Brigham Young University Education and Law Journal

Volume 2000 | Number 1 Article 3

Spring 3-1-2000

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SPECIAL EDUCATION DUE PROCESS: HEARING OFFICER BACKGROUND AND CASE VARIABLE EFFECTS ON DECISIONS OUTCOMES

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I. INTRODUCTION

The purpose of this paper is to review the effect that hearing officer background, and case variables have on decisions rendered during Individuals with Disabilities Education Act (IDEA) due process hearings.

The Individuals with Disabilities Education Act (IDEA) charges state education agencies with the responsibility of assuring that all eligible children are provided with a free, appropriate, public education.[1] The substantive due process right to a free, appropriate, public education is undergirded by a comprehensive set of procedural rights, rules, and requirements mandated by federal law.[2] At the core of these procedural safeguards stands the due process hearing.

When a parent and a public education agency disagree on matters related to the provisions of free, appropriate, public education for a child with a disability or a child suspected of having a disability, either party may initiate an "impartial" due process hearing.[3] The impartiality of the due process hearing is maintained by ensuring that the hearing officers are free from personal and professional pressures at both the local and state levels. To this end, the IDEA requires that "a hearing . . . may not be conducted by an employee of the state education agency or the local educational agency (LEA) involved in the education

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1. 20 U.S.C. § 1412(1) (1999).
2. *See id.*
3. *See id.* § 1415(a)-(e).

or care of the child."[4]

The federal regulations implementing the IDEA specifically address the issue of an impartial hearing officer as follows:

> Impartial hearing officer:
>
> (a) A hearing may not be conducted-
>
> (1) By a person who is an employee of the State agency or the local education agency that is involved in the educational care of the child; or
>
> (2) By any person having a personal or professional interest that would conflict with his or her objectivity in the hearing.
>
> (b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.
>
> (c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.[5]

Neither the 1997 amendments to the IDEA nor its 1999 implementing regulations address the impartiality of hearing officers or the integrity of the due process hearing system. However, the Department of Education (DOE) has received several specific requests to amend the IDEA regulation on hearing officers. These requests were divided into two categories. The first category proposed changing the qualification requirements for hearing officers, and the second involved publishing the qualifications of each individual hearing officer.[6]

Within the first category, the DOE received requests to exclude those individuals who are current employees of local education agencies or who were employed by a state education agency or a local employment agency within the past five years, from eligibility to serve as hearing officers. Requests were also received to exclude from service as hearing officers, attorneys who primarily represented school districts or parents in IDEA actions.[7]

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4. *See id.*
5. 34 C.F.R. § 300.508 (1999).
6. *See id.*
7. *See id.*

Although the DOE considered these amendment requests, it refused to amend the IDEA regulations on hearing officer eligibility. The DOE maintains that current IDEA regulations, coupled with state ethics rules for attorneys and judges, are sufficient to ensure hearing officer impartiality. The DOE said that states that had no formal ethical requirements for administrative hearing officers would be left alone to address the issues. Further, the DOE specifically found that prior employees of local or state educational agencies should not automatically be prevented from serving as hearing officers, absent a personal or professional conflict of interest that impacts that person's objectivity. Comparing hearing officers to judges, the DOE noted that hearing officers are capable of independently deciding whether they have conflicts of interest that would affect their impartiality.

The second category of requests for amendment of the IDEA regulation of hearing officers focused on the need to establish national and state training and competency standards. The proposed standards would include both DOE and State officiated training and examinations. Once these standards were implemented, only those hearing officers who successfully met the requirements could qualify to serve as a hearing officer at due process hearings. Prior to the commencement of a due process hearing, each party would be provided a list of qualified hearing officers along with the hearing officer's credentials. From this list, the parties would choose the hearing officer. Some states have already implemented these recommendations, so far as state training and examination are concerned.[8]

Several comments were received asking that the DOE amend the IDEA to allow parents or their representatives to be present at the selection meetings that determine which hearing officers will be included on the "qualified list". It was also requested that the list of hearing officer's qualifications be updated annually, and that the hearing officer's impartiality be determined by an objective standard, such as a state's Judicial Code of Conduct.[9]

As with the other requests, the DOE was not persuaded to amend the IDEA regulations to permit parents or their representatives to be present at the "qualified list" selection meet-

8. 34 C.F.R. § 300.508 (1999).

9. *See id.*

ings. The DOE said that decisions about the selection, training, and use of "qualified lists" should be left to the individual states. The DOE pointed out that because hearing officers' decisions are subject to appeal and fair judicial review, and because poor decisions create high litigation expenses, states have a strong incentive to: 1) choose qualified hearing officers that meet standards of expertise; and 2) conduct appropriate training programs.

II. CASE LAW

The issue of "impartiality" in the assignment of hearing officers has been the subject of a number of judicial decisions. This line of cases, as well as several Office of Civil Rights rulings on impartiality under Section 504, have shed some light on who may not serve as a hearing officer. In *Mayson v.Teague*, the Eleventh Circuit held that officers of local school boards were employees of agencies involved in the education and care of the child.[10] The Eleventh Circuit went on to say that these individuals had either personal or professional interests in the type of educational assistance extended to children with disabilities, and thus were not sufficiently impartial to serve on due process hearing panels.[11] The court ruled further that university personnel involved in the formulation and regulation of state policies were not sufficiently impartial to serve as due process hearing officers in special education disputes.[12]

In *Leon v. Michigan Board of Education*, the Sixth Circuit held that administrators and attorneys employed by one district can indeed preside over hearings involving a separate school district.[13] In *Leon*, the parents moved to disqualify the hearing officer prior to the hearing, claiming that he was both partial, and unlawfully appointed. The hearing officer was an attorney who had represented schools and parents concerning special education matters, and who refused to disqualify himself after the parents made a request to replace him. The court found that the hearing officer was not biased, reasoning that he had never represented the school, and that he had once actually represented a parent in a matter contrary to the school's

10. Mayson v. Teague, 749 F.2d 652 (11th Cir. 1984).
11. *See id.*
12. *See id.*
13. Leon v. Board of Educ., 807 F. Supp. 1278, 1281 (E.D. Mich. 1992)..

interest.[14]

In *Evans v. Evans*, the Seventh Circuit focused on impartiality issues related to the training of hearing officers.[15] *Evans* centered on a dispute over the cost of residential placement for a child with emotional handicaps. After an adverse ruling, the parents questioned the impartiality of a second-tier appellate board. This board was allegedly appointed and trained by the same attorney who represented the state education agency in the case against the parents. This same attorney had also previously functioned as a "legal advisor" to the appellate board in other cases. The court ruled that such training programs are common in many states and do not transgress the line between adjudicator and administrator. The *Evans* court further stated that the combination of investigatory, advisory, and prosecutorial roles does not necessarily violate due process.[16]

In addition to challenges involving the impartiality of hearing officers, parents have also questioned their qualifications. In *Board of Education of Jericho Union Free School District*, a state administrative review officer ruled that "[t]he fact that the hearing officer was not an attorney did not invalidate the [due process] proceedings."[17] The reviewing officer noted that level I hearing officers had to be certified by a state official and that they were required to complete a training course. The reviewing officer said that no other qualifications were required.[18]

In *Lapp v. Board of Education,* the court ruled against the parents of an elementary school student with a speech impediment who claimed that the administrative law judge (an attorney) who presided over their case was not knowledgeable about special education.[19] The court noted that "impartiality" was the only requirement for hearing officers under the IDEA and that "neither federal nor state law required any specific qualifications, background, or training for those appointed to decide due

14. *See id; See also* Joseph R. McKinney & Geoff Schultz, *Hearing Officers, Case Characteristics, And Due Process Hearings*, 111 WEST'S ED. LAW REP. 1069, 1070 (1996).

15. Evans v. Evans, 818 F. Supp. 1215 (N.D. Ind. 1993).

16. *See id.*

17. Board of Educ. of Jericho Union Free Sch. Dist., 29 IDELR 135 (SEA N.Y.1998).

18. *See id.*

19. Lapp v. Board of Educ., 28 IDELR 1 (Md., 1997).

process disputes".[20] Moreover, the court stated that hearing officers have broad discretion in determining whether they have a conflict of interest that would affect their impartiality. To overcome this discretion, parents must provide evidence of prejudice or bias, or of a hearing officer's inability to be impartial.[21]

Wojnarowicz v. Duneland School Corporation and Independent Department of Education involved parental allegations of hearing officer impartiality.[22] Interestingly, a federal district court dismissed the lawsuit against the school district but not against the state's department of education. In *Wojnarowicz,* a parent, who's son was in a self contained classroom, claimed that during a break in the due process hearing, the hearing officer said that her son was also in a self-contained classroom and that she agreed with the school that her son belonged there. The parent claimed that this hearing officer, who subsequently ruled that the child properly belonged in a self-contained classroom, had a personal bias that prevented her from remaining impartial. Consequently, the parent alleged that both the school district (at a first-tier level) and the Indiana Department of Education (at a second-tier hearing) denied the child a fair and impartial hearing. The court held that the school district had nothing to do with appointing the hearing officer and granted the school's motion to dismiss. The court found, however, that the Indiana Department of Education was a proper party to the lawsuit because it was in charge of appointing the hearing officer.[23]

In *Aiello v. Grasmick,* several parents in Maryland brought challenges to the state's entire due process system: "Maryland changed its due process procedures from a two-tiered system to a one-tiered system."[24] Under the old system, a local hearing was held, and then a state level hearing was conducted if either party appealed. The new system eliminated the local hearing, allowing only a state level hearing of special education disputes. Several parents claimed that the change violated the due process procedures of the IDEA, denied their children a

20. *See id.*

21. Okemos Pub. Schs., 29 IDELR 677 (SEA MI, 1998).

22. Wojnarowicz v. Duneland Sch. Corp. & Ind. Dept. of Educ., 28 IDELR 1197 (N.D. Ind. 1998).

23. *See id.*

24. Aiello v. Grasmick, 155 F.3d 557 (4th Cir. 1998).

free, appropriate, public education and violated the State Administrative Procedures Act. The Fourth Circuit Court "analyzed the language of the IDEA and concluded it did not create a substantive right to a local due process hearing."[25] The court found that the IDEA did not contain a provision that would incorporate the state statute allowing a local due process hearing.[26]

In *Lapp,* parents challenged the new "subject matter review" quality assurance provisions of the Maryland Education Code that was part of the change from a two-tiered to a one-tiered system.[27] The "subject matter review" provision allowed review by another hearing officer designated by the Office of Administrative Hearings. The purpose of the procedure was to ensure that each decision was well written, legally sufficient, timely and conformed to a standard format. Parents contended that the policy of "subject matter review" violated their constitutional and statutory rights by "allow[ing] an individual with no knowledge of the case to review the decision and exercise a level of substantive and editorial control completely inconsistent with the independent fact finding and decision making of the impartial hearing officer."[28] The federal district court disagreed with the parents' argument and held that "subject matter review" did not violate any constitutional or statutory right, nor did it affect the impartiality of the person issuing the decision. The court noted that internal communication among judges (as long as it was not prohibited ex parte communication) in the context of court administration was permissible under the Maryland rules of judicial conduct.

III. SCHOLARLY INVESTIGATIONS

Several research investigations have examined the potential for hearing officer bias and have reached conflicting conclusions.

John Stewart reported that it is the level of experience that most significantly influences hearing officer's rulings. Stewart concluded that neither occupational background of the hearing officer nor the type of issues discussed in the hearing biased

25. *See id.*
26. *See id.*
27. Lapp v. Board of Educ., 28 IDELR 1 (1997).
28. *See id.*

decision-making.[29]

Contrary to Mr. Stewart's findings, a 1991 investigation by Ralph Tarola found that: (1) a hearing officer's occupational background was significantly related to the outcome of the hearing; (2) hearing officers employed by universities and school districts were more likely to rule in favor of schools than attorneys or private practice psychologists; and (3) the type of issue discussed in the hearing was significantly related to the decision outcome.[30]

Many studies report that the quality of case presentations affect hearing officer decisions. Peter Kuriloff found that in Pennsylvania the way parents presented their cases affected the results they achieved. Parents who called more witnesses, offered more exhibits, and questioned school witnesses more thoroughly, received more favorable decisions.[31] Similarly, Linda O'Conner Rhen reported that parents also prevailed more often when they were represented by advocates or legal counsel. For the same reason, because schools reportedly used legal counsel more often than parents did, the schools won significantly more special education hearings.[32]

Data has also indicated a strong dissatisfaction with special education due process, especially from parents. For example, a five-year Virginia study by Steven Goldberg and Peter Kuriloff revealed that nearly ninety percent of the school administrators interviewed thought special education hearings were fair, while only forty-one percent of the parents agreed.[33] The parents particularly complained about the accuracy in reporting facts and the extent to which the decision was based on actual evidence. This satisfaction was seemingly related to whether a party won or lost the hearing. Because schools tended to win

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29. John Stewart, An Investigation of Predispositions for Placement of Handicapped Children by Special Education Due Process Hearing Officers (1987)(unpublished Ph.D. dissertation, Auburn University)(on file with Auburn University).

30. Ralph Tarola, The Relationship Between Sele Law & Contemporary Problems (1991) (unpublished Ed.D. dissertation, Lehigh University)(on file with Lehigh University).

31. Peter Kuriloff, *Is Justice Served by Due Process?: Affecting the Outcome of SpecialEducation Hearings in Pennsylvania*, 48 Law & Contemp. Probs., 89, 100 (Winter 1985 Number 1).

32. Linda O' Connor Rhen, An Analysis of Special Education Due Process Hearings in Pennsylvania (1977-1986) (1989) (Ed.D. dissertation, Temple University).

33. Steven S. Goldberg & Peter J. Kuriloff, *Evaluating The Fairness of Special Education Hearings*, 57 Exceptional Children 546 (1991).

more in special education hearings, they reported a higher level of satisfaction with the outcome.[34]

In the end, the desirable outcome of any special education dispute is that the conflict be resolved prior to conducting a due process hearing. When this end is accomplished, the parties involved save considerable cost and reach agreements that tend to be mutually acceptable.

When the parties are unable to resolve their differences among themselves, a formal hearing must be convened and a decision rendered that favors one party over the other. In these instances, the cost to the parties is often substantial both in terms of money and goodwill.

In keeping with the purpose of this paper, the authors hypothesize that a hearing officer's occupational background, gender, and years of experience affect the manner in which he or she resolves disagreements between parents and schools. Likewise the presence of an attorney for the parents, as well as the type of issues to be resolved, are factors believed to influence the results of special education due process hearings.

IV. METHODS

The data for this study was extracted from 227 cases that were assigned to fourteen hearing officers, in a midwestern state, during the 1992-1996 calendar years. Seven of the hearing officers were attorneys and seven were non-attorneys (five university professors and two private practice psychologists). Each hearing officer had four to twenty years experience. Eleven of the hearing officers were men, and three were women. The assigned cases involved disputes between parents and special education personnel related to the following types of issues: a) eligibility for special education services, b) test results interpretation, c) education program/placement, and d) parent reimbursement for educational costs. The cases were systematically rotated with each hearing officer receiving approximately twenty to twenty five assignments during the forty-eight month period.

A discriminate function analysis was used to determine which dependent variables best predicted the due process outcomes of interest in the study. The first function was whether a

34. *See id.*

case settled (*N=133*) or went to a decision (*N=94*). The other function of interest was whether the hearing officer rulings were favorable (*N=90*) or unfavorable (*N=111*) to the parents. Two types of dependent variables were used for prediction purposes that included a subset of hearing officer background characteristics (i.e., occupational background, gender, and years of experience) and case factors (i.e., parent representation and the four types of possible hearing issues).

V. RESULTS

The variable correlations are given in Table 1. Examining these for the first function, the presence of an attorney hearing officer is the primary variable ($r = .47$) for predicting whether a case settles before going to hearing. Parent representation ($r = .28$) and the presence of a special education program/placement issues ($r = -.24$) are revealed to be secondarily involved. At the same time, the most significant factor predicting rulings is the presence of counsel for the parent ($r = .38$). On the other hand, special education disputes over program/placement ($r = -.27$) issues adversely affect rulings for parents.

Table 1.
Discriminant Function-Variable Correlations for Hearing Officer Background and Case Characteristics

Variables for Parents (N=201)	*Settlement Outcome*	*Ruling (N=227)*
Hearing Officer Background		
Legal Background	.47**	.15
Years of Experience	.11	.18
Gender	.18	.15
Case Characteristics		
Parent Representation	.28*	.38**
Eligibility Issue	.10	-.21
Evaluation Issue	.13	-.17
Program Placement Issue	-.24*	-.27*
Cost issue	-.16	-.22

** p< .05 **p< .01*

A discriminant function analysis determined that a three-variable model was the strongest predictor of a dispute settle-

ment, yielding a maximum $R=.51$, $p < .01$. The presence of an attorney-hearing officer was a strong predictor of a case ending in settlement, $F(1, 225) = 29.12$, $p < .01$. A parent represented by an attorney or advocate also predicted a greater likelihood of the dispute being resolved prior to hearing, $F(2, 224) = 18.7$, $p < .01$. On the other hand, hearings involving an issue related to special education program/placement significantly improved chances of the dispute being heard, $F(3, 223) = 16.8$, $p < .01$. The discriminant equation using standardized coefficients to predict decision outcomes is presented in Figure 1. This equation accurately predicted settlement outcomes in 64% of the cases.

Figure 1. Model for prediction of Settlement Outcomes
Settlement Outcome = 33.67 + 1.03 (Legal Background of Hearing Officer) + .81 (Parent Representation) - .77 (Program/Placement Issue)

The same discriminate analysis was used to predict the hearing officer rulings for or against the parents. A two-variable model proved to be the best predictor of this outcome, yielding a maximum $R = 24$, $p < .05$. The presence of an attorney/advocate for the parents significantly improved their chances of receiving a favorable ruling $F(1, 199) =. 7.69$. However, disputes over special education program/placement issues were more likely to be won by the schools $F(2,198) = 4.78$, $p < .05$. The discriminant equation using standardized coefficients to predict decision outcomes is presented in Figure 2. This equation correctly grouped 58% of the case rulings rendered on behalf of parents by the hearing officers in the study.

Figure 2. Model for prediction of Rulings for Parents
Rulings for Parents = 28.6 +1.05 (Parent Representation) - .82 (Program and Placement Issue)

VI. DISCUSSION

The Use of Non-Attorneys. These findings indicate that the legal background of the hearing officer is significantly related to whether a hearing is settled. That is, attorney-hearing offi-

cers presided over a lower proportion of due process hearings than their non-attorney counterparts. One possible explanation for this difference is that non-attorneys may believe that the best way to contribute to solving an educational dispute is to provide the parties with a forum to air differences. Non-attorneys seemingly view hearings as being less adversarial than do attorneys, valuing the hearing as an opportunity for mediation and shared decision-making. Conversely, attorneys may be more accustomed to seeking settlement prior to adjudication, believing that this solution is less time consuming, less expensive, and provides more opportunity for reconciliation. Indeed, in North Carolina, hearing officers (48% were non-lawyers) listed providing expertise and solutions to special educational problems as the most important reason for their interest in serving as hearings officers.[35]

It is also possible that an educational orientation, rather than a legal background, motivates non-attorneys (e.g., university professors) to ensure that children receive a free, appropriate, public education regardless of lost time, expense, and goodwill. In addition, non-lawyers may view the hearing as a platform where they can interject their educational opinions and give informed insight on how to provide a better education for the student. Unfortunately, these particular practices may prevent settlements, and cost all involved significantly more than may be otherwise necessary. Ironically, Donald M. Sacken has pointed out that in order to avoid bias "one must eliminate those most knowledgeable about the substantive issues to be resolved."[36] Indeed, non-attorneys may be prone to this sort of bias.[37]

Parent Representation. Much has been written on the significant impact lawyers have had on public education. While the total amount of litigation greatly increased from the 1960s to the middle of the 1970s, and began to decrease modestly until the late 1980s, litigation rates remain at historically high levels today. Moreover, special education disputes have been found to contribute significantly to this phenomenon and con-

35. Ann P. Turnbull, et al. *Due Process Hearing Officers: Characteristics, Needs, and Appointment Criteria*, 48 EXCEPTIONAL CHILDREN 48, 50 (1981).

36. Donald M. Sacken, *Mayson v. Teague: The Dilemma of Selecting Hearing Officers*, 16 J.L. & EDUC.187, 200 (1987).

37. *See id.*

tinue to grow at an alarming rate.[38]

Nevertheless, this four-year study indicates that when a parent retains counsel, the case is less likely to result in a hearing being convened. These results seem surprising, but a thoughtful review of the issue leads one to conclude that the use of an attorney by either party may often lead to an early resolution of the dispute. It is a fact that most legal cases that involve lawyers do not go to trial. Attorneys are accustomed to the settlement process and many of them bring that negotiating dimension of practicing law to the hearing. In addition, in those instances when a parent retains counsel, strong incentive may arise on the part of the school to settle, thus avoiding parent attorney fees, should they in fact lose the case.

These findings also reveal that parents operate on a "level playing field" when they are represented by someone with appropriate legal expertise. Special education law is a highly complex legal area and parents win more cases when represented by an individual with legal knowledge. This improved winning percentage may also be abetted when parents are counseled by an attorney to consider settlement, avoiding the possibility of an unfavorable ruling, particularly in cases they have a minimal chance of winning.

Program/Placement Issues. The study indicates that a hearing that focuses on an educational program/placement issue is less likely to be settled. This finding is not surprising given that schools assume strong ownership of these decisions, especially when parents request expensive program and placement options (e.g., residential programs). Schools are particularly inflexible when they believe their recommended educational plan can benefit the student at less cost. Of course, parents are just as adamant about providing their child with the best program possible, regardless of the expense to the school. Because of the compelling feelings of both parties, a hearing is often required to resolve their strong differences of opinion. Under these circumstances, the study predicted that the hearing officers would rule against the parents on issues of educational program/placement. Although the parents are acknowledged to play an important role, decisions about appropriate methodology and beneficial school placement are likely

38. MARTHA MACARTHY & NELDA CAMBRON-MCCABE, PUBLIC SCHOOL LAW 17 (Allyn & Bacon ed., 1992).

viewed to fall primarily within the school's prerogative, particularly when the school can prove that an educational benefit has been provided.

These findings support the notion that the outcome of a due process hearing can be predicted by the legal background of the hearing officer. The results are intriguing because they seem contrary to the role attorneys are believed to play in prolonging costly and adversarial disputes. Interestingly, the question becomes: Does the non-attorney hearing officer's approach undermine the litigants' ability to reach mutual settlement, save time and money, and avoid emotionally charged disputes?

The use of an attorney (or advocate) by the parent also contributes to the increased chance of settlement. As mentioned above, the presence of these representatives on behalf of parents may put the school in a position where they are more inclined to seek settlement to avoid high attorney fees and other costs of a hearing. The only instances where these cost incentives are probably immaterial are when parents overly intrude into the educational decision-making, especially when seeking expensive program and placement options. In these instances, the cost-and-balances of conducting the hearing are less than conceding to the parent demands.

The background of the hearing officer does not appear to bias his or her decision against the parents. What better predicts a favorable outcome for parents is the retention of counsel or an advocate before entering the hearing process. Certainly, this action increases the chances of prevailing. Retaining representation probably helps parents avoid entering a hearing they have little chance of winning - an outcome that has the potential to drain them financially and emotionally, and further embitter their relationship with the school.

Finally, some limitations of this study should be noted. First, given the exploratory nature and the small sample of hearing officers involved, the results need to be interpreted with these limitations in mind. In addition, the study only represents due process activities as they occurred in one jurisdiction; therefore, these findings may only apply to states and locales that operate in a similar fashion in resolving special education disputes between parents and schools.

VII. CONCLUSION

The role of the hearing officer is similar to that of an administrative law judge. The primary duties of this individual are to inform the parties of their rights, allow all parties to present their case, conduct the hearing in a fair manner, and render a decision in accordance with the law. Each state maintains a list of persons who may serve as hearing officers that includes a statement of the qualifications of each of those persons. Either party may challenge the appointment of a particular hearing officer.

To ensure the impartiality of hearing officers, many states have adopted requirements for appointment and retention of hearing officers similar to those found in the federal Administrative Procedures Act (APA). The APA requires that all hearing officers must be: a) assigned cases on a rotation, b) removed only for cause as determined by an independent board, c) not removable by the agency who appointed the hearing officer, and d) compensated independent of the appointing agency.

Each state education agency varies as to how well they insulate the hearing officer from personal and professional pressures that may influence impartiality. Moreover, current litigation and ongoing scholarly research indicates a growing concern with hearing officer impartiality in special education due process proceedings.