

Evaluating Organizational Options for Special Education Hearings and Mediations:

A Report to the Massachusetts Commissioner of Elementary and Secondary Education

Perry A. Zirkel
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ABSTRACT

The U.S. Department of Education informed Massachusetts' Commissioner of Elementary and Secondary Education that the present structure for special education hearing officers and mediators is not in compliance with the IDEA requirement that they not be employees of the state education agency. In fulfillment of RFR # 09FINJW1, the impartial consultant offers an analysis of the practices in other states and the perceptions in Massachusetts to help the Commissioner formulate and evaluate options for his response regarding the structure for special education hearings and mediations in the Commonwealth.

This report to the Massachusetts Commissioner of Elementary and Secondary Education is organized into two basic parts. The first part includes introductory information about the report's genesis, author, scope, focus, and context. The second part consists of the author's observations and his discussion of the structural options to help the Commissioner formulate his decision as to the appropriate organizational model and "home" for the Commonwealth's mediation and hearing officer system for special education cases.

PART I: INTRODUCTION

Author/Consultant

The author of this report (referred to herein as "the consultant") is university professor of education and law at Lehigh University. He has a Ph.D. in educational administration and a J.D. from the University of Connecticut and an LL.M. from Yale University. He has not served as an attorney for school districts or parents, instead devoting his career to impartial roles, including 30 years as a professor at Lehigh; 18 years as a special education review officer in Pennsylvania; and writer/researcher of more than 1,000 publications, with the primary focus being special education law.

Background/Boundaries

In January 2009, the Massachusetts Department of Elementary and Secondary Education (Department) issued a public Request for Response (RFR) that led to this consultancy. The "Scope of Services" in the RFR stated the relevant background and boundaries:

In a letter dated January 15, 2009, the United States Department of Education (USED) notified the ... Department that its structure for conducting special education hearings and mediations was not in compliance with the Individuals with Disabilities Education Act (IDEA). This notification came in response to an inquiry from Education Commissioner Mitchell Chester. The letter states that IDEA requires that hearing officers and mediators not be employees of the state education agency.

USED has given the Department until April 15, 2009 to submit a plan to bring the state into full compliance with IDEA.¹ In formulating that response, the Department seeks the assistance of an impartial outside consultant. The consultant will work collaboratively with the Department to help formulate options for its response to USED regarding the structure for special education hearings and mediations in the Commonwealth. The consultant will conduct meetings and will gather information with the

Department from attorneys who represent parents and students, school districts, and state agencies before the Bureau of Special Education Appeals; advocacy groups; current Bureau employees; and other key constituents. The consultant will assist the Department in reviewing systems for conducting special education mediations and hearings in other states to inform the Commissioner's decision regarding how to structure the system for special education hearings and mediations.

Current Structure

The Bureau of Special Education Appeals (BSEA) is a unit currently within the Department that consists of a director and assistant director; 6 full-time hearing officers; 8 mediators with a coordinator; and 4.5 administrative support personnel along with a scheduler. During the most recent year, the BSEA received approximately 500 hearing requests, reportedly resulting in approximately 85% resolved via mediation and 34 adjudicated decisions.²

Consultant Activities

The sources of information of this report included the following activities:

- 3 heterogeneous “focus group” sessions with various stakeholders, including school district administrators, parent and district attorneys and organizational representatives
- 2 meetings with the BSEA hearing officers and mediators, including their Union representative
- in-person interviews with Commissioner Mitchell Chester and associate commissioner Jeff Wulfson, current BSEA director Rich Connolly and assistant director Reece Erlichman; other Department representatives; and former BSEA director Dan Ahearn
- telephone interviews with Massachusetts Senator O’Leary and Massachusetts Representatives L’Italien, Harkins, Sannicandro, and Walz
- an empirical national survey of the state hearing officer systems and review of Massachusetts special education director Marcia Mittnacht’s concomitant, qualitative survey (i.e., with more extensive commentary from the respondents) concerning the hearing officer and mediator systems in other states

- review of relevant available documents³ and, within the procedure pursuant to various foregoing meetings and interviews, the e-mail submitted by interested individuals

On the other hand, the consultant's scope of activity did not include analysis of the legal requirements in Massachusetts for a change in the organizational structure for special education mediations and hearings. Similarly, it did not extend to determining the specific feasibility of any particular organizational arrangement or host.

Contextual Consideration

As an overall matter, it is important to understand that special education hearings under the IDEA effectively consists of two “worlds”—a small group of approximately nine states, which account for almost 90% of the adjudicated decisions, and the remaining states, where such litigation is more the exception than the rule.⁴

Regardless of the metric—for example, the number of hearing requests at one end or the number of adjudicated decisions at the other end—and the time period, Massachusetts is within the first, litigious world.⁵ For example, its most recent year's number of 34 adjudicated decisions ranks seventh in the 50 states, with the others in the top group being, in alphabetical order, California, Connecticut, Illinois, Maryland, New Jersey, New York, Pennsylvania, and Texas.⁶ Yet, the approximately 500 hearing requests, when compared with the number of adjudicated decisions, represent an unusually high ratio,⁷ which would place Massachusetts notably higher in the top group.

Moreover, Massachusetts has played a leading role in the history of special education law. Its own positive (i.e., disability-favorable) education legislation pre-dated the passage of the original 1975 version of the IDEA.⁸ Moreover, for several years the legislation included a definition of eligibility and a substantive standard for appropriateness that clearly exceed the scope and substantive standard under the IDEA. Finally, Massachusetts' prevailing policies for procedural protections, such as the current BSEA practice of processing procedural safeguards notices as an automatic consequence of every parentally rejected individual education program (IEP), are relatively remarkable in comparison to most states.

As another, less central indicator of its relatively unusual level of sophistication in special education law, Massachusetts is the only state known to the consultant that has a specialized publication specific to its hearing officer decisions—specifically, the MASSACHUSETTS SPECIAL EDUCATION REPORTER, a privately published service that features “commentators” from two law firms—one representing school districts and one representing parents.

PART II: OBSERVATIONS AND DISCUSSION

Observations

1. The first observation of this report concerns the legal role of state education agencies (SEAs), such as the Department, in the conduct of IDEA hearings and mediations. More specifically, under the IDEA and its regulations, the SEA is ultimately responsible for the effective operation of the hearing officer and mediation system.⁹ Thus, for example, the USED's Office of Special Education Programs (OSEP) has issued policy letters clarifying that an SEA may specify the content of hearing officer training as part of its ultimate responsibility for oversight of the due process dispute resolution system.¹⁰ Other requirements for compliance include assuring the impartiality of hearing officers and mediators,¹¹ the competence of hearing officers,¹² and a specified process of pre-judicial dispute resolution.¹³ For example, the SEA is ultimately responsible for timeliness in terms of the 30-day deadline for completion of the pre-hearing resolution session and the immediately subsequent 45-day timeline for issuance of the hearing officer's decision.¹⁴

The corollary conclusion is that the Department has (a) the responsibility to determine the appropriate organizational structure for the IDEA mediation and hearing officer functions in Massachusetts and, after the new organizational arrangement is in place, (b) the continuing obligation to assure their effective compliance with the standards of the IDEA.

2. The second observation is, as made clear in Commissioner's Chester's letter of inquiry¹⁵ and USED's response, that Massachusetts previously had the same structural problem and its purported solution was not effective. Specifically, in 1992 USED's OSEP only approved of the BSEA structure upon the condition of an interagency memorandum of understanding that put the BSEA under the nominal authority (i.e., limited to evaluating the BSEA director and assistant director) of another agency, the University of Massachusetts Boston. Subsequently, that arrangement fell into disuse for several structural and pragmatic reasons.

Consequently, whatever the solution this time to the same problematic situation is, it needs to be more clear-cut and enduring than the previous attempt. OSEP is less likely this time to approve of a relatively nominal arrangement,¹⁶ and, in any event, the lack of stable institutionalization of the solution will only lead to another repetition of the problem.

3. The third observation is that Massachusetts' mediation and hearing officer system under the IDEA has a well-earned reputation for sophistication and innovation. Examples of legal sophistication include the following:

- the jurisdictional coverage of disputes under the overlapping scope of Section 504 of the Rehabilitation Act¹⁷
- the formal adjudicative procedures for addressing pre-hearing and interlocutory issues in hearings

- the generally thorough factual findings and legal analysis of the hearing officer decisions.

The even more outstanding examples of innovation include:

- the well-regarded effective settlement conferences
- the availability of advisory opinions¹⁸
- the development of the new “SPED-EX” procedure, which will provide the availability of an advisory opinion based on the perspective of a special education clinical professional.

Thus, the effectiveness of the BSEA must be assessed not only in light of the state’s litigious special education culture but also with regard to the full range of quantitative and qualitative indicators. For example, the ratio of the 34 adjudicated decisions divided by the present number of hearing officers appears on first impression—compared to other states¹⁹—to be relatively low. Yet, with the same comparison to other states, the productivity assessment may be different upon consideration of the 500 hearing requests, the synergistic and potent effect of mediation, and the sophisticated practice in the Massachusetts’ hearings.²⁰

4. The perceptions of the various interest groups that provided input in the foregoing “Consultant Activities” grouped into two divergent views. One view, which was the majority for a sample that was not random and, thus, not necessarily representative of the wider constituencies, was that the present system is not broken and, thus, the resolution should be limited to changing the home of the BSEA in response to OSEP’s mandate. Attorneys and other advocates who represented parents of students with disabilities were the dominant source of this perception.

The opposing view, which was the minority in this limited sample and principally expressed by attorneys representing school districts, was that the current system is fatally flawed and needs radical revision. A March 20, 2009 letter to the Commissioner signed by a group of superintendents, special education directors, and other school district administrators, exemplifies this view.²¹ Their primary relevant perception is that the BSEA hearing officers are biased toward parents; these school district representatives explained that even though districts win the clear majority of the decisions, they settle the vast bulk of the 500 hearing requests based on this perceived bias, thus preserving for decision only those cases that they expect to be clear winners.²² While lacking information to verify this explanation,²³ the consultant notes that the prevailing perception in the rest of the adversarial world of special education is that hearing officers are biased in favor of districts.²⁴ In any event, the March 20 letter also made the much more evident point that the present BSEA system lacks an effective feedback process; in contrast, for example, the Commonwealth’s Superior Court regularly conducts an anonymous survey of its legal practitioners that provides performance feedback to each individual judge and, at the administrative level, the presiding judge.

In contrast, both groups generally shared positive perceptions about (a) the aforementioned innovations of the BSEA hearing officer system, particularly the assistant director's settlement conferences, and (b) the mediators generally, with one exception—some of the district participants perceived a chilling effect of the combination of geographic mediator assignments and housing the mediators with the hearing officers.²⁵

5. Within and across the two divergent views was a general sense that this OSEP-mandated change, even if limited to no more than a move in the organizational home of the BSEA, was an opportunity to strengthen the system. The identified areas for incremental improvement, along with illustrative rather than exclusive ways for addressing each, concern these hearing officer issues:²⁶

- selection
e.g., according parties a limited choice in the selection of hearing officers within the relatively strict timelines for completion of the process²⁷
- feedback
e.g., institutionalizing a system of anonymous constructive participant feedback of mediator and hearing officer performance
- accessibility
e.g., providing for circuit-riding hearing officers
- efficiency-timeliness
e.g., having incentives for prompt completion of hearings in accordance with regulatory timelines
- efficiency-utilization
e.g., providing cross-training for hearing other types of administrative decisions during downward spikes and, depending on the structure, a converse managerial provision during upward spikes in caseload

Structural Options: Hearing Officers

The alternative structures for IDEA hearing officers theoretically fit into a spectrum of three broad categories: 1) part-time contractors; 2) full-time independent contractors, and 3) full-time employees. As a practical matter, the middle category is effectively eliminated, because no state currently uses it and even if full-time hearing officers are independent contractors in relation to the SEA—because it uses a contracting process for its IDEA hearing officer system—they are typically employees of the agency that receives the contract.²⁸ Thus, the likely alternatives amount to the two outer categories—part-time contractors and full-time employees.

Taking into account all 50 states, the predominant model is the use of part-time contractors, with a gradual and still far from complete movement toward the full-time employee category.²⁹ For the nine states in the group that includes Massachusetts, the

slight majority—MA and four others (CA, MD, NJ, and PA)—use the full-time employee model, whereas the top-ranked³⁰ state (NY)³¹ and the others (CT, IL, TX) use part-time consultants.³² Moreover, for those states that use the full-time employee model, the predominant home, by far, is an office of administrative law akin to Massachusetts’ Division of Administrative Law Appeals (DALA).³³

As a generic matter,³⁴ the basic advantages of the part-time contractor model are control³⁵ and flexibility,³⁶ whereas the disadvantages are less likelihood for expertise, independence, and stability.³⁷ Conversely, the basic advantages of the full-time employee model are stability and specialization,³⁸ whereas the corresponding disadvantages are more potential for inflexibility³⁹ and insularity.⁴⁰ The variable of coherence, if referring to the degree of predictability of analysis and outcome across the state’s hearing officers as a whole, is not clearly associated either model; for example, although the full-time model can decrease the variability of the part-time model due to concentrating the cases among a much smaller number of hearing officers, the variance among these remaining hearing officers—particularly in light of its more insular structure—can still amount to the same problematic level of what is akin to inter-rater reliability.⁴¹

As a specific matter, moving to a part-time contractor model in Massachusetts would obviously fulfill the OSEP mandate without moving the organizational home of the mediation and hearing officer function, and it would provide flexibility in terms of personnel utilization; however, the loss of expertise alone—without adding in the other weighty negative costs and complications—would appear to be at least countervailing. Conversely, retaining the full-time model would necessitate either moving the organizational home of the hearing officers from the Department to either another state entity, a private entity, or—within the full range of possible options, although not extant in another state—creating a free-standing entity. For examples of another state entity,⁴² the most likely possible candidates are DALA,⁴³ another part of the Executive Office for Administration and Finance,⁴⁴ or the University of Massachusetts (UMass).⁴⁵ In turn, the collaboratives and the private universities with law schools in the Commonwealth serve as examples of non-state and private entities, respectively. Further evaluation of this particular model necessitates first the structural options for the mediators and then a set of final considerations.

Structural Options: Mediators

The only limited structural issue specific to mediators in the BSEA is whether they should be housed with or apart from the hearing officers.⁴⁶ The predominant pattern in other states, whether limited to those in the top group⁴⁷ and whether limited to those with full-time mediators, is the separation model. Yet, illustrating the full range, at least one of the “top” tier states—California—has the same group of full-time hearing officers perform both functions.⁴⁸

As a general matter, the primary advantage and disadvantage of the first option respectively are synergy and “leakage.” “Synergy” in this context refers to agile interaction between mediators and hearing officers to not only share dispute resolution strategies but also—via swift switching from hearing officer to mediator upon the parties’

consent—facilitate prompt settlement. “Leakage” here refers to interaction between mediators and hearing officers that may affect the integrity of each process. For example, if mediators pass on individually identifiable information about the parties or the case, even if completely inadvertently or in good faith, to the hearing officer, the potential or actual effect would be counter to impartiality.

The primary advantage and disadvantage of the second option simply are the opposite—less likelihood of synergy and leakage. Overall, as applicable to the present practice of the mediators and hearing officers, the balance seems to modestly favor retaining having both groups within the same organizational unit; however, other factors that may accompany the OSEP-dictated change may counterweigh in favor of a separated structural arrangement. For example, if the Commissioner’s decision were to move the hearing officers to DALA based on its related specialized function, the same rationale might weigh in favor of moving the mediators into the Massachusetts Office of Dispute Resolution at UMass/Boston. This unit appears to have general recognition for effective mediation services.

Final Considerations

In any case, after weighing the various structural options, if the Commissioner decides to move in the direction of retaining the full-time employee model, a few final and intertwined factors merit consideration in the identification of the new host organization. First, in light of past history, is the need for an enduring institutional solution, not another nominal, temporary, and ultimately illusory fix.⁴⁹

Second is the matter of resources, which is a particularly crucial consideration in these stringent economic times. The Department representatives reported that the IDEA federal funds are the sole source of the salaries, benefits, travel, and training of the BSEA. As an effective matter, the fixed costs that the Department contributes, such as office space, nonportable equipment, and administrative support (e.g., information technology services) are not transferable. Thus, the new host organization, via its preexisting infrastructure and internal resource reallocation, or the state legislature presumably would have to provide the additional resources necessary for the efficient and effective operation of the BSEA.⁵⁰

Third is the opportunity costs that would be lost if the various concerned constituents and the host organization fail to make a concerted commitment to improve, not just preserve, the particular strengths of the present system.

Last, concluding this report where it started, whatever organizational option is ultimately selected in response to the USED, the Department will remain obligated to assure full compliance with the IDEA standards for the special education dispute resolution system, which includes but is not entirely limited to the mediation and hearing officer functions.⁵¹

Endnotes

¹ Based on the prompt initiation of the scope of services, the Department subsequently requested and received an extension until June 1, 2009 for submission of the plan.

² The remaining, approximately 40 hearing requests were either settled without mediation or withdrawn. Although it may be worthwhile to conduct in-depth tracking and analysis of the process between the 500 filings and the 34 decisions beyond the reported mediation success rate, such an endeavor was beyond the scope of the consultant's activities.

³ In addition to an informal sampling of Massachusetts' hearing officer decisions, the consultant reviewed the BSEA's HEARING RULES FOR SPECIAL EDUCATION APPEALS (2008), relevant legislation and regulations, and the websites for the various other potentially related agencies.

⁴ See, e.g., Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEADERSHIP 22 (2008). This study did not include, due to its unique non-state status, the District of Columbia, which has more adjudicated hearings than any other jurisdiction.

⁵ In the aforementioned Zirkel & Gischlar study of the period 1991-2005, Massachusetts ranked ninth, with 724 adjudicated decisions, compared to first-place New York with 16,064 decisions. When adjusted on a per capita basis of special education enrollments, Massachusetts rank for this 15-year period was 12th. Moreover, while the number of adjudicated decisions in Massachusetts' averaged 48 for this entire period, the pattern started with an initial three-year high level of approximately 100 per year followed by a range of 27 to 40 decisions, with two separate upward spikes of 50 and 53, for the remaining years.

⁶ This ranking is based on the national survey that the author started with a colleague concomitant with this consultancy. The study is still ongoing, and, upon its completion, its results will appear in an academic journal.

⁷ Eileen Ahearn, *Due Process Hearings: 2001 Update*, QUICK TURN AROUND FORUM (2002)(available at <http://www.nasde.org/forum.htm>).

⁸ In contrast, various other states had negative legislation that pre-dated the IDEA. For example, Pennsylvania's compulsory education law specifically excluded children with mental retardation.

⁹ See, e.g., 34 C.F.R. §§ 300.600(d)(2) (2008) (specifying reinforced priority for state supervision of dispute resolution system).

¹⁰ Letter to Zirkel, 21 IDELR 1000 (OSEP); Letter to Keenan, 20 IDELR 1166 (1993).

¹¹ See, e.g., *id.* §§ 300.506(c) and 300.511(c). The specific standards include prohibiting the mediator or hearing officer from being an SEA employee. However, via an express exclusion, this prohibition does not extend to SEA-paid independent contractors. *Id.* Thus, the SEA may have mediators or hearing officers who are independent contractors. Notably too, this prohibition is a relatively long-standing one in the IDEA regulations based on case law in the early 1980s, but it is new for mediators as of the 2006 IDEA regulations.

¹² The three expressly identified minimum competencies concern knowledge and ability in special education law, conducting hearings, and writing decisions. *Id.* § 300.511(c)(1)(ii)-(iv).

¹³ *Id.* §§ 300.506-300.515. The SEA is also responsible for a separate, administrative complaint resolution process. See, e.g., *id.* §§ 300.151-300.153; see generally Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process*, 237 EDUC. L. REP. 565 (2008).

¹⁴ 34 C.F.R. § 300.515(a).

¹⁵ Included in Commissioner's Chester's October 7, 2008 letter to USED was a key clarification regarding the meaning of "impartial" in this context:

[W]e believe that the system in Massachusetts for due process hearings and mediations has been and is operating in an impartial manner. Neither the Commissioner nor anyone else in the Department, outside of the BSEA, reviews or tries to influence in any way decisions of individual hearing officers or mediators in ongoing cases. We have received no allegations or complaints regarding the current structure for hearings and mediations from anyone. Impartial in fact, however, may be different from the more technical definition of impartial under the IDEA.

For the applicable meaning under the IDEA more generally, see, e.g., Peter Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers under the Individuals with Disabilities Education Act: A Checklist of Legal Boundaries*, 83 N. DAKOTA L. REV. 109 (2007); Elaine Drager & Perry A. Zirkel, *Impartiality under the Individuals with Disabilities Education Act*, 86 EDUC. L. REP. 11 (1984).

¹⁶ In addition to the same reason, the original case law—to the extent that it focuses on the state board of education rather than the state education agency alone—would seem to put in question the option moving the home of the BSEA to the Massachusetts Executive Office of the Education. See *Robert M. v Benton*, 634 F.2d 1139, 1142 n.10 (8th Cir. 1980); *Helms v. McDaniel*, 657 F.2d 800, 806 n.9 (5th Cir. 1981); *Vogel v. Sch. Bd.*, 491 F. Supp. 989, 994-45 (S.D. Mo. 1980).

¹⁷ 29 U.S.C. §§ 705(20), 794, and 794a (2008); 34 C.F.R. Part 104 (2008). See, e.g., PERRY A. ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (2004).

¹⁸ Often credited with this innovation because it appears in the state’s legislation, Connecticut apparently relied on the Massachusetts model to incorporate the advisory opinion into its IDEA dispute resolution procedures. CONN. GEN. STAT. § 10-76h-6 (2008).

¹⁹ By way of illustration, Pennsylvania’s 5 full-time hearing officers issued approximately 55 adjudicated decisions during the most recent year. Among other variables for comparison, for example, the number of hearing requests during that year in Pennsylvania was approximately 20% higher than the Massachusetts’ total.

²⁰ Further complicating the initial comparison are the lack of available data as to the full-time equivalents for the various states with part-time hearing officers and the similar unclear number of adjudicated decisions for those states with full-time hearing officers who have a caseload that extends well beyond special education cases.

²¹ A notable number of the criticisms expressed in the letter reflect more generalized frustration and concern that go beyond the specific system of the BSEA. For example, several of the criticisms focused on the differing interpretations of the IDEA mandate for least restrictive environment (LRE), which is not at all specific to Massachusetts’ system. Similarly, the expressed concerns with 1) the overlapping but differential processes of SEA compliance/complaint investigations and hearing office adjudications and 2) the financial burden of attorneys’ fees, private placements, and complicated proceedings, and 3) the “legalistic rather than humanistic” process are part and parcel of the IDEA as legislated at the national level and as implemented at the state level, especially in the litigious “world” that Massachusetts shares with an identifiable segment of other states.

²² A related prevailing perception among this district-dominated group is that one or two particular hearing officers are most pronounced in this purported pro-parent bias.

²³ In contrast, the March 29 letter’s three cited examples of hearing officer bias—an excerpted statement of the hearing officers, their control at hearings, and their professional background—were amenable to assessment; the consultant found each of these allegations to be an exaggeration that had been clearly distorted for the purposes of advocacy.

²⁴ See, e.g., Perry A. Zirkel, *Blaming the Referee*, 37 COMMUNIQUÉ 11 (Sept. 2008).

²⁵ Although they have the option of requesting an exception, they perceive possible negative effects, particularly in light of the otherwise synergistic placement of hearing officers and mediators in the same unit.

²⁶ Less significantly, each of these issues also applies to mediators, with adjustment of the first one from selection to assignment. More specifically, having mediators assigned on a rotational or random basis would be one means of addressing the aforementioned (*see supra* text accompanying note 25) perceived chilling effect.

²⁷ More specifically, one way would be to provide for preliminary random assignment of three hearing officers for each case, with the opportunity for each party to “strike” one name on this list before the final assignment of the hearing officer (without any communication of the preliminary screening actions to the hearing officer) within a prescribed short period. Only two states—Arkansas and Kansas—have any sort of such “bumping” provision

²⁸ Specifically, California previously had this arrangement when the successful bidder was the University of Pacific’s McGeorge School of Law, but for the SEA’s most recent two successive requests for proposals the state’s office of administrative hearings (which is the counterpart to DALA in Massachusetts) succeeded in obtaining the SEA’s contract for hearings and mediation. Only the outlier jurisdiction of the District of Columbia (*see supra* note 4) currently uses full-time independent contractors as hearing officers.

²⁹ At the current time, approximately 15 states use the full-time employee model.

³⁰ *See supra* note 5.

³¹ However, New York is a two-tiered state, and its review officer level fits in a full-time employee category. All of the other states in the top group have one-tier systems, with Pennsylvania being the most recent to follow the trend from two tiers to one. The IDEA allows each state the option of either a hearing officer level alone or an added review-officer tier before judicial review.

³² For these three states, the home is the SEA; this choice does not violate the IDEA impartiality requirement because the hearing officers are not employees. *See supra* note 11.

³³ The only exception in the top group is Pennsylvania, which uses an “intermediate unit” (a governmental educational agency between the local and the state levels, with the only partial counterpart in Massachusetts being the collaboratives). The only exception in the other group of states is Tennessee, which uses the Secretary of State’s office as the home for this purpose. Illustrating the full range of options, the states in the part-time independent contractor category that do not fit in the predominant pattern of the SEA being the home (*see supra* note 29 and accompanying text) extend to Virginia, which uses the state supreme court, and Oklahoma, which contracts with a university, to serve as the home. Consider too the example of the previous, private-university home in California (*see supra* note 28).

³⁴ On both sides of the generic balance sheet, the pluses and minuses are potential rather than necessarily actual, being merely more probable theoretically depending ultimately on the quality and nature of the specific implementation.

³⁵ “Control” as an objective advantage refers here to managerial efficiency and accountability.

³⁶ The primary aspect of flexibility in this context is the ability to respond to the ebbs and flows of hearing activity on not only the long- but also the short-term basis.

³⁷ The need, at least in a state like Massachusetts, for periodic procurement processes may also be a disadvantage in terms of the transaction costs.

³⁸ In this context, these two terms encompass the expertise that not only full-time focus but also inter-employee interaction facilitates.

³⁹ Again, the primary referent for inflexibility is in terms of efficiency. *See supra* note 36.

⁴⁰ “Insularity” in this context refers to an extreme of independence that impedes accountability.

⁴¹ Inter-rater reliability refers to the degree of consistency among the recorded judgments of various observers.

⁴² The use of “examples” here warrants emphasis; there may be other state entities that would ultimately be more appropriate upon full exploration.

⁴³ The primary reason for DALA would be its institutional focus on administrative hearings, thereby providing stability and expertise. However, such a re-location should be contingent upon intra-institution semi-autonomy; California and New Jersey provide importable and successful examples of a sub-unit of specialized hearing officers for IDEA cases, with cross-training for limited assignments to and from this sub-unit depending on the changing in- and out-flow of cases.

⁴⁴ The primary reason for this agency is that it already includes a wide variety of functions, including semi-autonomous units akin to BSEA, within its management structure. *See, e.g.,* http://www.mass.gov/bb/gaa/fy2009/app_09/ga_09/hcdefault.htm.

⁴⁵ The primary reasons for UMass would be its various campuses, thus providing institutional access to hearings in various parts of the state and the potential for mutual benefit in terms of student internships and faculty research.

⁴⁶ In contrast, the issue of full-time employee v. part-time consultant status was not at issue for the mediators; the stakeholder’s perceptions, the available data, and the policy-making constituents all supported their effectiveness, including impartiality, in their present status, albeit in a different home.

⁴⁷ *See supra* notes 4-6 and accompanying text.

⁴⁸ By virtue of the training, they are certified mediators and conduct the mediations but never for the same case in which they serve as hearing officers.

⁴⁹ *See supra* note 16. For example, retaining the physical location of the BSEA personnel within the Department’s offices would not appear, despite its patent immediate appeal, to be a viable option after careful consideration.

⁵⁰ Essential elements of such operation include 1) at least semi-autonomy for continued specialized and stable expertise, and 2) management for full utilization and accountability.

⁵¹ Again, if the decision is for a new organizational host, essential to fulfillment of the Commissioner’s obligation (*see supra* notes 9-14 and accompanying text) will be incorporation of an effective Department check-and-balancing mechanism.