IMPARTIALITY OF HEARING AND REVIEW OFFICERS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: A CHECKLIST OF THE LEGAL BOUNDARIES

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This article provides an overview of the relevant legal authority pertaining to the impartiality requirements for hearing and review officers under the Individuals with Disabilities Education Act (IDEA). The overview is in the form of a checklist containing items derived from published court decisions, hearing and review officer decisions, and federal agency interpretations. Based on the applicable legal authority, each item is described on a four-part continuum ranging from "clearly impartial" to "clearly biased." The article concludes with a summary and recommendations for the IDEA impartiality requirements.

The IDEA is a funding statute that provides an entitlement of a "free appropriate public education" (FAPE) for eligible students.[1] As the primary mechanism for dispute resolution, this legislation provides parents with the right to an "impartial due process hearing" with respect to "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."[2] The Act allows states to choose either a one-tier system, which is limited to an impartial hearing officer (HO), or a two-tier system, which provides additionally for appeal to a state-level review officer (RO).[3] Under both systems, either party may seek judicial review of the final decision by filing a civil action in state or federal court.[4] Approximately

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1. 20 U.S.C. § 1401(9) (2000). The implementing regulations are at 34 C.F.R. Part 300 (2006). Congress passed the original version, the Education of the Handicapped Act, in 1975. In subsequent reauthorizations, Congress has amended the Act several times since then, including 1986, when it added attorneys' fees, and 1990, when it re-named the act the IDEA. *See, e.g.*, MITCHELL YELL, THE LAW AND SPECIAL EDUCATION 69-92 (1998).

2. 20 U.S.C. § 1415(b)(6), (f)(1) (2005). The regulations not only repeat the jurisdictional scope of subject matter, but also clarify that districts also have the right to initiate such a hearing. Impartial Due Process Hearing; Parent Notice, 34 C.F.R. § 300.507(a) (2006).

3. 20 U.S.C. § 1415(g); 34 C.F.R. § 300.510(b).

4. 20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.512.

thirty-four states and the District of Columbia use a one-tier system, with the remaining minority having opted for a two-tier system.[5]

With regard to impartiality of hearing and review officers (H/ROs), prior to the recent reauthorization in 2004, the only express requirements in the IDEA and its regulations were the following two prohibitions respectively:[6] (1) an employee of the state educational agency or the local educational agency involved in the education or care of the child,[7] and (2) "any person having a personal or professional interest that would conflict with his or her objectivity in the hearing."[8]

Apparently recognizing the importance of impartiality of H/ROs, Congress's recent reauthorization upgraded the second requirement to statutory status.[9] As a related matter, the reauthorization established three requirements for HO competence.[10]

As with other such federal legislation, states may add further impartiality requirements. For example, Illinois has express prohibitions with regard to conflicts of interest and ex parte communications.[11]

Section 504 of the Rehabilitation Act,[12] which provides overlapping coverage,[13] does not explicitly address impartiality, and its regulations

5. Eileen Ahearn, *Due Process Hearings: 2001 Update*, QTA PROJECT FORUM (Nat'l Ass'n of State Dir. of Special Educ., Alexandria, VA), Apr. 2002, at 2, *available at* www.directionservice.org/pdf/due_process_hearings_2001.pdf.

6. In formulating the regulations for the 1997 amendments, the Office of Special Education (OSEP) rejected suggestions that called for the prohibition of a HO being an employee of any local education agency (LEA), a former employee of a LEA or state educational agency (SEA) who was involved in the care or education of any in child in the past five years, or an attorney who represents primarily parents or school districts. Also rejecting the suggestion for a more specific set of standards, such as a state's code of judicial conduct, OSEP concluded that the present regulation and any additional state requirements were sufficient to determine impartiality. Impartial Hearing Officer, 64 Fed. Reg. 12,613 (Mar. 12, 1999) (codified at 34 C.F.R. pt. 300).

7. 20 U.S.C. § 1415(f)(3). The regulations repeat this requirement with slightly but insignificantly altered wording. 34 C.F.R. § 300.508(a)(1). The regulations further clarify that a person is not an employee of an agency solely because the agency pays him or her to act as a hearing officer. *Id.* § 300.508(b).

8. 34 C.F.R. § 300.508(a)(2). The regulations also specify that the responsible agency shall keep a list of hearing officers which must include a statement of the qualifications for each officer. *Id.* § 300.508(c).

9. 20 U.S.C. § 1415(f)(3)(A)(i)(II). The Senate Report noted that the intent of this provision was not to exclude members of professional associations or exclude special educators from other school districts from serving as H/ROs if they meet the other qualifications. S. REP. NO. 108-185, at 39 (2003).

10. The statute states that hearing officers must have: (1) knowledge of the IDEA, its federal and state regulations, and their interpretations by the courts; (2) the knowledge and ability to conduct hearings; and, (3) the knowledge and ability to write decisions. 20 U.S.C. § 1415(f)(3)(A)(ii)-(iv).

11. 105 ILL. COMP. STAT. ANN. 5/14-8.02(a) (2007). For other examples of state laws with specific impartiality requirements for special education H/ROs, see N.H. CODE ADMIN. R. ANN. ED. 1128.24 (2007), *available at* http://www.gencourt.state.nh.us/rules/ed1100-1300.html; N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1 (2007).

merely specify, without further elaboration, an "impartial hearing."[14] However, the published policy letters and letters of findings of its administrative agency, the Office for Civil Rights (OCR), provide additional guidance.

The previous systematic studies concerning H/ROs are largely limited to empirical research concerning the frequency and outcomes of their decisions.[15] In 1981, in one of the few studies relating to impartiality, Turnbull et al. surveyed school district personnel responsible for appointing HOs in North Carolina. The survey found that the respondents' primary criterion for determining impartiality was the HO's ability to be objective, regardless of whether the HO had prior school district employment or was a parent of a child with a disability.[16] The various research studies concerning whether there is a significant relationship between HO occupational background and impartiality, in terms of HO decisions, have yielded mixed results based on such intervening variables as the location, time, and design of the study.[17] For example, in a decision in the mid 1980s, Diebold and Simpson found that the occupational background of HOs in Alabama, classified as LEA coordinators of special education, LEA administrators (i.e., superintendents or assistant superintendents), or university professors, did not affect their placement decisions.[18] However, the study classified the placement decisions in terms of the least restrictive environment continuum, rather than the party proposing the selected placement; thus, the relationship to impartiality is imperfect, as well as incomplete. In a subsequent study of 347 Pennsylvania decisions from 1973 to early 1989,

12. 29 U.S.C. § 794(a) (2000).

13. *See generally* PERRY ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (2004). For the similarities and differences, *see* Perry A. Zirkel, *A Comparison of the IDEA and Section 504/ADA*, 178 EDUC. L. REP. (WEST) 629 (2003).

14. 34 C.F.R. § 104.36 (2000). The regulations also require a review procedure, which refers to the right to judicial review. *Id.*

15. *See, e.g.*, Ahearn, *supra* note 5, at 1 (providing a survey of hearings requested and held during an eight year period); Perry Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. (WEST) 731 (2004). In addition to this national study, other research has focused on single states. *See, e.g.*, MARTHA L. MORVANT & RICHARD W. ZELLER, OREGON DISPUTE RESOLUTION STUDY: TRENDS, USES AND SATISFACTION 9 (1997) (focusing on rates of due process hearings in Oregon) (available from Western Regional Resource Center in Eugene, Oregon); KRISTIN RICKEY & DEE ANN WILSON, SPECIAL EDUCATION DUE PROCESS HEARINGS IN IOWA 2 (2003) (providing an analysis of due process hearings in Iowa) (available from the Iowa Department of Education).

16. Ann P. Turnbull, Bonnie Strickland, & H. Rutherford Turnbull, *Due Process Hearing Officers: Characteristics, Needs, and Appointment Criteria*, 48 EXCEPTIONAL CHILDREN 48, 51 (1981).

17. For a more extensive review of the research, see Elaine Drager & Perry Zirkel, *Impartiality Under the Individuals with Disabilities Education Act*, 86 EDUC. L. REP. (WEST) 11, 18-19 (1993).

18. Martin Diebold & Robert Simpson, *An Investigation of the Effect of Due Process Hearing Officer on Placement Decisions*, 11 DIAGNOSTIQUE 69, 74 (1986).

Newcomer et al. found that the occupational background of the HO was significantly related to the outcome (i.e., winning or losing at the HO level); districts tended to win more often when the HO was an employee of an education institution (i.e., a school district, intermediate unit, college, or university).[19] However, the sample was limited to HO decisions that went on to appeal at the RO level, and the classification of occupational background was also limited to whether or not the HO was an employee of an educational institution. As a final example, in a study of a five-year sample of cases in a single Midwestern state for 1992 to 1996, Schultz and McKinney found that the occupational background of the HO was significantly related to whether the case ended in a settlement.[20] Cases were more likely to settle when an attorney-HO presided than a non-attorney-HO (i.e., professors and psychologists). However, the study did not examine whether there was a significant relationship between the HO's background and whether the district or the parent was the winning party. Additionally, the study only broadly classified occupational background in terms of whether the HO was or was not an attorney.[21]

In the only previous article specific to the legal boundaries for H/RO impartiality under the IDEA,[22] Drager and Zirkel divided the relevant published decisions and policy interpretations into two categories—"structural" and "situational" bias.[23] In the structural category, they found that courts and agencies have established a per se prohibition against state education agency (SEA) heads and employees serving as either HOs or ROs[24] and that there was less, but still notable, legal authority barring local education

19. James Newcomer, Perry Zirkel, & Ralph Tarola, *Characteristics and Outcomes of Special Education Hearing and Review Officer Cases*, 123 EDUC. L. REP. (WEST) 449, 453-56 (1998).

20. Geoffrey F. Schultz & Joseph R. McKinney, *Special Education Due Process: Hearing Officer Background and Case Variable Effects on Decisions Outcomes*, 2000 BYU EDUC. & L.J. 17, 24 (2000).

21. Although there are no current data available in the literature, an early national survey revealed that the leading occupations for hearing officers in the forty-two responding states were lawyers (forty-five percent), professors (twenty-nine percent), and administrators/supervisors (sixteen percent). Tom E. C. Smith, *Status of Due Process Hearings*, 48 EXCEPTIONAL CHILDREN 232, 233 (1981).

22. Lunch's article was based on a relatively small sample of case law and was limited to the recommendation that "[New York's] Legislature should tighten the eligibility standards of impartial hearing officers to exclude local school system personnel from service to truly assure due process." Mary A. Lunch, *Who Should Hear the Voices of Children with Disabilities: Proposed Changes in Due Process in New York's Special Education System*, 55 ALB. L. REV. 179, 179 (1991).

23. Drager & Zirkel, *supra* note 17, at 14-15. An earlier article was largely limited to an analysis of one pertinent court decision. Donal M. Sacken, Mayson v. Teague*: The Dilemma of Selecting Hearing Officers*, 16 J. L. & EDUC. 187, 187 (1987).

24. Drager & Zirkel, *supra* note 17, at 22, 36.

agency (LEA) officers or employees from serving as HOs for cases involving other districts[25] and from serving as ROs generally.[26] At the situational level, they concluded that courts and agencies tend to use an actual bias, rather than an appearance of bias as a standard for H/ROs.[27] However, neither they nor others have updated the analysis with the relevant agency and judicial authority for the intervening period, which is more than a decade.

The purpose of this article is to provide an updated comprehensive synthesis of relevant legal authority pertaining to the impartiality requirements for H/ROs in the form of a concise checklist. This legal authority consists of published court decisions, H/RO decisions (designated herein as "SEA" in light of the state education agency's administering responsibility), and the relevant federal agency interpretations.[28] Although the primary focus is the IDEA, rulings based on Fourteenth Amendment due process and section 504 are included to the extent that they apply to H/ROs in special education cases. However, the scope does not extend to the related but separable issue of the competence of hearing officers[29] and does not include cases regarding judicial or H/RO immunity[30] or where the issue of impartiality was raised but not decided.[31]

The checklist is organized in terms of two dimensions. First, the rows on the left side are the items derived from the applicable legal authority.

25. More recent caselaw has changed this conclusion. *See infra* note 32 and accompanying text.

26. Drager & Zirkel, *supra* note 17, at 24, 37.

27. *Id*. at 29, 39.

28. In addition to published interpretations by the OSEP, which is the administering agency for the IDEA, the cited authority includes published interpretation by OCR's of section 504 impartiality requirements for hearings within their overlapping jurisdiction.

29. *See, e.g*., Canton Bd. of Educ. v. N.B., 343 F. Supp. 2d 123, 128 (D. Conn. 2004); Cavanagh v. Grasmick, 75 F. Supp. 2d 446, 461 (D. Md. 1999); Carnwath v. Bd. of Educ. of Anne Arundel County, 33 F. Supp. 2d 431, 432 (D. Md. 1998), *further proceedings sub nom*., Carnwath v. Grasmick 115 F. Supp. 2d 577 (D. Md. 2000); Yancey v. New Baltimore City Bd. of Sch. Comm'rs, 24 F. Supp. 2d 512 (D. Md. 1998); *cf*. Bd. of Educ. of the Jericho Union Free Sch. Dist., 29 IDELR 135, 135 (N.Y. SEA 1998) (dismissing claim that HO should have been an attorney).

30. *See, e.g*., DeMerchant v. Springfield Sch. Dist., 47 IDELR 400, 402 (D. Vt. 2007).

31. *See, e.g*., Colin K. v. Schmidt, 715 F.2d 1, 6 (1st Cir. 1983); V. v. York Sch. Dist., 434 F. Supp. 2d 5, 13 (D. Me. 2006); Blackman v. D.C., 294 F. Supp. 2d 10 (D. D.C. 2003), *further proceedings*, 294 F. Supp. 2d 15 (D. D.C. 2003); Bd. of Educ. of Harford County v. Bauer, 33 IDELR 1016, 1018-19 (D. Md. 2000); Moubry v. Indep. Sch. Dist. No. 696, 58 F. Supp. 2d 1041, 1050 (D. Minn. 2000); D.B. v. Ocean Twp. Bd. of Educ., 985 F. Supp. 457, 472 (D.N.J. 1997), *aff'd mem*., 159 F.3d 1350 (3d Cir. 1998); Wojnarowicz v. Duneland Sch. Corp., 28 IDELR 1197, 1202 (N.D. Ind. 1998); Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512, 959 F. Supp. 1338, 1341 (D. Kan. 1997), *aff'd mem*., 153 F.3d 727 (10th Cir. 1998); D.R. v. Bedford Bd. of Educ., 926 F. Supp. 47, 49 (S.D.N.Y. 1996); Bd. of Educ., of the Baldwin Union Free Sch. Dist. v. Sobol, 610 N.Y.S.2d 426, 428-29 (Sup. Ct. 1994); Washoe County Sch. Dist., 27 IDELR 880, 882 (Nev. SEA 1997); Wissahickon Sch. Dist., 46 IDELR 654, 655 (Pa. SEA 2006).

The items are grouped into the two tiers of HOs and ROs respectively and, within these two levels in relatively logical, albeit not scientifically precise, operational subcategories. Second, the columns to the right of the items represent a continuum from clear impartiality to clear bias based on the present pertinent authority for each item. Although again reflecting approximation rather than precision due to the limitations of the authority and the format, the checkmark for each item represents what appears to be its current legal status on said four-part impartiality continuum. Inasmuch as the H/ROs, courts, and administering agencies have not used particularly specific or consistent standards, the middle columns of "presumptive" impartiality or bias are merely intermediate categories on the continuum that do not represent a consensus standard of a rebuttable presumption. Finally, the footnoted citations provide the specific scope of and support for each entry. The cited authority is organized in terms of its support for, or opposition to, the proposition represented by the language and classification of the item. The outcome for those cases not in the direction of the proposition is listed as a parenthetical.

CHECKLIST OF HEARING AND REVIEW OFFICER IMPARTIALITY UNDER THE IDEA

	Clearly Impartial	Presumptively Impartial	Presumptively Biased	Clearly Biased
1. First-Tier Hearing Officers				
(a) Employment				
•board member, chief officer, or other employee of the SEA				√[32]
•board member, chief officer, or other employee of the LEA that is party to the hearing				√[33]
•board member, chief officer, or other employee of another LEA		√[34]		
•former employee of LEA or spouse who is present employee of LEA	√[35]			

32. Helms v. McDaniel, 657 F.2d 800, 804-06 (5th Cir. 1981); Robert M. v. Benton, 634 F.2d 1139, 1141-42 (8th Cir. 1980); Christopher N. v. McDaniel, 569 F. Supp. 291, 301-02 (N.D. Ga. 1983); East Brunswick Bd. of Educ. v. N.J. State Bd. of Educ., 554 EHLR 122, 123-24 (D.N.J. 1982). For example, the Eighth Circuit in *Robert M.*, ruled that the SEA's chief administrator was sufficiently involved in the plaintiff student's education to violate the IDEA's impartiality requirement. *Robert M.*, 634 F.2d at 1142. Earlier, OCR had interpreted section 504 to allow SEA employees to conduct hearings only where the state made a case-by-case determination of impartiality. Letter to Kettler, 211 EHLR 51, 51-52 (OCR 1978); *see also* Sand v. Milwaukee Pub. Sch., 46 IDELR 710, 711 (E.D. Wis. 2006) (determining that a parent's claim that an IHO was a state employee did not raise an inference of bias).

33. *See supra* note 7 and accompanying text. For a related decision, *see* Jacky W. v. New York City Bd. of Educ., 848 F. Supp. 358, 362 (E.D.N.Y. 1994), which held that a school board's appointment and payment does not make a HO a board employee. OCR reached a similar conclusion under section 504. *See, e.g.*, Butte (Mont.) Sch. Dist. No. 1, 311 EHLR 70, 75 (OCR 1986); Mont. State Office of Pub. Instruction, 352 EHLR 372, 372 (OCR 1987); Policy Interpretation No. 6, 132 EHLR 03 (OCR 1978). For a proposal to exclude LEA personnel as IHOs, see Lunch, *supra* note 22, at 179. Conversely, for a proposal that LEA boards replace the current IHO system, see DONAL SACKEN, REFLECTIONS ON AN ADVERSARIAL PROCESS: THE CONFESSIONS OF A SPECIAL EDUCATION HEARING OFFICER (1988) (on file with author).

34. L.B. v. Nebo Sch. Dist., 379 F.3d 966, 978 (10th Cir. 2004); Leon v. Michigan State Bd. of Educ., 807 F. Supp. 1278, 1287 (E.D. Mich. 1992). *But see* Mayson v. Teague, 749 F.2d 652, 658 (11th Cir. 1984); Helms v. McDaniel, 657 F.2d 800, 806 (5th Cir. 1981); S-1 v. Turlington, 635 F.2d 342, 350 (5th Cir. 1981); Matlock v. McElrath, 557 EHLR 383, 385 (M.D. Tenn. 1986). H/RO rulings, which were largely earlier than the judicial rulings, have been split. *Compare, e.g.*, Minisink Cent. Sch. Dist., 16 EHLR 331, 331 (N.Y. SEA 1989) (impartial); Brentwood Union Free Sch. Dist., 501 EHLR 319, 320 (N.Y. SEA 1979) (same), *with In re* W.M., 503 EHLR 336, 336 (R.I. SEA 1980) (biased). Moreover, the legislative history of the recent reauthorization supports the more recent view. *See supra* note 9 and accompanying test. OCR has taken the same presumptive permissibility position under section 504. *See, e.g.*, Ill. State Bd. of Educ., 257 EHLR 600, 601 (OCR 1984); Letter to Orris, 211 EHLR 138, 139 (OCR 1979).

35. Paula P.B. v. New Hampshire Bd. of Educ., 17 EHLR 898, 899-900 (D.N.H. 1991); Letter to Angelo, 213 EHLR 177, 178-79 (OSEP 1988); *In re* Ari P., 401 EHLR 268, 269-70 (Pa. SEA 1988).

(b) Occupation				
•private attorney for LEA's law firm				√36
•private attorney who represented other LEAs and/or other parents		√37		
•professor at a state college or university		√38		
•professor who participated in formulation of state special education policy			√39	
(c) Relationship				
•prior contact with either party or parties' attorney that was notably limited		√40		
•continuing consulting relationship with LEA				√41

36. *See supra* note 8 and accompanying text; *see also* Allegany (N.Y.) Cent. Sch. Dist., 257 EHLR 494, 495 (OCR 1984). *Cf.* Okemos Pub. Sch., 29 IDELR 677, 680 (Mich. SEA 1998) (involving a former member of law firm representing LEA—disclosed LEA's identity and waived the right to an impartial hearing).

37. Leon v. Mich. Bd. of Educ., 807 F. Supp. 1278, 1281-83 (E.D. Mich. 1992); Paula P.B. v. N.H. Bd. of Educ., 17 EHLR 898, 900 (D.N.H. 1991); Case No. 247, 508 EHLR 219, 219 (Ind. SEA 1986); Half Hollow Hills Cent. Sch. Dist., 21 IDELR 406, 409 (N.Y. SEA 1994); West Bend Sch. Dist., 24 IDELR 1125, 1125-26 (Wis. SEA 1996). *Cf.* Griffith (IN) Pub. Sch., 40 IDELR 401, 411-12 (OCR 2003) (addressing section 504 where HO's law firm represents schools, not parents).

38. Silvio v. Commonwealth Dep't of Educ., 439 A.2d 893, 898 (Pa. Commw. Ct. 1982), *aff'd mem.*, 456 A.2d 1366 (Pa. 1983); Wis. Dep't of Pub. Instruction, 352 EHLR 357, 357 (OCR 1986); Miss. Dep't of Educ., 352 EHLR 279, 279 (OCR 1986). *Cf.* H.H. v. Ind. Bd. of Special Educ., 47 IDELR 250 (N.D. Ind. 2007) (denying the dismissal of a claim related to rules ensuring impartiality where a professor was a HO); *In re* Martin, 508 EHLR 161, 165 (Pa. SEA 1986) (purportedly private university).

39. *Cf.* Mayson v. Teague, 749 F.2d 652, 658 (11th Cir. 1984) (limited injunction and lack of rebuttal evidence). In a ruling concerning a RO, not a HO, a federal court in Michigan rejected the *Mayson* rationale. Leon v. Mich. State Bd. of Educ., 807 F. Supp. 1278, 1284 (E.D. Mich. 1992).

40. Raymond (NH) Sch. Dist., 257 EHLR 330, 330 (OCR 1981) (LEA); Marblehead Pub. Sch., 36 IDELR 745, 748-49 (Mass. SEA 2002) (same); Okemos Pub. Sch., 29 IDELR 677, 680 (Mich. SEA 1998) (same); Copake-Taconic Hills Cent. Sch. Dist., 16 EHLR 1302, 1303 (N.Y. SEA 1990) (same); *In re* Cold Spring Harbor Cent. Sch. Dist., 503 EHLR 242, 243 (N.Y. SEA 1982) (same); Delaware Valley Sch. Dist., 38 IDELR 896, 898 (Pa. SEA 2003) (parents); *In re* Vashon Island Sch. Dist., 503 EHLR 250, 251 (Wash. SEA 1982) (LEA); West Bend Sch. Dist., 24 IDELR 1125, 1126 (Wis. SEA 1996) (same). *Cf.* Dell v. Bd. of Educ., 32 F.3d 1053, 1065-66 (7th Cir. 1994) (HO's employer used same law firm as did the LEA—no violation of Fourteenth Amendment due process); Moubry v. Kreb, 58 F. Supp. 2d 1041, 1049-50 (D. Minn. 2000) (dicta, plus limited contact with related third parties); Griffith (IN) Pub. Sch., 40 IDELR 410, 411 (OCR 2003) (section 504); Quaker Valley Sch. Dist., 30 IDELR 634, 636 (Pa. SEA 1999) (finding no evidence to substantiate alleged prior contact between HO and LEA, including its attorney and to show that any such contact might have impaired objectivity).

41. Letter to Harkin, 19 IDELR 929, 929-30 (OSERS 1993); Pine Bush Cent. Sch. Dist., 401 EHLR 270, 271-72 (N.Y. SEA 1988).

(d) Other personal characteristics				
•negligible connection of family members	√[42]			
(e) Performance or product				
•ex parte communications			√[43]	
•hearing conduct		√[44]		

42. *See* L.B. v. Nebo Sch. Dist., 379 F.3d 966, 975 (10th Cir. 2004) (finding that the same district's employment of HO's spouse and LEA's expert witness was not grounds for recusal, particularly because they did not know each other); Falmouth Sch. Comm. v. B, 106 F. Supp. 2d 69, 74 (D. Me. 2000); Okemos Pub. Sch., 29 IDELR 677, 680 (Mich. SEA 1998).

43. Thomas v. Dist. of Columbia, 407 F. Supp. 2d 102, 113 (D.D.C. 2005) (impartial—lack of evidence); Falmouth Sch. Comm. v. B, 106 F. Supp. 2d 69, 74 (D. Me. 2000) (finding an impartial conversation on same issue with regard to HO's child was only social); Hollenbeck v. Bd. of Educ., 699 F. Supp. 658, 668-69 (N.D. Ill. 1988) (biased); Murphy v. Pennsylvania Dep't of Educ., 460 A.2d 398, 401 (Pa. Commw. Ct. 1983) (same); Franklin County Bd. of Educ., 17 EHLR 928, 931 (Ga. SEA 1991) (impartial—lack of evidence); Metropolitan Sch. Dist. of Wabash County, 36 IDELR 90 (Ind. SEA 2002) (same); Bd. of Educ. of the Springville-Griffith Inst. Cent. Sch. Dist., 44 IDELR 22 (N.Y. SEA 2005) (impartial); Delaware Valley Sch. Dist., 38 IDELR 896, 898 (Pa. SEA 2003) (same); *cf.* Ahern v. Keene, 593 F. Supp. 902, 910-11 (D. Del. 1984) (impartial—communication by letter between HO and LEA's counsel did not prejudice parents); Bd. of Educ. of the Williamsville Cent. Sch. Dist., 46 IDELR 294 (N.Y. SEA 2006) (pre-hearing); s*ee also* Letter to Stadler, 24 IDELR 973, 975 (OSEP 1996) (ex parte disclosure of student's records). *But cf.* L.C. v. Utah State Bd. of Educ., 125 F. App'x 252, 261 (10th Cir. 2005) (lacking substantial countervailing reason rebutting HO's presumed impartiality).

44. *See, e.g.*, Paolella v. Dist. of Columbia, 210 F. App'x 1, 3 (D.C. Cir. 2006) (meaningful parent participation); Sand v. Milwaukee Pub. Sch., 46 IDELR 710, 711 (E.D. Wis. 2006); Combier v. Biegelson, 2005 U.S. Dist. LEXIS 3056, at *13 (S.D.N.Y. 2005); Krista P. v. Manhattan Sch. Dist., 255 F. Supp. 2d 873, 884 n.7 (N.D. Ill. 2003); Donlan v. Wells Ogunquit Cmty. Sch. Dist., 226 F. Supp. 2d 261, 273-74 (D. Me. 2002); Falmouth Sch. Comm. v. B, 106 F. Supp. 2d 69, 74 (D. Me. 2000); Kattan v. Bd. of Educ., 691 F. Supp. 1539, 1547-48 (D.D.C. 1988); Forer v. Warrior Run Sch. Dist., 21 IDELR 450, 451 (Pa. Commw. Ct. 1994); Mass. Dep't of Educ., 18 IDELR 286, 288 (Mass. 1991); Franklin County Bd. of Educ., 17 EHLR 928, 929 (Ga. SEA 1991); Saugus Pub. Sch., 38 IDELR 779, 782 (Mass. SEA 2003); Bd. of Educ. of the Springville-Griffith Inst. Cent. Sch. Dist., 44 IDELR 22 (N.Y. SEA 2005); Bd. of Educ. of the City Sch. Dist. of Ithaca, 28 IDELR 71, 74 (N.Y. SEA 1998); Bd. of Educ. of the Canastota Cent. Sch. Dist., 27 IDELR 419, 422 (N.Y. SEA 1997); Half Hollow Hills Cent. Sch. Dist., 21 IDELR 406, 409 (N.Y. SEA 1994). *Cf.* Thomas v. D.C., 407 F. Supp. 2d 102, 109-10 (D.D.C. 2005) (post-hearing); *In re* Student with a Disability, 44 IDELR 579, 584 (N.M. SEA 2005) (pre-hearing); Brockport (NY) Cent. Sch. Dist., 33 IDELR 846, 847 (OCR 2000) (post-hearing and section 504); Walled Lake Consol. Sch., 40 IDELR 359, 375 (Mich. SEA 2003) (upholding impartiality, but in dicta, suggesting possible recusal upon remand); Bd. of Educ. of the City Sch. Dist., 21 IDELR 472, 474 (N.Y. SEA 1994) (dicta); Ne. Clinton Cent. Sch. Dist., 504 EHLR 200, 201 (N.Y. SEA 1982) (pre-hearing).

•written decision		√45		
•prior decisions		√46		
(f) System				
•internal consultation process	√47			
•lack of parental participation in selection	√48			
•participation by LEA		√49		

45. Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 809 (5th Cir. 2003); G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 (6th Cir. 1991); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 998 (1st Cir. 1990); Michael D. M. v. Pemi-Baker Reg'l Sch. Dist., 41 IDELR 1131, 1133 (D.N.H. 2004); L.C. v. Bd. of Educ., 188 F. Supp. 2d 1330, 1338-39 (D. Utah 2002), *aff'd,* 125 F. App'x 252 (10th Cir. 2005); Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 914-15 (M.D. Tenn. 2000); Cavanagh v. Grasmick, 75 F. Supp. 2d 446, 460 (D. Md. 1999); Bd. of Educ. of Williamsville Cent. Sch. Dist., 46 IDELR 294 (N.Y. SEA 2006); Abington Sch. Dist., 21 IDELR 508, 509-10 (Pa. SEA 1994); *cf.* Gagliardo v. Arlington Central Sch. Dist., 418 F. Supp. 2d 559, 570-71 (S.D.N.Y. 2006) (finding a lack of evidence to support a claim of bias as a result of an IHO issuing a decision late) *rev'd on other grounds,* 483 F.3d 105 (2d Cir. 2007).

46. Tracy v. Beaufort County Bd. of Educ., 335 F. Supp. 2d 675, 686 (D.S.C. 2004); Samuel Tyler W. v. Nw. Indep. Sch. Dist., 202 F. Supp. 2d 557, 562 (N.D. Tex. 2002); Shamokin Area Sch. Dist., 40 IDELR 332, 334 (Pa. SEA 2003).

47. The published court decisions on this subject are limited to Maryland, which, in moving from a two- to a one-tier system, incorporated a procedure of "subject matter review." Under this procedure, a designated HO, who has specialized subject matter expertise, reviews the draft opinion and provides feedback to the deciding HO, who retains independent responsibility for the final decision. *See* Jones v. Bd. of Educ. of Wash. County, 15 F. Supp. 2d 783, 787 (D. Md. 1998); Lapp v. Bd. of Educ. of Anne Arundel County, 28 IDELR 1, 2 (D. Md. 1997).

48. L.C. v. Bd. of Educ., 188 F. Supp. 2d 1330, 1338 (D. Utah 2002), *aff'd,* 125 F. App'x 252 (10th Cir. 2005); Brimmer v. Traverse City Area Pub. Sch., 872 F. Supp. 447, 450 (W.D. Mich. 1994); Hessler v. State Bd. of Educ. of Maryland, 262 EHLR 553 (D. Md. 1981), *aff'd on other grounds*, 700 F.2d 134 (4th Cir. 1983); N.Y. State Dep't of Educ., 19 IDELR 20, 22 (OCR 1992). *Cf.* Letter to Stadler, 24 IDELR 973, 973 (OSEP 1996) (stating school district attorney's practice of notifying HO that their selection is contingent upon parents' approval does not have a "chilling effect" on parents' ability to object to a selected HO).

49. L.C. v. Bd. of Educ., 188 F. Supp. 2d 1330, 1338 (D. Utah 2002), *aff'd,* 125 F. App'x 252 (10th Cir. 2005). *Cf.* Heldman v. Sobol, 962 F.2d 148, 158 (2d Cir. 1992), *on remand to* 846 F. Supp. 285 (S.D.N.Y. 1994) (indicating that a parent had standing to challenge selection process that arguably favored school districts); Bd. of Educ. of the Canastota Cent. Sch. Dist., 27 IDELR 419, 422 (N.Y. SEA 1997) (finding a principal's involvement in HO list is not grounds for recusal).

2. Second-Tier Review Officers				
(a) Employment				
•board member, chief officer, or other employee of the SEA			√[50]	
•board member, chief officer, or other employee of another LEA (or of LEA-party)				√[51]
•paid by SEA	√[52]			
(b) Occupation				
•private attorney, even if former limited, indirect connection to SEA	√[53]			
•professor who participated in formulation of state special education policy			√[54]	
(c) Performance or Product				
•written decision		√[55]		
•prior decisions		√[56]		

50. Burr v. Ambach, 863 F.2d 1071, 1077 (2d Cir. 1992), *vacated sub nom.*, Sobol v. Burr, 492 U.S. 902 (1989), *aff'd on remand*, 888 F.2d 258 (2d Cir. 1991); Muth v. Cent. Bucks Sch. Dist., 839 F.2d 113, 121 (3d Cir. 1987), *rev'd on other grounds sub nom.*, Dellmuth v. Muth, 491 U.S. 223 (1989); Grymes v. Madden, 672 F.2d 321, 323 (3d Cir. 1982); Johnson v. Lancaster-Lebanon Intermediate Unit 13, 757 F. Supp. 606, 615 (E.D. Pa. 1991); Louis M. v. Ambach, 714 F. Supp. 1276, 1281 (N.D.N.Y. 1989); Holmes v. Sobol, 690 F. Supp. 154, 161 (W.D.N.Y. 1988); Stark v. Walter, 556 EHLR 203, 205 (S.D. Ohio 1984); Max M. v. Thompson, 566 F. Supp. 1330, 1339 (N.D. Ill. 1983); Vogel v. Sch. Bd. of Educ., 491 F. Supp. 989, 995 (W.D. Mo. 1980); Ill. State Bd. of Educ., 352 EHLR 17, 20 (OCR 1986); Ill. State Bd. of Educ., 257 EHLR 506, 506 (OCR 1984); Div. of Assistance to States Rev. Bull. No. 107, 203 EHLR 19, 19 (OSEP 1984). *But see* Victoria L. v. Dist. Sch. Bd., 741 F.2d 369, 374 (11th Cir. 1984); Brandon E. v. Dep't of Pub. Instruction, 595 F. Supp. 741, 746 (E.D. Wis. 1984); *cf.* Schuldt v. Mankato Indep. Sch. Dist., 16 EHLR 1111, 1115 (D. Minn. 1990), *aff'd on other grounds*, 937 F.2d 1357 (8th Cir. 1991) (finding state procedures adequately address the conflict issues raised by the contrary presumption); Half Hollow Hills Cent. Sch. Dist., 21 IDELR 406, 409 (N.Y. SEA 1994) (including a rejection of proposed regulations in 1991 and 1992).

51. Kotowicz v. State Bd. of Educ., 630 F. Supp. 925, 927 (S.D. Miss. 1986); Vogel v. Sch. Bd., 491 F. Supp. 989, 996 (W.D. Mo. 1980) (finding that a deputy commissioner of the state board of education was not an impartial hearing officer); Letter to Morris, 211 EHLR 174, 174 (OSEP 1978).

52. Dombrowski v. Wissahickon Sch. Dist., 40 IDELR 39 (E.D. Pa. 2003).

53. Mo. Dep't of Elementary & Secondary Educ., 257 EHLR 487, 488 (OCR 1984); *In re* Marie I., 506 EHLR 291, 291 (Ga. SEA 1985).

54. *Cf.* Mayson v. Teague, 749 F.2d 652, 659 (11th Cir. 1984) (offering limited injunction and lack of rebuttal evidence).

55. Pa. Dep't of Educ., No. 03-93-1081, 19 IDELR 1105, 1107 (OCR 1993).

56. Tracy v. Beaufort County Bd. of Educ., 335 F. Supp. 2d 675, 685-86 (D.S.C. 2004); Pace v. Bogalusa City Sch. Bd., 137 F. Supp. 2d 711, 717-18 (E.D. La. 2001), *aff'd on other grounds*, 403 F.3d 272 (5th Cir. 2005), *cert. denied*, 546 U.S. 933 (2005); Shamokin Area Sch. Dist., 40 IDELR 332 (Pa. SEA 2003).

(d) System				
•lack of parental participation in selection	√[57]			
•limited connections to the SEA		√[58]		
•recusal at first tier				√[59]

The checklist above is based on published court and hearing decisions and federal agency interpretations to date. In addition, the items for the first-tier presumably also apply to the second-tier where the second-tier's functions in a state overlap with the first-tier function at issue in the ruling. With the exception of the items that clearly violate statutory and regulatory prohibitions, the prevailing rationale appears to be to defer to the impartiality of the H/RO, as most of the items in the checklist are categorized as "clearly impartial" or "presumptively impartial." Such latitude can be attributed to special education being a small, specialized field with the result that many H/ROs will have had contact with or connection to one of the parties or parties' attorneys or an LEA or SEA. Despite the wide boundaries granted to H/ROs, a majority of the items in the checklist have not been decisively ruled upon and therefore fall within the gray area of "presumptively impartial" or "presumptively biased," indicating the absence of a clear standard for determining the impartiality of H/ROs. The traditional standard requiring the "appearance" of impartiality used for federal judges[60] is inappropriate[61] due to the small community of special education.[62] Therefore, a customized standard for deciding impartiality under the IDEA is needed.

Currently, the IDEA first establishes a per se standard for impartiality in its prohibition of employees of an SEA or LEA involved in the education or care of the child from serving as an H/RO.[63] If the per se test is met, the

57. Leon v. Mich. State Bd. of Educ., 807 F. Supp. 1278, 1283 (E.D. Mich. 1992); Hessler v. State Bd. of Educ., 553 EHLR 262, 265 (D. Md. 1981), *aff'd on other grounds*, 700 F.2d 134 (4th Cir. 1983).

58. Brandon E. v. Dep't of Pub. Instruction, 595 F. Supp. 740, 746 (E.D. Wis. 1984); Cothern v. Mallory, 565 F. Supp. 701, 705-07 (W.D. Mo. 1983).

59. Veazey v. Ascension Parish Sch. Bd., 109 F. Supp. 2d 482, 484 (M.D. La. 2000), *aff'd*, 121 F. App'x 552 (5th Cir. 2005).

60. *See* 28 U.S.C. § 455 (2000) (addressing disqualification of judicial officials).

61. *See, e.g.*, Falmouth Sch. Comm. v. B., 106 F. Supp. 2d 69, 73 (D. Me. 2000) (explaining that the "appearance" standard is insufficient).

62. *See, e.g.*, A.D. v. Clay Cmty. Sch./Special Serv., 43 IDELR 890, 892 (S.D. Ind. 2005) (indicating that at least one state has adopted the appearance of impropriety standard that governs judges).

63. *See supra* note 7 and accompanying text (discussing the IDEA regulations for employees).

impartiality requirements then shift to an "actual bias" standard where persons with a personal or professional conflict of interest are barred from serving as an H/RO.[64] For example, a private attorney for the LEA's law firm[65] or a person having a continuing consulting relationship with the LEA[66] may not serve as a hearing officer. On the other hand, an H/RO's notably limited contact with either party or parties' attorneys is not necessarily grounds for recusal.[67]

A customized standard could be implemented by first enhancing the procedures for determining H/RO impartiality. At the federal level, the IDEA regulations require the agency responsible for holding due process hearings to keep a list of H/ROs and their qualifications.[68] To assist parties in determining whether a potential conflict of interest exists, this list should be expanded to include not only H/ROs' qualifications, but also detailed personal and professional information that is relevant to their impartiality. Additionally, H/ROs should have an explicit duty of disclosure to reveal the nature of any contact or connection he or she has had with the parties, parties' attorneys, or any LEA or SEA. An H/RO could describe any such contacts or connections during the resolution process. The IDEA requires the LEA to hold a resolution meeting with the parents, relevant IEP team members, and an official from the agency conducting the hearing within fifteen days of receiving notice of the parents' complaint.[69] The LEA then has thirty days to resolve the complaint, after which the due process hearing may proceed.[70] During this time period, the H/RO could fill out a simple disclosure form. Such a disclosure would allow the H/RO to consider and rule on possible objections by a party before the hearing starts.

In addition to these procedures, the current standard for impartiality should be replaced by a hybrid actual/appearance standard. The IDEA's new statutory prohibition of persons with a personal or professional conflict of interest from serving as an H/RO highlights the importance of H/RO impartiality; however, further requirements still are warranted. While SEA

64. *See supra* note 8 and accompanying text (indicating that hearings may not be conducted by persons having a conflict of interest).

65. *See supra* note 35 and accompanying text (providing a checklist of impartiality for LEA employment).

66. *See supra* note 40 and accompanying text (discussing the impartiality of persons who have a relationship with the LEA).

67. *See supra* note 39 and accompanying text (suggesting that professors involved in policy making are presumptively biased).

68. *See supra* note 8 and accompanying text (requiring agencies to keep records of hearing officers).

69. 20 U.S.C. § 1415(f)(1)(B)(i)(I)-(III). The parents and LEA may agree to waive this meeting. *Id*. § 1415(f)(1)(B)(i)(IV).

70. *Id*. § 1415(f)(1)(B)(ii).

and LEA employees involved in the education of the child are barred from serving as an H/RO,[71] agency decisions and case law in some jurisdictions permit employees of an LEA not involved in the complaint to serve as hearing officers at the first tier.[72] As a result, a potential conflict of interest is created in that the hearing officer's rulings could influence future due process hearing outcomes affecting other LEAs including their own. Therefore, at the state level, the per se standard should be extended to prohibit an employee from any LEA from serving as a hearing officer. Similarly, this standard should be applied to preclude parental advocates and attorneys who only represent either parents or LEAs from becoming hearing officers because, like LEA employees, they too potentially have a stake in creating precedent in SEA cases. Finally, questions of impartiality could be significantly reduced if states implemented a policy by which the H/RO is selected jointly by both parties, or independently appointed.

71. *See supra* note 7 and accompanying text (prohibiting agency employees from acting as H/ROs).

72. *See supra* note 33 and accompanying text (indicating that LEA officers that are a party in the hearing are clearly biased).