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# The Legal Boundaries for Impartiality of IDEA Hearing Officers: An Update

Perry A. Zirkel

Special education has become a significant area of litigation in the K-12 school context.<sup>1</sup> The primary reasons include: (1) the highly prescriptive and detailed requirements of the Individuals with Disabilities Act (“IDEA”)<sup>2</sup> and its regulations,<sup>3</sup> and (2) its user-friendly right of private action via an “impartial due process hearing,”<sup>4</sup> with the state option of a review officer tier<sup>5</sup> and the ultimate right of judicial appeal.<sup>6</sup>

As a result, the impartial hearing officer (“IHO”) is the fulcrum of this adjudicative process under the IDEA.<sup>7</sup>

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<sup>1</sup> E.g., Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011) (revealing the upward trajectory of IDEA litigation within the relatively level trend of K–12 litigation within the past three decades).

<sup>2</sup> 20 U.S.C. §§ 1401–1419 (2019).

<sup>3</sup> 34 C.F.R. §§ 300.1–300.537 (2020).

<sup>4</sup> 20 U.S.C. § 1415(f); 34 C.F.R. § 300.511(b). The number of states opting for a review officer tier has decreased from twenty-six in 1991 to eight in 2019. Jennifer F. Connolly et al., *State Due Process Hearing Systems under the IDEA: An Update*, 30 J. DISABILITY POL’Y STUD. 156, 157–58 (2019) (identifying Kansas, Kentucky, Nevada, New York, North Carolina, Ohio, and South Carolina); see also Lisa Lukasik, *Special-Education Litigation: An Empirical Analysis of North Carolina’s First Tier*, 118 W. VA. L. REV. 735, 745 n.38 (2016) (identifying Oklahoma as an additional state with a review officer tier).

<sup>5</sup> 20 U.S.C. § 1415(g); 34 C.F.R. § 300.514(b).

<sup>6</sup> 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516. For the IDEA exhaustion provision, see 20 U.S.C. § 1414(l); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017) (requiring exhaustion of claims that are based on the IDEA obligation of providing a “free appropriate public education” (“FAPE”)).

<sup>7</sup> The IDEA also provides for an alternative decisional dispute resolution process at the administrative level that is investigative rather than adjudicative. E.g., Perry A. Zirkel, *State Laws and Guidance for Complaint Procedures* 257

However, the IDEA only provides for the two standards for impartiality, stating that “at a minimum” IHOs shall not be: “(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or (II) a person having a personal or professional interest that conflicts with the person’s objectivity in the hearing.”<sup>8</sup> The first of these two standards is a per se prohibition, whereas the second one is an ad hoc conflict-of-interest standard depending on the specific situational circumstances.<sup>9</sup>

The framework of remaining standards are left—via the IDEA’s structure of “cooperative federalism”<sup>10</sup>—to state laws.<sup>11</sup> Ultimately, the courts serve as the chief cartographer for the legal boundaries of IDEA IHO impartiality in their interpretation, gap-filling, and application of the federal and

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*under the Individuals with Disabilities Education Act*, 368 EDUC. L. REP. 24 (2019); Perry A. Zirkel, *The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169 (2017); Perry A. Zirkel, *A Comparison of the IDEA’s Dispute Resolution Complaint Procedures and Due Process Hearings*, 326 EDUC. L. REP. 1 (2016).

<sup>8</sup> 20 U.S.C. § 1415(f)(3)(a)(i)(I)–(II)

<sup>9</sup> 20 U.S.C. § 1415(f)(3)(a)(i)(I)–(II)

<sup>10</sup> *E.g.*, *Bay Shore Union Free Sch. Dist. v. Kain*, 485 F.3d 730, 733–34 (2d Cir. 2007) (quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005)); *Evans v. Evans*, 818 F. Supp. 1215, 1223 (N.D. Ind. 1993) (recognizing that states may add requirements to the IDEA’s foundation).

<sup>11</sup> *E.g.*, Perry A. Zirkel, *State Laws for Due Process Hearings under the Individuals with Disabilities Education Act*, 38 J. NAT’L ADMIN. L. JUDICIARY 3, 17 (2019); *see also* Andrew Lee & Perry A. Zirkel, *State Laws for Due Process Hearings under the Individuals with Disabilities Education Act III: The Prehearing Stage*, 40 J. NAT’L ASS’N ADMIN. L. JUDICIARY (forthcoming spring 2021) (canvassing recusal provisions). For the limited additional impartiality requirements for review officers under the IDEA, *see e.g.*, N.Y. COMP. CODES R. & REGS. tit. 8, § 279.1(c) (2018). For the separable role of codes of conduct for administrative law judges to the extent that they are not incorporated in state (or federal) laws, *see generally* Ronnie A. Yoder, *The Role of Administrative Law Judge*, 22 J. NAT’L ADMIN. L. JUDICIARY 321 (2002). For an example of a customized code of conduct and related procedural forms for IDEA IHOs, *see e.g.*, PENNSYLVANIA SPECIAL EDUCATION DISPUTE RESOLUTION MANUAL 57 (2017), available at [www.odr-pa.org](http://www.odr-pa.org) (including a prefatory clarification of not having the force of law).

state framework.<sup>12</sup> Unlike the “thin” impartiality standard often associated with public school student disciplinary hearings,<sup>13</sup> the primary competing analogies are the appearance of bias approach that generally applies to judges<sup>14</sup> and the less strict approach that is closer to actual bias and that generally applies—due to their small close-knit context—to labor arbitrators.<sup>15</sup>

### Previous Research

As reviewed in the springboard synthesis for this update,<sup>16</sup> the previous research relating at least in part to IDEA IHO impartiality is notably limited in date, location, and focus.<sup>17</sup> Only two prior analyses were comprehensive

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<sup>12</sup> The secondary sources are the decisions of review officers in the dwindling number of two-tier jurisdictions (*supra* note 4) and the policy interpretations of the administering agencies for the IDEA and, to a limited extent within its overlap with the IDEA, Section 504 (*infra* note 16).

<sup>13</sup> John M. Malotnik, *Beyond Actual Bias: A Fuller Approach to Impartiality in School Exclusion Cases*, CHILD. LEGAL RTS. J. 112, 115 (2018) (characterizing the prevailing standards in such cases as “thin” and advocating a thicker approach that approximates appearance of bias).

<sup>14</sup> *E.g.*, 28 U.S.C. § 455 (2017).

<sup>15</sup> *E.g.*, Perry A. Zirkel & Peter Winebrake, *Legal Boundaries of Partiality and Misconduct of Labor Arbitrators*, 1992 DET. C.L. REV. 679, 685–86 (1992) (citing the intermediate standard in *Morelite Constr. Co. v. N.T.C. Dist. Council Carpenters Benefits Funds*, 748 F.2d 79, 88 (2d Cir. 1984)).

<sup>16</sup> Peter J. Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers under the Individuals with Disabilities Education Act: A Checklist of the Legal Boundaries*, 83 N. DAKOTA L. REV. 109, 111–14 (2007).

<sup>17</sup> *E.g.*, Martin Diebold & Robert Simpson, *An Investigation of the Effect of Due Process Hearing Officer on Placement Decisions*, 11 DIAGNOSTIQUE 69, 74 (1986) (finding that occupational background of IHOs in Alabama did not appear to affect their placement decisions); James Newcomer, Perry A. Zirkel, & Ralph Tarola, *Characteristics and Outcomes of Special Education Hearing and Review Officer Cases*, 123 EDUC. L. REP. 449, 453–56 (1998) (finding a significant difference in outcomes between Pennsylvania IHOs with and those without experience in education); 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) (finding in a midwestern state that settlement rates were higher for IHOs who were attorneys than for those who were not attorneys); Ann P. Turnbull, Bonnie Strickland, & H. Rutherford Turnbull, *Due Process Hearing Officers: 259*

in primary legal sources and exclusively focused on IHO impartiality.<sup>18</sup> In the first, which dates back to 1993, Drager and Zirkel divided the relevant sources, including court decisions and agency policy interpretations,<sup>19</sup> into two categories—"structural," including per se, and "situational" bias.<sup>20</sup> In the structural category, they found that courts and agencies had established the subsequently codified<sup>21</sup> per se prohibition against state education agency ("SEA") and local education agency ("LEA") employees from serving as either IHOs or, in two-tier states, review officers ("RO"s).<sup>22</sup> At the situational level, they concluded that courts and agencies gravitated more toward an actual bias than an appearance of bias approach.<sup>23</sup>

Next, in the predecessor of the present analysis, Maher and Zirkel synthesized the cumulative court decisions,

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*Characteristics, Needs, and Appointment Criteria*, 48 EXCEPTIONAL CHILD 48, 51 (1981) (finding in a survey of North Carolina district personnel who were responsible for appointing IHOs that the respondents' primary criterion for determining impartiality was the IHO's ability to be objective, regardless of prior school district experience).

<sup>18</sup> Elaine A. Drager & Perry A. Zirkel, *Impartiality Under the Individuals with Disabilities Education Act*, 86 EDUC. L. REP. 11 (1993); Maher & Zirkel, *supra* note 16.

<sup>19</sup> Drager & Zirkel, *supra* note 18, at 21–22, 35. The relevant agencies are parts of the U.S. Department of Education: (1) the Office of Special Education and Rehabilitation Services (OSERS) and its subsidiary that administers the IDEA—the Office of Special Education Programs (OSEP), and (2) the Office for Civil Rights (OCR), which administers Section 504 and the Americans with Disabilities Act in the K–12 context. See <https://www2.ed.gov/about/offices/or/index.html>.

<sup>20</sup> Drager & Zirkel, *supra* note 18, at 14–17.

<sup>21</sup> See *supra* note 8 and accompanying text.

<sup>22</sup> Drager & Zirkel, *supra* note 18, at 20–24. However, the cited case law largely arose from the approach for administrative adjudicators generally rather than IDEA IHOs specifically, such as *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 998 (1st Cir. 1990) (applying standard of "actual bias or hostility," citing cases arising from state agency adjudications not tied to special education or another particular administrative sub-area). See *supra* note 4 and accompanying text.

<sup>23</sup> Drager & Zirkel, *supra* note 18, at 29.

RO decisions,<sup>24</sup> and federal agency interpretations as of 2007 into a checklist template.<sup>25</sup> More specifically, their template consisted of a table that (a) in its rows identified various more specific categories within the overall Drager and Zirkel framework that had arisen in this cumulative body of law, such as employment, occupation, relationship, and conduct, and (b) in its rows placed an entry for each column, footnoting the supporting sources, within a four-part continuum ranging from “clearly impartial” to “clearly biased.”<sup>26</sup> They found that the majority of the entries were in the “presumptively impartial” category, although it was not entirely clear whether the basis for the classification was the underlying approach or the ultimate outcome.<sup>27</sup> In any event, the only cited instances of an outcome adverse to the IHOs or ROs impartiality were in either the per se categories of SEA or LEA employment<sup>28</sup> or the presumptively biased category of ex parte communications.<sup>29</sup> Overall, they concluded that for the various situational categories the

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<sup>24</sup> Although of clearly less legal weight than IHO decisions, review officer decisions more frequently address the impartiality issue of the first tier. Maher & Zirkel, *supra* note 16, at 122. Moreover, at the time of the Maher and Zirkel analysis, the number of two-tier states, although notably decreased from the Drager and Zirkel analysis, still accounted for approximately a third of the states. *Id.*

<sup>25</sup> *Supra* note 18. They also pointed out that state laws added more specific standards, although only identifying two examples. Maher & Zirkel, *supra* note 16, at 110 n.11, 115–19, 120 n.62.

<sup>26</sup> Maher & Zirkel, *supra* note 16, at 115–19. Their table provide a parallel but differentiated set of entries for IHOs and ROs, respectively, in light of the still notable frequency of states with and sources specific to a second tier. *See supra* note 24.

<sup>27</sup> Maher & Zirkel, *supra* note 16, at 116–17 nn.36, 41. For instance, they listed various contractual-relationship situations in the “clearly biased” category, but the cited agency interpretations and case law used the per se employment categories only as a reference point for an ad hoc approach that had an adverse outcome in these particular situations. *Id.*

<sup>28</sup> *Id.* at 115 nn.32–33.

<sup>29</sup> *Id.* at 116 n.43 (citing *Hollenback v. Bd. of Educ.*, 699 F. Supp. 658, 668–69 (N.D. Ill. 1988); *Murphy v. Pa. Dep’t of Educ.*, 460 A.2d 398, 401 (Pa. Commw. Ct. 1983)).

judicial appearance-of-bias standard was not applicable,<sup>30</sup> and instead, the prevailing approach was deferential.<sup>31</sup> Their recommendations included (1) development of a customized approach, (2) IDEA regulatory requirements for disclosure, and (3) state law expansion of the per se categories and appointment procedures that remove or counterbalance district participation.<sup>32</sup>

## I. PURPOSE AND METHOD

The purpose of this article is to provide an update of the Maher and Zirkel case law analysis, with limited appropriate adjustments. More specifically, the template remains the same except for two adjustments: (1) based on the limited remaining number of two-tier jurisdictions and the similarly reduced applicable case law specific to the second tier, the focus is on IHOs with the limited citations specific to review officers integrated into the footnotes for the entries in each row;<sup>33</sup> and (2) for differentiation from the original version, the new item content is italicized and the

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<sup>30</sup> *Id.* at 120. However, rather than the customized approach that they recommended based on the small community of special education, the cited court decision, which is one of the few analyses that specifically addressed the issue, relied on the aforementioned “actual bias, hostility or prejudice” approach derived from more general administrative adjudications. *Falmouth Sch. Comm. v. Mr. & Mrs. B.*, 106 F. Supp. 2d 69, 73 (D. Me. 2000) (citing *Dell v. Bd. of Educ.*, 32 F.3d 1053, 1064–66 (7th Cir. 1994); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 997–98 (1st Cir. 1990)).

<sup>31</sup> Maher & Zirkel, *supra* note 16, at 120. “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 [IHO or RO].” *Id.*

<sup>32</sup> *Id.* at 121–22.

<sup>33</sup> Connolly et al., *supra* note 4, at 157–58; Lukasik, *supra* note 4, at 745 n.38; Maher & Zirkel, *supra* note 16, at 115–19; Perry A. Zirkel, *State Laws for Due Process Hearings Under the Individuals with Disabilities Education Act II: The Post-Hearing Stage*, 40 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1, 3 n.9 (2020); see *supra* note 27.

prior entries are listed in small parentheses.<sup>34</sup>

The data collection was from two overlapping electronic databases: Westlaw and LRP's SpecialEdConnection<sup>®</sup>,<sup>35</sup> and the selection was limited to the period January 1, 2007<sup>36</sup> to September 1, 2020.<sup>37</sup> The Boolean search included variations of not only “impartiality,” but the obverse or overlapping terms of “bias,” “disqualification,” and “recusal” in connection with the “Individuals with Disabilities Education Act” and “hearing officer.” Clarifying the boundaries for selection among the resulting rulings, the exclusions were for (a) impartiality cases resolved on grounds other than the merits;<sup>38</sup> (b) cases in which the impartiality issue was only incidental and

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<sup>34</sup> The parenthetical entries are only approximations due to the aforementioned imprecision and the elimination of the separate set of RO items. Maher & Zirkel, *supra* note 16, at 116–17 nn.36, 41; *see supra* note 27 and accompanying text.

<sup>35</sup> This specialized database includes not only court decisions but also agency interpretations as well as IHO and RO decisions in the context of the IDEA and Section 504. The citations to this source are to “IDELR” or for what approximately corresponds to WL citations, “LRP.”

<sup>36</sup> The starting date was based on the approximate ending of Maher and Zirkel's coverage. The limited sources that they identified in 2007 were excluded herein. Maher & Zirkel, *supra* note 16, at 109–22.

<sup>37</sup> The final check for the selection “data” was October 1, 2020, thus leaving only a limited possibility of the belated publication of additional relevant cases decided prior to September 1, 2020.

<sup>38</sup> *E.g.*, R.R. v. Scarsdale Union Free Sch. Dist., 366 F. App'x 239 (2d Cir. 2010); Horen v. Bd. of Educ., 655 F. Supp. 2d 794 (N.D. Ohio 2009) (waiver); H.H. v. Ind. Bd. of Special Educ. Appeals, 50 IDELR ¶ 34 (N.D. Ind. 2008) (dismissed as systemic claim not part of original complaint); J.N. v. S.W. Sch. Dist., 55 F. Supp. 3d 589 (W.D. Pa. 2014) (admission of supplementary evidence concerning alleged bias); H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 59 IDELR ¶ 108 (S.D.N.Y. 2012), *aff'd on other grounds*, 528 F. App'x 64 (2d Cir. 2013) (inadmissible evidence, as part of the line of cases re New York's RO); B.D. v. District of Columbia, 77 IDELR ¶ 124 (D.D.C. 2020); D.T. v. Sumner Cnty. Sch., 75 IDELR ¶ 224 (M.D. Tenn. 2019); Donahue v. Kan. Bd. of Educ., 75 IDELR ¶ 12 (D. Kan. 2019); Avaras v. Clarkstown Cent. Sch. Dist., 75 IDELR ¶ 71 (S.D.N.Y. 2019); R.S. v. Bedford Cent. Sch. Dist., 899 F. Supp. 2d 285 (S.D.N.Y. 2012); H.A. v. Teaneck Bd. of Educ., 54 IDELR ¶ 98 (D.N.J. 2010) (subject to or subordinated within exhaustion); Haw. Dep't of Educ. v. Zachary B., 52 IDELR ¶ 213 (D. Haw. Dec. 31, 2009) (subsumed within remedial delegation).

unspecific;<sup>39</sup> and (c) impartiality cases in which the IHO or RO was responding to a motion for recusal rather than it being a subject of review by a higher adjudicative level.<sup>40</sup> Thus, the included cases started at the RO level.<sup>41</sup> Finally, the scope was limited to impartiality, not the overlapping but separable issue of competence,<sup>42</sup> of IHOs.<sup>43</sup>

## II. FINDINGS

The following table provides the resulting updated checklist, with due differentiation from the findings for the prior period for a more complete and comparative overview:<sup>44</sup>

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<sup>39</sup> *E.g.*, M.G. v. Williamson Cnty. Sch., 720 F. App'x 280, 284 n.3 (6th Cir. 2018); Doe v. Attleboro Pub. Sch., 960 F. Supp. 2d 286, 296 n.5 (D. Mass. 2013) (tangential mention without sufficiently specific nature of claim); *In re* Student with a Disability, 115 LRP 27798 (N.Y. SEA 2015) (general conclusory allegations).

<sup>40</sup> *E.g.*, Harford Cnty. Pub. Sch. 117 LRP 23626 (Md. SEA 2016); Duxbury Pub. Sch., 108 LRP 64293 (Mass. SEA 2008) (IHO recusal rulings); Bd. of Educ. of Mex. Acad., 107 LRP 64195 (N.Y. SEA 2007) (RO recusal ruling).

<sup>41</sup> "SEA" in the parenthetical for a case citation herein designates a decision at the IHO or RO level.

<sup>42</sup> For the competence criteria, the most recent amendments of the IDEA added directly after the aforementioned impartiality standards, *see* 20 U.S.C. § 1415(f)(3)(A)(ii)–(iv).

<sup>43</sup> For cases that addressed both issues, the coverage here was limited to the ruling specific to impartiality. *E.g.*, A.M. v. District of Columbia, 933 F. Supp. 2d 193, 207 (D.D.C. 2013) (ruling that IHO's efficient management of the hearing for timeliness did not violate impartiality, with intertwined treatment of competence issue).

<sup>44</sup> For the original version, representing the prior period, *see* Maher & Zirkel, *supra* note 16, at 115–19. Here, the italicized items in column 1 are additions, and the small parenthetical entries in the other columns are for the prior period. *See supra* text accompanying note 34 and accompanying text.

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*Impartiality of IDEA Hearing Officers*  
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*Table: Overview of Updated Case Law Specific to IHO Impartiality*

	Clearly Impartial	Presumptively Impartial	Presumptively Biased	Clearly Biased
<b>Employment</b>				
Board member, chief officer, or other employee of the SEA				✓ <sup>45</sup> (✓)
Board member, chief officer, or other employee of the party LEA				✓ <sup>46</sup> (✓)
Board member, chief officer, or other employee of another LEA		✓ <sup>47</sup> (✓)		

<sup>45</sup> Letter to Chester, 52 IDELR ¶ 106 (OSERS 2009) (interpreting IDEA regs as clearly prohibiting IHOs from being SEA employees and suggesting acceptable alternatives for the inquiring state to have them serve as separate state employees).

<sup>46</sup> Greendale (WI) Sch. Dist., 65 IDELR ¶ 155 (OCR 2014); Matthews Cnty. (VA) Pub. Sch., 114 LRP 42768 (OCR 2014); Norwalk (CT) Pub. Sch., 108 LRP 21708 (OCR 2007); Ferguson-Florissant (MO) R-II Sch. Dist., 108 LRP 42444 (OCR 2007) (for district's § 504 hearings—usually via confusion with 504 grievance procedure).

<sup>47</sup> C.E. v. Chappaqua Cent. Sch. Dist., 695 F. App'x 621, 624–25 (2d Cir. 2017) (finding the former superintendent of another LEA years earlier was complying with N.Y. regulation requiring at least a two-year gap).

Former employee of SEA or LEA or spouse who is LEA employee	(√)	√ <sup>48</sup>		
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<sup>48</sup> D.R. v. Dep't of Educ., 827 F. Supp. 2d 1164, 1167 (D. Haw. 2011) (former SEA employee).

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<b>Occupation</b>				
private attorney for LEA's law firm				(✓)
private attorney who represented other LEAs and/or other parents		✓ <sup>49</sup> (✓)		
professor at a state college or university		(✓)		
professor who participated in state special education policy formulation			(✓)	
<b>Relationships</b>				
<i>continuing relationship with SEA employee</i>		✓ <sup>50</sup> (✓)		
prior contact with either party or parties' attorney		✓ <sup>51</sup> (✓)		
continuing consulting relationship with LEA			(✓)	
<i>contractual relationship with other LEAs</i>		✓ <sup>52</sup>		
<b>Personal Characteristics</b>				
negligible connection of family members	(✓)			

<sup>49</sup> *SCO of Fam. Serv.*, 2017 LRP 43926 (N.Y. SEA 2017) (disclosed and nonprejudicial).

<sup>50</sup> *J.S. v. N.Y.C. Dep't of Educ.*, 69 IDELR ¶ 153 (S.D.N.Y. 2017) (no evidence of substantive involvement or effect); *W.T. v. Bd. of Educ. of N.Y.C. Sch. Dist.*, 716 F. Supp. 2d 270 (S.D.N.Y. 2010) (cohabitation of review officer with SEA special education attorney).

<sup>51</sup> *Allyson B. v. Montgomery Cnty. Intermediate Unit No. 23*, 54 IDELR ¶ 64 (E.D. Pa. 2010), *aff'd*, *A.B. v. Montgomery Cnty. Intermediate Unit*, 409 F. App'x 602 (3d Cir. 2011) (party attorney formerly worked as fellow IHO—due process>IHO manual); *In re Student with a Disability*, 113 LRP 16887 (N.Y. SEA 2013) (unproven and no showing of actual bias, though recommending disclosure).

<sup>52</sup> *In re Student with a Disability*, 112 LRP 8925 (N.Y. SEA 2012) (although disclosure would have been preferable).

Performance or Product				
<i>prehearing conduct</i>		√ <sup>53</sup>		
prior decisions		√ <sup>54</sup> (√)		
ex parte communications		√ <sup>55</sup>	(√)	
hearing conduct <i>and/or</i>		√ <sup>56</sup> (√)		

<sup>53</sup> *Morrison v. Perry Sch. Dep't*, 2019 WL 3035283 (D. Me. July 11, 2019), *adopted*, 2019 WL 3502879 (D. Me. Aug. 1, 2019) (prehearing motions); *James D. v. Bd. of Educ.*, 642 F. Supp. 2d 804, 819 (N.D. Ill. 2009) (denial of request for neutral location—contrary to state law); *E. Islip Union Free Sch. Dist.*, 119 LRP 4661 (N.Y. SEA 2018); *In re Student with a Disability*, 109 LRP 56226 (N.Y. SEA 2008) (broad-based challenge extending to hearing conduct and decision preparation but including prehearing scheduling).

<sup>54</sup> *Cruz v. N.Y.C. Dep't of Educ.*, 74 IDELR ¶ 204 (S.D.N.Y. 2019) (explaining that legal errors in prior proceeding “rarely suffice”); *Dep't of Educ. v. Ria L.*, 64 IDELR ¶ 236 (D. Haw. 2014) (prior rulings before remand were not extrajudicial and, in any event, did not show appearance of bias); *N.Y.C. Dep't of Educ.*, 119 LRP 4663 (N.Y. SEA 2019) (comments re prior decision for same parties); *In re Student with a Disability*, 109 LRP 47584 (DODEA 2008) (administrative rather than substantive matters without material effect); *cf. K.I. v. Durham Pub. Sch. Bd. of Educ.*, 76 IDELR ¶ 287 (M.D.N.C. 2020) (in context of exhaustion, prior adverse ruling on timing did not overcome presumption of impartiality); *Price v. Upper Darby Sch. Dist.*, 68 IDELR ¶ 214 (E.D. Pa. 2016) (no violation for failure to disclose superficial involvement with prior case re same child, albeit referring to state appearance-of-impartiality ethical standards for IDEA IHOs); *R.S. v. Lakeland Sch. Dist.*, 56 IDELR ¶ 211 (S.D.N.Y. 2011); *R.E. v. New York City Dep't of Educ.*, 785 F. Supp. 2d 28 (E.D.N.Y. 2011), *rev'd on other grounds*, 694 F.3d 167 (2d Cir. 2012); *TC v. Valley Cent. Sch. Dist.*, 777 F. Supp. 2d 577 (S.D.N.Y. 2011); *C.G. v. New York City Dep't of Educ.*, 752 F. Supp. 2d 355 (S.D.N.Y. 2010); *W.T. v. Bd. of Educ. of N.Y.C. Sch. Dist.*, 716 F. Supp. 2d 270 (S.D.N.Y. 2010); *J.N. v. Pittsburgh City. Sch. Dist.*, 536 F. Supp. 2d 564 (W.D. Pa. 2008) (among line of cases regarding box score statistics concerning review officer—insufficient alone, as with judges generally).

<sup>55</sup> *James D. v. Bd. of Educ.*, 642 F. Supp. 2d 804, 820 (N.D. Ill. 2009) (unproven); *W.H. v. Clovis Unified Sch. Dist.*, 52 IDELR ¶ 258 (E.D. Cal. 2009) (disclosed per state law and harmless effect); *In re Student with a Disability*, 109 LRP 47579 (DOD SEA 2008); *In re Student with a Disability*, 109 LRP 47584 (DOD SEA 2008) (rejected here as administrative rather than substantive).

<sup>56</sup> *Johnson v. Bos. Pub. Sch.*, 906 F.3d 182 (1st Cir. 2018); *Nickerson-Reti v. Lexington Pub. Sch.*, 893 F. Supp. 2d 276 (D. Mass. 2012) (credibility determinations); *Doe v. Cape Elizabeth Sch. Dep't.*, 382 F. Supp. 3d 83 (D. Me. 2019); *D.S. v. Parsippany Troy Hills Bd. of Educ.*, 73 IDELR ¶ 143 (D.N.J. 2018); *B.H. v. Joliet Sch. Dist. No. 86*, 54 IDELR ¶ 121 (N.D. Ill. 2010); *Wilson*

v. Colbert Cnty. Bd. of Educ., 2008 WL 11424188 (N.D. Ala. Apr. 17, 2008); Slater v. Exeter-W. Greenwich Sch. Dist., 2007 WL 2067719 (D.R.I. July 16, 2007); N.Y.C. Dep't of Educ., 119 LRP 1582 (N.Y. SEA 2018); *In re Student with a Disability*, 2018 LRP 50601 (N.Y. SEA 2018); *In re Student with a Disability*, 2017 LRP 13921 (N.Y. SEA 2017) (disagreement with unfavorable decision); Tehachapi Unified Sch. Dist. v. K.M., 2019 WL4735735 (E.D. Cal. Sept. 28, 2018); *In re Student with a Disability*, 2015 LRP 51106 (N.Y. SEA 2015) (alleged undue weight to other side's evidence in decision); Genn v. New Haven Bd. of Educ., 219 F. Supp. 3d 296 (D. Conn. 2016) (curt comments to parent side in response to their discourteous conduct—no prejudicial effect shown); *In re Student with a Disability*, 118 LRP 50584 (N.Y. SEA 2018) (incivility to both parties); A.M. v. District of Columbia., 933 F. Supp. 2d 193 (D.D.C. 2013) (curtailing off-point evidence and active>asleep); *In re Student with a Disability*, 119 LRP 41379 (N.Y. SEA 2019) (familiarity with a witness—disclosed and partial analogy to case law re judges); *In re Student with a Disability*, 115 LRP 50231 (N.Y. SEA 2015); N.Y.C. Dep't of Educ., 107 LRP 53514 (N.Y. SEA 2007) (activist IHO—not contrary to state regs); Sudbury Pub. Sch. v. Mass. Dep't of Elementary & Secondary Educ., 762 F. Supp. 2d 254 (D. Mass. 2010) (active questioning of witnesses); Bd. of Educ. v. Risen, 61 IDELR ¶ 130 (N.D. Ill. 2013); M.N. v. Rolla Pub. Sch. Dist. 31, 59 IDELR ¶ 44 (W.D. Mo. 2012) (marginal within context of deference—comments in management of hearing); Sch. Bd. of Norfolk v. Brown, 769 F. Supp. 2d 928 (E.D. Va. 2010); S.A. v. Exeter Union Sch. Dist., 2010 WL 4942539 (E.D. Cal. Nov. 24, 2010) (marginal within context of deference—active questioning of witnesses); J.C. v. New Fairfield Bd. of Educ., 56 IDELR ¶ 207 (D. Conn. 2011) (marginal as alternative to inapplicability of state APA—both decision and nonprejudicial evidentiary determinations); Avila v. Spokane Sch. Dist. No. 81, 71 IDELR ¶ 172 (E.D. Wash. 2018), *aff'd on other grounds*, 744 F. App'x 506 (9th Cir. 2019); J.S. v. N.Y.C. Dep't of Educ., 69 IDELR ¶ 153 (S.D.N.Y. 2017); E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417 (S.D.N.Y. 2010), *aff'd on other grounds*, 487 F. App'x 619 (2d Cir. 2012); W.H. v. Clovis Unified Sch. Dist., 52 IDELR ¶ 258 (E.D. Cal. 2009); *Potsdam Cent. Sch. Dist.*, 117 LRP 13961 (N.Y. SEA 2017); *In re Student with a Disability*, 115 LRP 20886 (N.Y. SEA 2015); *In re Student with a Disability*, 113 LRP 7510 (Okla. SEA 2011); *Richmond Heights Local Sch. Dist.*, 116 LRP 31041 (Oh. SEA 2016); *York Cnty. Sch. Dist. Three*, 108 LRP 70128 (S.C. SEA 2007) (evidentiary determinations, including time constraints); Wanham v. Everett Pub. Sch., 550 F. Supp. 2d 152, 159 (D. Mass. 2008); *In re Student with a Disability*, 119 LRP 41383 (N.Y. SEA 2019); *In re Student with a Disability*, 119 LRP 36208 (N.Y. SEA 2019); *N.Y.C. Dep't of Educ.*, 118 LRP 50597 (N.Y. SEA 2018), *rev'd on other grounds sub nom. Soria v. N.Y.C. Dep't of Educ.*, 74 IDELR ¶ 293 (S.D.N.Y. 2019) (conduct and decision); *In re Student with a Disability*, 118 LRP 33995 (N.Y. SEA 2018); *York Cnty. Sch. Dist. Three*, 108 LRP 6769 (S.C. SEA 2008) (broad-based challenge to IHO conduct and decision, such as curtailing evidence—broad state regs + harmless error); *Akron Bd. of Educ.*, 116 LRP 10766 (Oh. SEA 2015), *aff'd on other grounds sub nom. Barney v. Akron Bd. of Educ.*, 763 F. App'x 528 (6th Cir. 2019) (unproven

<i>decision content</i>				
<b>System</b>				
internal consultation process	(√)			
lack of parental participation in selection	(√)			
• participation by LEA		√ <sup>57</sup> (√)		
<b>Miscellaneous</b>				
<i>public disability-related expression</i>			√ <sup>58</sup>	

Overall, the updated items and entries follow a similar pattern to the previous iteration, with the presumption of impartiality being the prevailing approach—with the exception of the codified per se categories of SEA and LEA employment. On successive levels of closer examination, other, more specific findings emerge.

First, the entries for the more recent period, when examined in tandem with the footnoted sources, reveal that the per se employment prohibitions are limited to agency reinforcement,<sup>59</sup> whereas the bulk of the case law has shifted to the performance and product area. More specifically, although IHO relationships continue to be an area of occasional litigation,<sup>60</sup> IHO conduct and decisions have become the focal categories of impartiality challenges and rulings.<sup>61</sup>

Second, the approach evident in these expanding

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defamation of parent’s counsel). *But cf. In re Student with a Disability*, 119 LRP 36210 (N.Y. SEA 2019) (mistake and abuse of discretion but not sufficient for bias); *N.Y.C. Dep’t of Educ.*, 118 LRP 50576 (N.Y. SEA 2018) (remanding for new IHO based on abundance of caution).

<sup>57</sup> *Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 111 LRP 65918 (Nev. SEA 2011) (broad-based including payment of IHO fee).

<sup>58</sup> *Cf. Stengle v. Off. of Disp. Resol.*, 631 F.2d 564 (M.D. Pa. 2009) (rejected First Amendment and § 504 claims of nonrenewed IHO who engaged in disability advocacy via a blog—publicly perceived lack of impartiality).

<sup>59</sup> *Supra* notes 45–46.

<sup>60</sup> *Supra* notes 50–52 and accompanying entries.

<sup>61</sup> *Supra* notes 53–56 and accompanying entries.

areas of case law is a rather consistent presumption in favor of the IHO's impartiality.<sup>62</sup> Examination of the cited cases reveals that the presumption is usually tied to administrative law judges rather than "traditional" judges.<sup>63</sup> For example, First Circuit courts have continued to apply the "actual bias and hostility" and its intertwined "presumption of honesty and integrity" approach,<sup>64</sup> which is applicable to administrative adjudicators in general.<sup>65</sup> Courts in other jurisdictions have similarly and expressly applied this deferential approach.<sup>66</sup> Alternatively, other courts have provided corresponding IHO latitude via an outcome-based approach, whether via a two-step approach of procedural FAPE under the IDEA,<sup>67</sup> or a more general approach of prejudicial effect.<sup>68</sup> Overall, these prevailing variations came much closer to an actual appearance of bias approach,

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<sup>62</sup> *Supra* notes 53–57 and accompanying entries.

<sup>63</sup> The use of "traditional" in this context is not uncommon but only approximate. *E.g.*, *Sherrod v. Birnbaum*, 457 F. App'x 573, 575 (7th Cir. 2012); *Harrison v. Coffman*, 35 F. Supp. 2d 722, 726 (E.D. Ark. 1999). Like the corresponding use of "hidden" for administrative law judges, it is subject to changing awareness over time. *E.g.*, *Yoder*, *supra* note 11, at 323 (citing, *inter alia*, Thomas C. Mans, *Selecting the "Hidden Judiciary": How the Merits Process Works in Choosing Administrative Law Judges*, 63 JUDICATURE 60 (1979)).

<sup>64</sup> *E.g.*, *Johnson v. Bos. Pub. Sch.*, 906 F.3d 182, 193–94 (1st Cir. 2018); *Morrison v. Perry Sch. Dep't*, 2019 WL 3035283, 23 (D. Me. July 11, 2019), *adopted*, 2019 WL 3502879 (D. Me. Aug. 1, 2019); *Nickerson-Reti v. Lexington Pub. Sch.*, 893 F. Supp. 2d 276, 288 (D. Mass. 2012).

<sup>65</sup> For the precedent cited in these cases, see *supra* notes 22, 30.

<sup>66</sup> *E.g.*, *A.M. v. District of Columbia*, 933 F. Supp. 2d 193, 206 (D.D.C. 2013) ("A hearing officer enjoys 'a presumption of honesty and integrity, which is only rebutted by a showing of some substantial countervailing reason to conclude that a decisionmaker is actually biased,'" citing a D.C. Circuit decision referring to administrative adjudications generally); *M.N. v. Rolla Pub. Sch. Dist. 31*, 59 IDELR ¶ 44 (W.D. Mo. 2012) ("Administrative officers are presumed to be unbiased," citing an Eighth Circuit decision concerning federal ALJs).

<sup>67</sup> *E.g.*, *James D. v. Bd. of Educ.*, 642 F. Supp. 2d 804, 819 (N.D. Ill. 2009) (no resulting FAPE effect on student or parents). For this two-step approach, see 20 U.S.C. § 1415(f)(3)(E) (2018).

<sup>68</sup> *E.g.*, *Genn v. New Haven Bd. of Educ.*, 219 F. Supp. 3d 296, 311 (D. Conn. 2016) (failure to show that the IHO's conduct affected the case outcome).

with the exceptions being almost negligible.<sup>69</sup>

Third, an examination of the footnoted case law reveals that state law standards have played a role in a more than negligible, but still rather limited number of the cases.<sup>70</sup> Moreover, although the specific state law standard has been outcome-determinative in the occasional case,<sup>71</sup> it has at least as often been of non-controlling significance.<sup>72</sup>

At the final and perhaps most telling level, an examination of the outcomes of the cited sources for this 2007–2020 period reveals that the various challenges to IHO impartiality have almost entirely been unsuccessful, with the limited exception of the agency determinations in the per se employment category.<sup>73</sup> Indeed, none of the second-tier and court reviews has rendered a ruling of IHO impartiality.<sup>74</sup> The closest to such a ruling were two recent New York RO decisions.<sup>75</sup> In the first of these decisions, the RO concluded that “there is insufficient evidence on the record to affirmatively establish bias on the part of the IHO.”<sup>76</sup>

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<sup>69</sup> Cf. *Dep’t of Educ. v. Ria L.*, 64 IDELR ¶ 236 (D. Haw. 2014) (default use of appearance of bias); *In re Student with a Disability*, 119 LRP 41383 (N.Y. SEA 2019) (alternative use of actual and appearance of bias); *In re Student with a Disability*, 119 LRP 41379 (N.Y. SEA 2019) (alternative use of judicial analogy with due distinction).

<sup>70</sup> *Supra* notes 55–58 and accompanying entries.

<sup>71</sup> *E.g.*, *C.E. v. Chappaqua Cent. Sch. Dist.*, 695 F. App’x 621, 625 (2d Cir. 2017) (ruling that IHO, a former superintendent of another LEA earlier in his career, complied with N.Y. regulation requiring at least two-year gap).

<sup>72</sup> *E.g.*, *James D. v. Bd. of Educ.*, 642 F. Supp. 2d 804, 820 (N.D. Ill. 2009) (ruling that IHO’s denial of request for neutral location, while contrary to state law, raised “legitimate concerns,” but the parent failed to show that it denied the child a FAPE or demonstrated bias).

<sup>73</sup> *Supra* notes 45–46 and accompanying entries.

<sup>74</sup> As a result, an RO’s repeated conclusion that “[a]llegations of hearing officer bias and lack of impartiality are *rarely* successful” amounts to an overstatement for the case law during the last several years. *Richmond Heights Local Sch. Dist.*, 116 LRP 31041, at 25 (Oh. SEA 2016); *Akron Bd. of Educ.*, 116 LRP 10766, at 20 (Oh. SEA 2015), *aff’d on other grounds sub nom. Barney v. Akron Bd. of Educ.*, 763 F. App’x 528 (6th Cir. 2019) (emphasis added).

<sup>75</sup> *In re Student with a Disability*, 119 LRP 36210 (N.Y. SEA 2019); *N.Y.C. Dep’t of Educ.*, 118 LRP 50576 (N.Y. SEA 2018).

However, in the absence in the record or in the decision of an explanation for the IHO's denial of recusal, the RO, "in an abundance of caution," remanded the case to another IHO.<sup>77</sup> In the subsequent decision, the RO concluded:

Here, although I have found that the IHO should have taken into account the scheduling of the impartial hearing and abused his discretion in his evidentiary rulings, the error did not create an appearance of partiality in favor of the district nor was there evidence of actual bias on behalf of the IHO.<sup>78</sup>

However, as additional assurance, the RO accepted additional evidence and modified the IHO's decision to remediate the error.<sup>79</sup>

### **Discussion**

Impartiality is an inherently critical criterion for hearing officers, as it is for traditional judges. However, two countervailing interests merit consideration in formulating and interpreting the applicable standards. The first countervailing interest is applicable to administrative law judges and other such hearing officers in general. The aforementioned<sup>80</sup> *Falmouth* court opinion insightfully expressed this countervailing cluster of considerations as follows:

[T]here are powerful institutional interests in making post-decision challenges to an adjudicator the exception and not the rule.

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<sup>76</sup> *N.Y.C. Dep't of Educ.*, 118 LRP 50576 (N.Y. SEA 2018), at \*9–10.

<sup>77</sup> *Id.* at \*10.

<sup>78</sup> *In re Student with a Disability*, 119 LRP 36210 (N.Y. SEA 2019), at \*10.

<sup>79</sup> *Id.* at 11.

<sup>80</sup> *Supra* note 30.

Each losing party searches for every possible reason to attack a negative decision, and issues that were insignificant or evanescent before the decision suddenly and unfairly (to the other party and the adjudicator) become monumental. An “appellate” tribunal is seldom in a good position to make the necessary factual determination. Discovery presents its own dangers. Unless a very high standard is set for any disgruntled litigant to be able to question an adjudicator about his/her personal affairs, fishing expeditions on the subject will be inevitable.<sup>81</sup>

The second countervailing consideration is missing in the applicable case law to date—the specialized purpose and nature of the IDEA.<sup>82</sup> As for its purpose, “[t]he legislative history, statutory terms, and regulatory framework of the IDEA [that] all emphasize promptness as an indispensable element of the statutory scheme.”<sup>83</sup> As for

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<sup>81</sup> *Falmouth Sch. Comm. v. Mr. & Mrs. B.*, 106 F. Supp. 2d 69, 73 (D. Me. 2000).

<sup>82</sup> *See generally About IDEA, Individuals with Disabilities Education Act*, U.S. DEPARTMENT OF EDUCATION, <https://sites.ed.gov/idea/about-idea/#IDEA-Purpose>.

<sup>83</sup> *E.g.*, *Amann v. Stow*, 991 F.2d 929, 932 (1st Cir. 1993) (citing *Spiegler v. District of Columbia*, 866 F.2d 461 (D.C. Cir. 1986); *Adler v. Educ. Dep’t of State of N.Y.*, 760 F.2d 454 (2d Cir. 1985); *Bow Sch. Dist. v. Quentin W.*, 750 F. Supp. 546 (D.N.H. 1990)). As a commonly cited example of this purpose, the Act’s principal sponsor emphasized the importance of promptly completed

its nature, the field of special education under the IDEA and its corollary state laws entails a specialized subject matter that is so narrowly practiced that state and local education agency representatives, attorneys on both sides, and IHOs often have occasion to interact beyond, not just within, the hearing process.<sup>84</sup> Yet, the “judicialization” of IDEA IHOs,<sup>85</sup> which includes the gradual but steady increased use of lawyers generally and administrative law judges (“ALJs”) more specifically,<sup>86</sup> and the resulting trade-off of specialized expertise,<sup>87</sup> runs the risk of (1) prolongation of the hearing process and (2) imposition of an insufficiently tailored approach to impartiality.<sup>88</sup>

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due process hearings. *Dell v. Bd. of Educ.*, 32 F.3d 1053, 1060 (7th Cir. 1994); *Blackman v. District of Columbia*, 277 F. Supp. 71, 80 n.8 (D.D.C. 2003) (citing Senator Williams’ statement in the final Senate debate at 121 CONG. REC. 37,416 (1975)).

<sup>84</sup> This narrowly specialized field not only yields repeat players at IDEA hearings but also informal and formal interactions at conferences and other professional activities focused on special education law. Connolly et al., *supra* note 4, at 161.

<sup>85</sup> *E.g.*, Pery A. Zirkel, Zorka Karanxha, & Anastasia D’Angelo, *Creeping Judicialization of Special Education Hearings: An Exploratory Study*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 27, 38–44 (2007) (finding a gradual increase in varying objective indicators of legalization in the IHO decisions in a single state).

<sup>86</sup> Connolly et al., *supra* note 4, at 161 (finding a “judicialization trend” toward legal background in place of special education background and toward full-time ALJs rather than part-time IHOs). The shift to ALJs is often without careful connection to and customization of the generic nature of state APA laws, thus causing not only ambiguities to the extent of their application, particularly when conflicting with state special education laws, but also disharmonies with the particular spirit and nature of the IDEA.

<sup>87</sup> A foundational pillar of judicial deference to IDEA IHOs is the presumption that they, unlike courts, have particular expertise in this specialized field. *E.g.*, *T.K. v. N.Y.C. Dep’t of Educ.*, 810 F.3d 869, 875 (2d Cir. 2016); *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 450 (3d Cir. 2015) (recognizing IHOs’ “specialized knowledge and experience”); *L.M. v. Capistrano Unified Sch. Dist.*, 462 F. App’x 745, 747 (9th Cir. 2011) (citing IHOs’ special “expertise”); *Lessard v. Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 24 (1st Cir. 2008) (relying on IHOs’ “specialized knowledge”).

<sup>88</sup> As a baseline for the time-consuming over-legalized approach, a legal scholar on the eve of the passage of the IDEA, in the wake of experience with the hearing process in Pennsylvania under *PARC v. Commonwealth*, 343 F. Supp.

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Instead, similar to the relatively small and specialized context of labor arbitration,<sup>89</sup> a customized approach that approximates actual, rather than appearance of, bias continues to be un-realized but warranted for the impartiality of IDEA IHOs.<sup>90</sup> Courts that face impartiality challenges and the corollary state laws under the IDEA need to add this reinforcing customized consideration. More specifically, because the structural areas of employment and occupation are largely settled,<sup>91</sup> the priority for the reinforcing customized approach is secondarily in the continuing relationship subcategories,<sup>92</sup> and primarily in the expanding performance and product subcategories.<sup>93</sup> The more general presumption of impartiality is in the appropriate direction,<sup>94</sup> but needs fine-tuning in light of the specialized purpose and nature of the IDEA.<sup>95</sup> Moreover,

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279 (E.D. Pa. 1972), concluded that (1) dead-center impartiality was not the appropriate standard, (2) IHOs should have professional expertise in special education, and (3) “[t]he trick is to get a much efficiency as possible.” William Buss, *What Procedural Due Process Means to a School Psychologist*, 13 J. SCH. PSYCH. 278, 304–06 (1975). For similar scholarly early warnings against over-proceduralization, see Zirkel, *supra* note 11, at 26 n.128 (citing David Kirp, William Buss, & Peter Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40, 154 (1974); Maynard C. Reynolds, *More Process Than Is Due*, 14 THEORY INTO PRAC. 61 (1975)). The use of central panel ALJs and state APA laws, which are overlapping but not coterminous for IDEA hearings, may each be appropriate policies on a state-by-state basis but only on a carefully harmonized with state special education laws for net effectiveness of IHO hearings; see, e.g., Zirkel, *supra* note 33, at 23–24.

<sup>89</sup> *Supra* text accompanying note 15.

<sup>90</sup> For the earlier recommendation that the courts have yet to incorporate, see *supra* text accompanying note 32.

<sup>91</sup> *Supra* notes 45–49 and accompanying text.

<sup>92</sup> *Supra* notes 50–52 and accompanying text.

<sup>93</sup> *Supra* notes 53–56 and accompanying text.

<sup>94</sup> *Supra* notes 73–79 and accompanying text. The outcomes pattern seems to show an almost absolute presumption but it warrants moderation in light of the possible skewing effect of prophylactic recusals. The specific extent of this factor is unknown, as is the extent of the possible intervening effect of the parties’ legal counsels’ disincentive to put impartiality in question for IHOs whom they may face in future cases.

the appearance of bias approach, which appears in some of the applicable state laws,<sup>96</sup> merits reallocation to ethical and best-practice prophylaxis rather than a reversible requirement for IDEA ALJs.<sup>97</sup>

This proposal for a customized standard is intended to stimulate discussion, debate, and resulting legislative and judicial refinements that provide latitude for carefully considered state variation under the IDEA, including central and specialized panels of ALJs.<sup>98</sup> This consideration should focus on the two successive areas of applicable legal activity during this lengthy updated period.

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<sup>95</sup> Cf. *P.M.B. v. Ridgefield Bd. of Educ.*, 944 F.3d 473, 477 (2d Cir. 2019) (concluding that the Congressional intent for “expedient resolution of [IDEA] claims” overrode applying the state APA legislation’s filing period for state courts to federal court appeals of IHO decisions).

<sup>96</sup> In addition to the three state laws identified in Zirkel, *supra* note 11, at 17 (Colorado, Iowa, and Maryland), others are Indiana, New Jersey, and Tennessee. IND. CODE § 4-21.5-3-10 (2017) (listing in addition to various other grounds for disqualification “any cause for which a judge of a court may be disqualified”); N.J. ADMIN. CODE § 1.1 App. (attaching Code of Conduct for ALJs as appendix for APA regulations for Office of Administrative Law); TENN. COMP. R & REGS. (2018) (incorporating canons 1–4 of the Code of Judicial Conduct). The state laws of all of these states, except Iowa, are general Administrative Procedures Act (APA) provisions for ALJs generally rather than within the laws specific to the special education context. Moreover, even for ALJs, the standards for traditional judges merit careful adjustment. For example, pointing out that IHO impartiality overlaps with IHO independence, Mayes observed that the administrative law judiciary generally is more susceptible to external forces; *see generally* Thomas A. Mayes, *Protecting the Administrative Judiciary from External Pressures: A Call for Vigilance*, 60 DRAKE L. REV. 827 (2012). For the independence interest associated with central panel ALJs, see Malcolm C. Rich & Alison C. Goldstein, *The Need for a Central Panel Approach to Administrative Adjudication: Pros, Cons, and Selected Practices*, 39 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1 (2019).

<sup>97</sup> Similarly, provisions for IHO training, evaluation and remediation, renewal, or removal are a separate matter that should have more strict standards for impartiality.

<sup>98</sup> Approximately twenty states use central panels as IDEA IHOs, and three additional jurisdictions—the D.C., Massachusetts, and Pennsylvania—have separate specialized panels of ALJs for this purpose. Connolly et al., *supra* note 4, at 158.

For the primary priority area of IHO performance and product, various state law provisions make explicit what is otherwise implicit under the IDEA—IHOs have the authority as well as responsibility to manage the hearing process actively so as fulfill the IDEA regulatory requirement to issue the decision within 45 days of the completion of the resolution process.<sup>99</sup> These provisions, which predominate in the state laws within the specific context of the IDEA, include limiting (1) testimony,<sup>100</sup> (2) extensions,<sup>101</sup> and (3) hearing sessions.<sup>102</sup> Thus, IHOs who actively manage the hearing for prompt completion should be protected from impartiality challenges except where the complaining party proves a prejudicial effect, such as denial of FAPE.<sup>103</sup> Conversely, state laws that provide for inefficient selection or assignment,<sup>104</sup> peremptory strikes,<sup>105</sup> easy self-recusals,<sup>106</sup> formal recusal reviews,<sup>107</sup> or other

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<sup>99</sup> 34 C.F.R. § 300.515 (requiring issuance of the decision within 45 calendar days after expiration of the resolution period, with the limited exception of “specific extensions . . . at the request of either party”). The resolution process, which the 2004 amendments of the IDEA added, is a 30-day period designed to facilitate settlement of the matter prior to the hearing. 20 U.S.C. § 1415(f)(1)(B); 34 C.F.R. § 300.510.

<sup>100</sup> Zirkel, *supra* note 11, at 20 (Arkansas’ and Hawaii’s special education laws as examples).

<sup>101</sup> *Id.* at 21–22 (examples include Alaska’s, Arkansas’, Connecticut’s, and New York’s special education laws).

<sup>102</sup> *Id.* at 23 (examples include Arkansas’, New York’s, and Vermont’s special education laws).

<sup>103</sup> *Cf.* James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 819 (N.D. Ill. 2009) (two-step procedural FAPE analysis for other, non-timing impartiality challenges).

<sup>104</sup> Zirkel, *supra* note 11, at 19 (Montana’s ranking system).

<sup>105</sup> *Id.* at 19–20 (five states, with Kansas being the most extreme). Moreover, the possibility of the due process hearing complainant simply withdrawing the complaint and filing another complaint within the limitations period as an “end run” peremptory strike is a problem in states that use a rotational system rather than assigning the same IHO to the case.

<sup>106</sup> *E.g.*, MONT. ADMIN. R. 10.16.3509 (2017) (permitting withdrawal at any point that the IHO perceives a personal or professional interest “might conflict with the [IHO’s] objectivity”).

more generic ALJ procedures and practices that do not conform to the IDEA-specific primacy on promptness should be adjusted or eliminated.<sup>108</sup>

For the secondary priority area of relationships, the continuing direction of the applicable case law only needs fine-tuned reinforcement in light of the inevitable frequent contacts within the relatively small community. Disclosure has a particularly prophylactic effect, although it is neither an automatic cure-all nor an absolute prerequisite.<sup>109</sup>

Overall, this update shows that the impartiality of IHOs under the IDEA merits further customization so as to facilitate the prompt completion of the hearing process.<sup>110</sup> This efficiency of dispute resolution under the IDEA is essential for not only the individual interest child with disabilities, for whom the window of opportunity for learning is particularly important, but also the institutional interests of local education agencies, for which funding is limited and the priority is instruction. Finally, this broad but well-tailored latitude is also in the intermediary interest of IDEA IHOs, for whom integrity, independence, and efficiency are essential.

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<sup>107</sup> *E.g.*, LA. ADMIN. CODE tit. 28, § 511 (2017) (department of administrative law shall determine written challenge, with substitution of another IHO where any doubt that first IHO is not “truly impartial”).

<sup>108</sup> As a consequence of the increasing use of central panel ALJs (*supra* note 95), the majority of such laws are state APAs that warrant superseding careful customization in the state’s corresponding special education law.

<sup>109</sup> *See supra* notes 49, 51–52.

<sup>110</sup> This IDEA customization applies generally to state law, not just judicially developed, standards. *E.g.*, *Zirkel, supra* note 11, at 25–27.