged to raise others for discussion. Given the

¹ In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. *See* Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. *See* Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) (“This chapter may be cited as the ‘Individuals with Disabilities Education Act.’”).

² For example, IDEA prohibits an employee of the State educational agency (“SEA”) or the local educational agency (“LEA”) involved in the education or care of the child, or a person having a personal or professional interest that conflicts with the person’s objectivity in the hearing, from serving as a due process hearing officer. 20 U.S.C. § 1415(f)(3)(A)(i)(I) and (II).

³ *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46705 (August 14, 2006) (“The application of State judicial code of conduct standards is a State matter.”)

⁴ In the District of Columbia, for example, hearing officers are held to the ABA Model Code of Judicial Conduct by reference in their contracts.

⁵ IDEA hearing officers in the State of New York, for example, are not subject to any judicial code of conduct.

vast array of participants from multiple jurisdictions, this writer will draw general analogies to basic ethical principles set forth in most codes governing judicial conduct. In this regard, the writer has borrowed from the ABA Model Code of Judicial Conduct (August, 2010) and the Code of Conduct for United States Judges (June, 2009).⁶

II. QUALIFICATIONS

A. IDEA 2004 sets forth minimum qualifications for hearing officers who preside over IDEA hearings.⁷ Specifically, an IDEA hearing officer shall -

1. 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;
2. possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
3. possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.⁸

B. However, because standard legal practice will vary depending on the State in which the hearing is held, the requirements that the hearing officer possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice, are general in nature.⁹

C. Equally, the IDEA does not provide for training requirements.¹⁰ However, each State must ensure that individuals selected to conduct impartial due process hearings are sufficiently trained.¹¹ Each State is tasked with determining the required training and the frequency of the required training, consistent with State rules and policies.¹²

⁶ Reference to ABA Model Code of Judicial Conduct (August, 2010) and the Code of Conduct for United States Judges (June, 2009) is not intended to suggest that said Codes are, in fact, applicable to all hearing officers. Rather, their inclusion herein is simply to provide a framework for our discussion.

⁷ See, generally, 20 U.S.C. § 1415(f)(3)(A).

⁸ 20 U.S.C. § 1415(f)(3)(A)(ii) – (iv).

⁹ See, generally, *id.*

¹⁰ See, generally, 20 U.S.C. § 1415(f)(3)(A); see also *C.S. by Struble v. California Dep't of Educ.*, 50 IDELR 63 (S.D. Cal. 2008) (denying the parent's request for a temporary restraining order to enjoin the California's Department of Education from contracting with the Office of Administrative Hearings on the grounds that the parent did not have standing to challenge the Department's training requirements, as the requirement is not in IDEA but an obligation between two contracting parties); *Carnwath v. Grasmick*, 115 F. Supp. 2d 577, 33 IDELR 271 (D. Md. 2000) (dismissing the parent's claims against the State education agency because there is no federal right to a competent or knowledgeable ALJ); *Cavanagh v. Grasmick*, 75 F. Supp. 2d 446, 31 IDELR 158 (D. Md. 1998) ("Standards for ALJ competency and training are not found within the statutory provisions of the IDEA.... Thus, ALJ competency and training appear to be governed solely by state law standards.")

¹¹ *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46705 (August 14, 2006).

¹² *Id.*

III. ETHICAL PRECEPTS – GENERALLY

A. IDEA prohibits an employee of an SEA or LEA involved in the education or care of the child from serving as a hearing officer.¹³ IDEA further prohibits persons with an actual bias because of a personal or professional conflict of interest from also serving as hearing officers.¹⁴ However, although hearing officers need only meet the minimum standard of impartiality set out in the IDEA, and “enjoy a presumption of honesty and integrity, which is only rebutted by a showing of some substantial countervailing reason to conclude that [he] is actually biased,”¹⁵ adherence to utmost ethical conduct maintains and enhances confidence in the hearing process.

B. Independence, Integrity, and Impartiality. A hearing officer should uphold and promote the independence, integrity, and impartiality of the hearing process.¹⁶

1. Promote Confidence. The hearing officer should act in a manner that promotes public confidence in the independence, integrity, and impartiality of the hearing process.¹⁷ Public confidence is eroded by improper conduct and conduct that creates the appearance of impropriety.¹⁸

2. Must Accept Restrictions. The work of the hearing officer opens him up to “public scrutiny.” Although said public scrutiny may be viewed as burdensome, the hearing officer should accept reasonable restrictions.¹⁹

3. Avoid the Appearance of Impropriety. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the hearing officer has engaged in conduct that reflects adversely on the hearing officer’s honesty, impartiality, temperament, or fitness to serve.²⁰

Although courts have been reluctant to apply the appearance of impropriety standard for Federal judges to hearing officers, requiring conflict of interest or actual bias, hostility or

¹³ 20 U.S.C. § 1415(f)(3)(A)(i)(I). *See Robert M. v. Benton*, 634 F.2d 1139, 552 IDELR 262 (8th Cir. 1980) (finding that the Superintendent is sufficiently involved in the child’s education and, therefore, not able to sit as the hearing officer in the due process hearing); *see also Helms v. McDaniel*, 657 F.2d 800, 553 IDELR 205 (5th Cir. 1981) (finding that Georgia’s then State review procedures which treated the findings of the State review officer as the findings of a special master, without an automatic appeal to State or Federal court, conflicted with the Education for All Handicapped Children Act’s, IDEA’s predecessor, prohibition against employees of the State agency from conducting hearings).

¹⁴ 20 U.S.C. § 1415(f)(3)(A)(i)(II).

¹⁵ *L.C. v. Utah State Bd. of Educ.*, 125 F. App’x 252, 43 IDELR 29 (10th Cir. 2005) *quoting Harline v. Drug Enforcement Admin.*, 148 F.3d 1199 (10th Cir. 1998).

¹⁶ *See, e.g.*, ABA MODEL CODE JUD. CONDUCT, Canon 1 (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 1 (2009).

¹⁷ *See, e.g.*, ABA MODEL R. JUD. CONDUCT 1.2 (2010).

¹⁸ *See* ABA MODEL R. JUD. CONDUCT 1.2, Comment [1] (2010). *But see infra* notes 21, 22 and accompanying text (discussing the reluctance of courts to apply the appearance of impropriety standard applicable to Federal judges).

¹⁹ *See* ABA MODEL R. JUD. CONDUCT 1.2, Comment [2] (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 2(A), Commentary (2009).

²⁰ *See* ABA MODEL R. JUD. CONDUCT 1.2, Comment [2] (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 2(A), Commentary (2009).

prejudgment instead,²¹ the hearing officer should nonetheless avoid the appearance of impropriety or risk disrepute to the hearing process and unnecessary appeals.²²

C. Performance of Duties. A hearing officer should perform his duties impartially, competently, and diligently.²³

1. Limit Personal Activities. Frequent disqualification compromises the hearing officer's ability to perform his duties. To minimize the risk of conflicts that would result in frequent disqualification, the hearing officer should not engage in activities that would compromise the hearing officer's ability to perform his duties impartially, competently, and diligently.²⁴

Complete isolation from society (however appealing as it may be) is neither possible nor encouraged.²⁵ For example, a hearing officer may speak, write, lecture, and teach on the IDEA and the hearing system.²⁶ This does not necessarily compromise the hearing officer's ability to perform his duties impartially, competently, and diligently. However, the hearing officer should be mindful that what he says, as well as when and how he says it, might reflect adversely on the hearing officer's impartiality, potentially compromising his ability to perform his duties and leading to frequent disqualification requests.

2. Impartiality and Fairness. A hearing officer should uphold and apply the law, and perform all duties fairly and impartially.²⁷ To promote fairness and impartiality, in performing his duties, the hearing officer must / should –

- a. be objective and open-minded.²⁸
- b. interpret and apply the law without regard to whether the hearing officer approves or disapproves of the law in question.²⁹

²¹ See, e.g., *Roland M. v. Concord School Comm.*, 910 F.2d 983, 16 IDELR 1129 (1st Cir. 1990). *Accord Dell v. Board of Educ.*, 32 F.3d 1053, 21 IDELR 563 (7th Cir. 1994).

²² See, e.g., *Falmouth Sch. Comm. v. B.*, 106 F. Supp. 2d 69, 32 IDELR 256 (D. Me. 2000).

²³ See, e.g., ABA MODEL CODE JUD. CONDUCT, Canon 2 (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3 (2009).

²⁴ See ABA MODEL R. JUD. CONDUCT 2.1, Comment [1] (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(D) (2009).

²⁵ CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 4, Commentary (2009).

²⁶ See ABA MODEL R. JUD. CONDUCT 3.1, Comment [1] (2010); See, e.g., CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 4 (2009).

²⁷ See, e.g., ABA MODEL R. JUD. CONDUCT 2.2 (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 2(A) (2009).

²⁸ See ABA MODEL R. JUD. CONDUCT 2.2, Comment [1] (2010); see, e.g., CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(D) (2009).

²⁹ See ABA MODEL R. JUD. CONDUCT 2.2, Comment [2] (2010).

- c. make reasonable accommodations³⁰ to ensure that the pro se parent has the opportunity to have his matter fairly heard.³¹
 - d. maintain order and decorum throughout the hearing process.³²
 - e. be patient, dignified, respectful, and courteous to all who appear before the hearing officer.³³
 - f. accord to each party, and their representatives, the full right to be heard.³⁴
 - g. dispose promptly of motions and/or requests and issue decisions within the statutory, or any adjusted, timeline.³⁵ Prompt disposition of motions and/or requests, or the timely issuance of decisions, requires a hearing officer to devote adequate time to his duties and to take reasonable measures to ensure that the parties and/or their representatives cooperate with the hearing officer.³⁶
3. Bias and Prejudice. A hearing officer should perform all duties without bias or prejudice.³⁷ The hearing officer who manifests bias or prejudice, by words or conduct, impairs the fairness of the hearing process.³⁸ Bias and prejudice can be avoided by –
- a. limiting unnecessary commentary to the parties during the proceedings, whether on or off the record, related to the merits of the case.³⁹

³⁰ State law and/or regulations, or local rules should be consulted to determine the extent of the reasonable accommodations. In New York, for example, the hearing officer may assist an unrepresented party by providing information relating only to the hearing process. 8 NYCRR 200.5(j)(3)(vii).

³¹ See ABA MODEL R. JUD. CONDUCT 2.2, Comment [4] (2010).

³² See, e.g., ABA MODEL R. JUD. CONDUCT 2.8(A) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(2) (2009).

³³ See, e.g., ABA MODEL R. JUD. CONDUCT 2.8(B) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(3) (2009).

³⁴ See ABA MODEL CODE JUD. CONDUCT 2.5, Comment [4] (2010); see, e.g., CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4) (2009).

³⁵ See ABA MODEL R. JUD. CONDUCT 2.5, Comment [3] (2010); see, e.g., CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(5) (2009).

³⁶ See ABA MODEL R. JUD. CONDUCT 2.5, Comment [3] (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Commentary to Canon 3(A)(5) (2009).

³⁷ See, e.g., ABA MODEL R. JUD. CONDUCT 2.3(A) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(C)(1)(a) (2009).

³⁸ See ABA MODEL CODE JUD. CONDUCT 2.3, Comment [1] (2010). See also *Veazey v. Ascension Parish Sch. Bd.*, 33 IDELR 36 (M.D. La. 2000) (where the court found that the appellate officer, who had previously recused himself from the underlying, first tier hearing because he felt “prejudiced” in favor of the LEA, denied the parents a “fair and constitutionally correct hearing”).

³⁹ See ABA MODEL CODE JUD. CONDUCT 2.3, Comment [2] (2010). For an example of how a hearing officer’s off-the-record discussion with counsel for both parties in which the hearing officer referred to a particular witness’s past testimony as a “spiel” and said comment resulted in a complaint to the Office for Civil Rights, see *Massachusetts Dept. of Educ.*, 18 IDELR 286 (OCR 1991).

- b. avoiding facial expressions and body language that conveys to the parties, their representatives, or others an appearance of bias or prejudice.⁴⁰
 - c. avoiding conduct that may reasonably be perceived as prejudiced or biased.⁴¹
4. External Influences on Conduct. A hearing officer should not be swayed by fear of criticism.⁴² Cases should be decided according to the law and facts, without regard to whether a particular decision would be subject to an appeal by either or both parties.⁴³
5. Competence. Competence requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform the hearing officer's responsibilities.⁴⁴ To enable the hearing officer to competently perform his duties, the hearing officer should take the necessary time to thoroughly prepare for the hearing process by –
- a. Putting some thought to the issue(s) presented in the hearing and, should the hearing officer be unfamiliar with the applicable law, doing some research to understand what facts would have to be introduced to apply the law.
 - b. Reviewing the disclosure to get a general feel for the case in order to best decide objections to the exhibits/witnesses.
 - c. Anticipating particular problems and considering how he might address the problems and what needs to happen prior to the actual hearing.
6. Responsibility to Decide. The hearing officer should be available to decide matters assigned to the hearing officer.⁴⁵ In this regard, the hearing officer has a responsibility to limit activities or conduct that has the potential to expose the hearing officer to requests for disqualification.⁴⁶
7. Decorum and Demeanor. Maintaining an air of neutrality and civility are important to the efficient and expeditious handling of the hearing process. This can best be established by requiring order and proper behavior throughout the hearing process.⁴⁷ When the hearing officer exercises control of the parties and their representatives, the hearing process moves forward without delay.⁴⁸

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See, e.g.,* ABA MODEL R. JUD. CONDUCT 2.4(A) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(1) (2009).

⁴³ *See* ABA MODEL CODE JUD. CONDUCT 2.4, Comment [1] (2010).

⁴⁴ *See* ABA MODEL CODE JUD. CONDUCT 2.5, Comment [1] (2010).

⁴⁵ *See, e.g.,* ABA MODEL R. JUD. CONDUCT 2.7 (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(2) (2009).

⁴⁶ *See* ABA MODEL CODE JUD. CONDUCT 2.7, Comment [1] (2010).

⁴⁷ *See, e.g.,* ABA MODEL R. JUD. CONDUCT 2.8 (A) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(2) (2009).

⁴⁸ *See* ABA MODEL CODE JUD. CONDUCT 2.8, Comment [1] (2010).

The hearing officer should also be patient, dignified, and courteous to parties and their representatives and require reciprocal conduct from the parties and their representatives.⁴⁹ The hearing officer should not argue with the parties or their representatives or become angry, even when a party or his representative is behaving inappropriately.

Fraternization with the parties and/or their representatives should be avoided.

IV. COMMON ETHICAL CONUNDRUMS

A. *Ex Parte Communications*. For the hearing process to be fair, the parties need to be given the opportunity to present evidence to a neutral decision-maker upon which the case will be decided. Should the decision-maker be permitted to independently investigate the facts through unauthorized contacts, the hearing process is undermined.⁵⁰

1. A hearing officer must/should not initiate, permit, or consider *ex parte* communications, or consider other communications made to the hearing officer outside the presence of the parties or their representatives concerning a pending or impending matter.⁵¹

a. Communication for scheduling, administrative, or emergency purposes is permissible, provided (i) the hearing officer reasonably believes that no party, or their representative, will gain a procedural, substantive, or tactical advantage; and (ii) the hearing officer promptly notifies the other party of the communication and allows said party the opportunity to respond.⁵²

b. When consulting with the hearing system's staff, or with fellow hearing officers, the hearing officer should make reasonable efforts to avoid receiving factual information that is not part of the record.⁵³ The hearing officer also must not abrogate his decision-making responsibility to another.⁵⁴

c. To the extent that the parties have requested the hearing officer's assistance with settlement discussions,⁵⁵ with the consent of the parties, the

⁴⁹ See, e.g., ABA MODEL R. JUD. CONDUCT 2.8 (B) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(3) (2009).

⁵⁰ See, e.g., ABA MODEL R. JUD. CONDUCT 2.9 (C) (2010). See also *Murphy v. Commonwealth of Pennsylvania, Dep't of Educ.*, 554 IDELR 527 (Pa. Cmwlth. 1983) (finding that the hearing officer's *ex parte* telephone conversation with the director of a private residential school prior to rendering his decision in a pending hearing violated the parents' due process rights).

⁵¹ See, e.g., ABA MODEL R. JUD. CONDUCT 2.9 (A) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4)(a) (2009). For an example on how an alleged *ex parte* conversation, in retrospect, should have been avoided because it created an issue for appeal, see *Falmouth Sch. Comm. v. B.*, 106 F. Supp. 2d 69, 32 IDELR 256 (D. Me. 2000).

⁵² See, e.g., ABA MODEL R. JUD. CONDUCT 2.9 (A)(1) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4)(b) (2009). But see *Bd. of Educ. of the Williamsville Cent. Sch. Dist.*, 46 IDELR 294 (SEA NY 2006) (where the unrepresented parent sought recusal of the hearing officer for bias and prejudice because the hearing officer telephoned her on one occasion at 8:20 p.m. after failed attempts to contact her earlier in the day).

⁵³ See, e.g., ABA MODEL R. JUD. CONDUCT 2.9 (A)(3) (2010).

⁵⁴ *Id.*

⁵⁵ See Section IV. D., *infra*.

hearing officer can confer separately with the parties and their representatives in an effort to assist the parties in reaching a settlement agreement.⁵⁶

2. Remedies to improper or inadvertent *ex parte* communications may include:
 - a. Politely, but firmly, cutting off any communication when unavoidable contact occurs, such as at a social event. The hearing officer should explain that such is prohibited and then remove himself from the situation.
 - b. Notifying all parties of when the hearing officer receives written communication that is not provided to all parties.⁵⁷ The hearing officer should provide a copy of the written communication to all parties and, if feasible and appropriate, suggest a course of action regarding how such should be handled.⁵⁸
 - c. Explaining to unrepresented parties at the outset of the pre-hearing conference, or when scheduling the pre-hearing conference, that generally verbal communications with the hearing officer, in the absence of the other party, is prohibited. The hearing officer should also explain to the unrepresented party that all written communications directed to the hearing officer must also be provided to the other side.⁵⁹
3. Mere receipt of an *ex parte* communication, without more, does not necessarily require recusal. Generally, only when an *ex parte* communication significantly affects the process, have the courts voided the proceeding.⁶⁰

⁵⁶ See, e.g., ABA MODEL R. JUD. CONDUCT 2.9 (A)(4) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4)(d) (2009).

⁵⁷ See, e.g., ABA MODEL R. JUD. CONDUCT 2.9 (B) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4) (2009).

⁵⁸ *Id.*

⁵⁹ See, e.g., *Ahern v. State Bd. of Educ.*, 593 F. Supp. 902, 556 IDELR 175 (D. Del. 1984) (holding that there was no prejudice to the *pro se* parent when the LEA lawyer communicated with the hearing officer by letter but also mailed to the parent a carbon copy of the letter and the parent had ample opportunity to send a similar letter to the hearing officer).

⁶⁰ See, e.g., *Signet Constr. Corp. v. Goldin*, 99 AD2d 431 (1st Dept. 1984); *Cnty. Consol. Sch. Dist., No. 93 v. John F.*, 33 IDELR 210 (N.D. Ill. 2000) (finding that the LEA suffered no prejudice when the hearing officer called the LEA's counsel *ex parte*, told the LEA counsel that she had heard enough testimony, and suggested that the LEA settle the case). *But see Hollenbeck v. Bd. of Educ. of Rochelle Twp.*, 699 F. Supp. 658, 441 IDELR 281 (N.D. Ill. 1988) (where the court struck the decision of the hearing officer because the hearing officer engaged in *ex parte* communication with an LEA witness but did not strike the testimony or the exhibits). *But cf. Falmouth Sch. Comm. v. B.*, 106 F. Supp. 2d 69, 32 IDELR 256 (D. Me. 2000) (where the hearing officer's alleged *ex parte* conversation during a break about her own son's placement in private school with the party-parent, who was seeking reimbursement for a unilateral placement, was deemed by the court to be "passing social conversation").

B. Disqualification - IDEA provides that a hearing may not be conducted by a person who is an employee of the SEA or the LEA involved in the education or care of the child, or a person having a personal or professional interest that conflicts with the person's objectivity in the hearing.⁶¹

1. A hearing officer must/should disqualify himself when his impartiality might reasonably be questioned,⁶² including when –
 - a. the hearing officer has a personal bias or prejudice concerning a party or a party's representative.⁶³
 - b. the hearing officer has personal knowledge of facts that are in dispute in the hearing.⁶⁴
 - c. the hearing officer, hearing officer's spouse (or domestic partner), or a person within the third degree of relationship to either of them is (i) a party to the hearing; (ii) acting as a lawyer in the hearing; (iii) a person who has more than a *de minimis* interest in the hearing; and (iv) likely to be a material witness in the hearing.⁶⁵
 - d. the hearing officer knows that he has an economic interest in the subject matter or in party to the proceeding.⁶⁶
 - e. the hearing officer has made a public statement that commits the hearing officer to reach a particular result or rule in a particular way in the hearing.⁶⁷

Where recusal is required (e.g., for bias or prejudice), said obligation applies regardless of whether a motion to disqualify is filed.⁶⁸

⁶¹ 20 U.S.C. § 1415(f)(3)(A)(i)(I) and (II).

⁶² See, e.g., ABA MODEL R. JUD. CONDUCT 2.11(A) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(C)(1) (2009). See also *Manchester Sch. Dist. v. Christopher B.*, 19 IDELR 143 (D.N.H. 1992) (although recognizing that no particular section of the IDEA describes standards relevant to impartiality, the court nonetheless found the applicable standard to be analogous to one involving disqualification of federal judges).

⁶³ See, e.g., ABA MODEL R. JUD. CONDUCT 2.11(A)(1) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(C)(1)(a) (2009).

⁶⁴ *Id.*

⁶⁵ See, e.g., ABA MODEL R. JUD. CONDUCT 2.11(A)(2) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(C)(1)(d) (2009).

⁶⁶ See, e.g., ABA MODEL R. JUD. CONDUCT 2.11(A)(3) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(C)(1)(c) (2009). See also *Pine Bush Cent. Sch. Dist.*, 401 IDELR 270 (SEA NY 1988) (holding that the hearing officer's continuing relationship with the LEA as a result of the demographic study being conducted by the hearing officer and contracted for by the LEA constitutes a professional interest which would conflict with his objectivity in the hearing).

⁶⁷ See, e.g., ABA MODEL R. JUD. CONDUCT 2.11(A)(5) (2010).

⁶⁸ See ABA MODEL R. JUD. CONDUCT 2.11, Comment [2] (2010).

2. Waiver. In situations other than for bias or prejudice, the parties can agree to waive disqualification.⁶⁹ To do so, the hearing officer should disclose on the record the basis of the hearing officer's disqualification and ask the parties and their representatives to consider whether to waive disqualification.⁷⁰ Should the parties agree that the hearing officer should not be disqualified, the hearing officer may participate in the hearing. Said agreement should be made part of the record.⁷¹

3. Good Practice. A number of good practices to consider include –
 - a. Voluntary disclosure by the hearing officer of information that he believes the parties might reasonably consider relevant to a possible motion for disqualification, even if the hearing officer believes there is no basis for recusal. Preferably, this should be done early on in the hearing process and certainly on the record.
 - b. Granting the parties the opportunity to inquire of the hearing officer about any concerns that, if true, form a basis for disqualification. This should be done on the record.
 - c. Should a motion for disqualification be filed, the hearing officer should make a good record of the alleged facts that form the basis of the request and his detailed response to said request.

- C. Lawyer Misconduct. A hearing officer who has knowledge that an attorney has committed a violation of the rules of professional conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness to practice may have a responsibility to inform the bar.⁷²

- D. Settlement Discussions. While a hearing officer may encourage parties and/or their representatives to settle matters in dispute, the hearing officer should not act in a manner that coerces any party into settlement.⁷³ Nonetheless, the hearing officer can play an important role in settlement discussions. However, the hearing officer must / should –

⁶⁹ See, e.g., ABA MODEL R. JUD. CONDUCT 2.11(C) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(D) (2009); see, e.g., *Manchester Sch. Dist. v. Christopher B.*, 19 IDELR 143 (D.N.H. 1992).

⁷⁰ See, e.g., ABA MODEL R. JUD. CONDUCT 2.11(C) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(D) (2009).

⁷¹ *Id.*

⁷² See, e.g., ABA MODEL R. JUD. CONDUCT 2.15(B) (2010). Depending on the jurisdiction, said responsibility may extend to a hearing officer who receives information indicating a substantial likelihood that a lawyer has committed a violation of the rules of professional conduct. See ABA MODEL CODE JUD. CONDUCT 2.15, Comment [2] (2010).

⁷³ See, e.g., ABA MODEL R. JUD. CONDUCT 2.6(B) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4)(d) (2009); see also CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4), Commentary (2009). See also *Madison (WI) Metro. Sch. Dist.*, 20 IDELR 283 (OCR 1993) (where OCR determined that the hearing officer's statement that he would likely order a new evaluation prior to reaching a decision on the merits was not inappropriate or coercive).

1. be careful that efforts to further settlement discussions do not undermine any party's right to be heard.⁷⁴
2. be mindful of the effect the hearing officer's participation in settlement discussions may impact his own views of the case and, should settlement discussions be unsuccessful, how information obtained during settlement discussions could influence the decision.⁷⁵
3. consider how the hearing officer's participation may impact the perceptions of the parties and/or their representatives should settlement discussions be unsuccessful.⁷⁶

Factors to consider in deciding whether to engage the parties in settlement discussion include (i) whether the parties have requested or voluntarily consented to the hearing officer's participation; (ii) whether one party would be unfairly disadvantaged by the relative sophistication of the other side; (iii) whether the parties will participate with their representatives in the settlement discussions; and (iv) whether any party is unrepresented.⁷⁷

E. Public Comments. Public statements that risk affecting the outcome or impair the fairness of a matter pending or impending should/must be avoided.⁷⁸ The hearing officer should/must also limit nonpublic statements that might substantially interfere with a fair hearing.⁷⁹ Said restrictions are essential to the maintenance of the independence, integrity, and impartiality of the hearing officer.⁸⁰

The hearing officer, however, can publicly speak about hearing procedures and can also participate in scholarly presentations^{81 82}.

⁷⁴ See ABA MODEL CODE JUD. CONDUCT 2.6, Comment [2] (2010). See also *Madison (WI) Metro. Sch. Dist.*, 20 IDELR 283 (OCR 1993) (where OCR determined that the hearing officer's "persistent encouragement" of the parties to settle their differences did not cause the complainant to participate in mediation involuntarily in violation of his procedural safeguards).

⁷⁵ *Id.*

⁷⁶ See ABA MODEL CODE JUD. CONDUCT 2.6, Comment [3] (2010).

⁷⁷ See ABA MODEL CODE JUD. CONDUCT 2.6, Comment [2] (2010).

⁷⁸ See, e.g., ABA MODEL R. JUD. CONDUCT 2.10(A) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(6) (2009).

⁷⁹ See, e.g., ABA MODEL R. JUD. CONDUCT 2.10(A) (2010).

⁸⁰ See ABA MODEL CODE JUD. CONDUCT 2.10, Comment [1] (2010).

⁸¹ See, e.g., *H.H. v. Indiana Bd. of Special Educ. Appeals*, 501 F. Supp. 2d 1188, 47 IDELR 250 (N.D. Ind. 2007) (finding that it is not reasonable to assume that the hearing officer automatically sympathizes with the LEA because he taught a seminar to school administrators; must show actual bias).

⁸² See, e.g., ABA MODEL R. JUD. CONDUCT 2.10(D) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(6) (2009).

F. Private Practice. Generally, an attorney who provides legal services to other school districts or advises parents of children with disabilities, is allowed to preside over special education due process hearings in neighboring jurisdictions where s/he does not provide legal services to the neighboring school districts or advises parents of children with disabilities who reside in the neighboring school districts.⁸³ In these instances, the hearing officer is presumptively impartial and a party seeking to disqualify the hearing officer must demonstrate actual bias.⁸⁴

There may also be situations where the hearing officer has a non-special education related private practice in which he encounters other attorneys who also happen to represent one party or another in special education matters. In these instances, the hearing officer should give consideration to the potential impact these relationships may have on impending special education matters.⁸⁵

When weighing either circumstance, the hearing officer is reminded that –

1. he has a duty of candor to the parties;
2. he should disclose to both parties any relationship of a professional or personal nature that might have a bearing on the hearing officer's ability to conduct a fair hearing or render an impartial decision;⁸⁶ and,
3. he has a responsibility to promptly rule on motions to disqualify.

⁸³ See, e.g., *Leon v. Mich. Bd. of Educ.*, 807 F. Supp. 1278, 19 IDELR 397 (E.D. Mich. 1992); *Okemos Pub. Sch.*, 29 IDELR 677 (SEA Mich. 1998). See also *Minisink Central Sch. Dist.*, 16 IDELR 331 (SEA NY 1989) (finding that the fact that a hearing officer is an administrator in another school district is not a basis for disqualification unless the moving party can make a factual showing that a “personal or professional conflict” exists which interferes with the hearing officer’s objectivity); *Copake-Taconic Hills Cent. Sch. Dist.*, 16 IDELR 1302 (SEA NY 1990) (holding that the hearing officer’s previous assignment as an interim superintendent in another school district, where the district’s current superintendent was serving as a principal, was far too tenuous to present a personal or professional conflict of interest). Cf. *Allegany (NY) Cent. Sch. Dist.*, 257 IDELR 494 (OCR 1984) (finding that the LEA violated IDEA’s impartiality requirement by appointing as hearing officer an attorney from the law firm that serves as the LEA’s legal counsel).

⁸⁴ *Id.* See also *Raymond (NH) Sch. Dist.*, 257 IDELR 330 (OCR 1981) (finding that the hearing officer’s prior contact with a party did not constitute a basis for bias because the contact was limited and took place for or five years before the hearing date).

⁸⁵ For an excellent analysis by one hearing officer weighing whether a past professional relationship with an attorney who appeared before him at a hearing warranted disqualification, see *Marblehead Pub. Sch.*, 36 IDELR 170 (SEA MA 2002).

⁸⁶ See, e.g., *Pine Bush Cent. Sch. Dist.*, 401 IDELR 270 (SEA NY 1988) (explaining that the hearing officer has an obligation at the commencement of the hearing to disclose to the parties any potential conflicts of interest which may compromise his impartiality).

G. Consulting Others. As an independent arbiter of fact, the hearing officer should be insulated from agency (i.e., SEA, OAH) or other influences.⁸⁷ A hearing officer, however, can seek technical assistance from the agency on purely procedural matters that are unrelated to particular cases.⁸⁸ The hearing officer can also discuss substantive issues with fellow hearing officers or others, provided the hearing officer –

1. does not disclose confidential information;
2. does not abrogate his responsibility to another on deciding the particular issue being discussed;⁸⁹ and,
3. limits the discussion to factors or options which the hearing officer should consider related to the issue.⁹⁰

H. Non-Attorney Advocates. In a number of jurisdictions, it is unlawful for a person to practice law without a license. Nonetheless, the IDEA permits a non-attorney advocate to *accompany* and *advise* a party at a hearing.⁹¹ However, the IDEA does not address whether non-attorney advocates who have “special knowledge or training with respect to the problems of children with disabilities” can *represent* parties at hearings.⁹² The issue of whether non-attorney advocates may *represent* parties to a due process hearing is a matter that is left to each State to decide.⁹³ If State law is silent on the issue, a non-attorney advocate may *represent*, not just *accompany* and *advise*, a party at a hearing.⁹⁴

1. In States where non-attorney advocates cannot represent a party at a hearing, the hearing officer may not ethically permit such practice. The hearing officer may further be obligated to report the unauthorized practice of law to the State bar committee.
2. Even in States where a non-attorney advocate is permitted to represent a party at a hearing, the hearing officer can limit a parent advocate’s representation of a parent at a hearing without violating the parent’s hearing rights, particularly where the advocate is ignorant regarding state administrative procedures.⁹⁵

⁸⁷ See, e.g., ABA MODEL R. JUD. CONDUCT 2.4(B) (2010); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 2(B) (2009). *But see Lapp v. Bd. of Educ. of Anne Arundel Cty.*, 28 IDELR 1 (D. Md. 1997) (finding that Maryland’s policy which allowed a designated individual to review the subject matter of the assigned ALJ’s decision did not compromise the integrity or impartiality of the ALJ issuing the opinion). *Accord Jones v. Washington Cty. Bd. of Educ.*, 15 F. Supp. 2d 783, 28 IDELR 961 (D. Md. 1998).

⁸⁸ There is the potential for abuse, and the hearing officer should limit informal communication with agency personnel. See, e.g., *Illinois Bd. of Educ.*, 257 IDELR 597 (OCR 1984).

⁸⁹ See, e.g., ABA MODEL R. JUD. CONDUCT 2.9(A)(3) (2010).

⁹⁰ Cf. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4), Commentary (2009).

⁹¹ See 20 U.S.C. § 1415(h)(1); 34 C.F.R. § 300.512(a)(1).

⁹² *Analysis and Comments to the Regulations*, Federal Register, Vol. 73, No. 156, Page 73017 (December 1, 2008).

⁹³ *Id.* There are a number of States that expressly prohibit representation by non-attorney advocates while others expressly permit it. See Perry A. Zirkel, *Lay Advocates and Parent Experts under the IDEA*, 217 EDUC. L. REP. 19 (2007).

⁹⁴ *Analysis and Comments to the Regulations*, Federal Register, Vol. 73, No. 156, Page 73018 (December 1, 2008).

⁹⁵ *Victoria L. v. Dist. Sch. Bd., Lee Cty.*, 741 F.2d 369, 556 IDELR 200 (11th Cir. 1984).

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