EMERGENCY COALITION OF
SPECIAL EDUCATION ATTORNEYS
FOR A FAIR DUE PROCESS SYSTEM

February 14, 2020

OPPOSITION MEMORANDUM TO
THE PROPOSED USE OF NONLAWYERS
AS IMPARTIAL HEARING OFFICERS IN NEW YORK CITY

To: Chancellor Betty A. Rosa
Vice Chancellor T. Andrew Brown
Members, New York State Board of Regents
Shannon Tahoe, Interim Commissioner, New York State Education Department
Christopher Suriano, Assistant Commissioner for Special Education
Kimberly Wilkins, Assistant Commissioner for Innovation and School Reform

As members of the special education bar that represent significant numbers of children whose parents file due process hearings in New York City, we write to voice our unanimous opposition to the proposal to revert back to using non-lawyer hearing officers. This proposal was described in the memorandum authored by Kimberly Young Wilkins on January 7, 2020 entitled "Expanding the Pool of Applicants to Serve as Impartial Hearing Officers to Hear Special Education Due Process Complaints Filed in New York City" and was discussed at the January 13, 2020 Regents meeting ("Wilkins Memorandum"), as well as by Interim Commissioner Tahoe at the New York State budget hearing on February 11, 2020.

The special education bar is deeply concerned about the shortage of qualified, knowledgeable hearing officers available to hear IDEA complaints in New York City. We are all well versed in the range of problems outlined in the Wilkins Memorandum, as well as the "External Review of The New York City Impartial Hearing Office," dated February 22, 2019 authored by Deusdedi Merced ("Merced Report"), which was referenced in the Wilkins Memorandum.

We understand that these problems are challenging. However, the problems require real solutions, and not a return to a policy that has already failed in New York. This proposal does not address the underlying causes of the problems in New York City and will cause further injury to the due process rights of families and their vulnerable children who are entitled to a fair and IDEA-compliant due process system.

We strongly believe that there is a pool of available and trained hearing officers, as well as potential hearing officers who are lawyers, that would be available to take cases if the regulations and policies that require multiple 30 day extensions, mountains of unnecessary and unpaid paperwork and sanctions for late cases when all parties agree to adjournments were

revoked and the unfair hearing officer payment issues were resolved.[1] Further, there would be far less hearings and more settlements if certain practices were revised and unconscionable delays in settlement processing were addressed. However, those issues are not the subject of this letter and we will not be discussing them in detail at this time.

The New York State Education Department and the New York State Regents should not reinstate regulations to allow non-lawyer hearing officers who have not completed law school to preside over hearings. The diverse constituents of the special education bar are united in opposition to this proposal.

Importance of Due Process that Conforms to Legal Standards

Absent an emergency or other limited exceptions, parents must use the hearing and appeals process before filing in Court. Over the past fifteen years, special education litigation following the administrative process has expanded. In the federal Second Circuit (which covers New York), a body of case law has developed which underscore the importance of developing a legally sound and factually detailed record, consistent with standard legal practice. The record built at the hearing is generally the record that is used in federal court cases that may make their way up to the Second Circuit Court of Appeals, or even the United States Supreme Court.

It is for this reason that Courts have underscored the importance of developing a record at the hearing. In general, Courts have ruled that exhaustion of administrative remedies through the impartial hearing process is required, in part, to "serve the underlying purposes of the IDEA's administrative scheme," which includes assisting federal courts by establishing a factual record reflecting agency expertise through "full exploration of technical educational issues." *See Polera v. Board of Educ. of Newburgh Enlarged City School Dist*., 288 F.3d 478 (2d Cir. 2002). Further, this "development of a complete factual record . . . promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children." *Id.*

Beyond the above, the Courts in the Second Circuit have developed a body of case law pursuant to which deference is given to the decisions of the impartial hearing officer or State Review Officers. While the Courts are not required to accept legal interpretations made by IHOs and SROs, the Second Circuit has held that due weight must be afforded certain legal conclusions. *M.H. v. New York City Dep't of Educ*., 685 F.3d 217, 243–44 (2d Cir. 2012) (rejecting the argument that the Court must "review legal conclusions of administrative decisions de novo without giving due weight to the administrative decisions" because "subsequent decisions of this Court favor a different approach"). Using non-lawyer hearing officers without the ability to analyze the complex body of law that has developed in the area of special education will undermine the due process system in the Courts.

[1] We are aware that a new hearing officer compensation policy was just issued on February 7, 2020. However, from what we understand, the hearing officers believe that this new compensation policy does not resolve, and will likely exacerbate, their issues. We do not understand why New York City's children do not have the right to have hearing officers who are paid the same hourly rate for conducting hearings, motion practice, reading transcripts, writing decisions, conducting legal research, as well as hearing cancellations as those children who are living outside of the city limits.

Non-lawyers who Have Not Completed Law School Cannot Meet IDEA Requirements

Under the IDEA, a hearing officer shall not be (a) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or (b) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing. *See* 20 U.S.C. §1415(f)(3)(A)(i)-(iv). Further, the hearing officer must have the following qualifications:

- Possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, *and legal interpretations of this chapter by Federal and State courts*;
- Possess *the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice*; and
- Possess the knowledge and *ability to render and write decisions in accordance with appropriate, standard legal practice*.

See 20 U.S.C. § 1415(f)(3)(A)(i)-(iv)(emphasis added).

New York abandoned the practice of using non-lawyers as hearing officers for many reasons before the IDEA was amended in 2004 to include the above requirements. At that time, there was broad consensus across the field that using non-lawyers as hearing officers failed to ensure a legally functioning due process system. The practice caused delays and significant appeals to the State Review Officer, which delayed children's remedies. The idea that the necessary expertise could be learned in a short training and then appropriately applied, given the wide range of legal issues that are addressed in hearings, by individuals lacking formal legal training and qualifications, is totally misplaced.

It is difficult to ascertain how a typical layperson who has not completed law school would be able to fulfill the mandates of 20 U.S.C. § 1415(f)(3)(A)(i)-(iv). This is particularly true in New York City where the special education bar is very active, has the resources to engage in litigation, and where the City's actions often compel litigation on claims that, upon information and belief, would likely settle were they to arise outside of the City.

The term "standard legal practice" in the IDEA requires that IHOs have the training, knowledge and capacity to operate the hearing in accordance with the IDEA, as well as general principles of trial practice. This includes but is not limited to the following responsibilities: (a) making on-the-spot rulings on objections during direct and cross examination; (b) rendering on-the-spot legal rulings about documentary evidence and addressing objections to evidence; (c) so ordering subpoenas and ruling on objections to subpoenas; (d) making decisions about the adequacy, sufficiency, reliability and credibility of evidence; and (d) deciding motions (i.e. applications by lawyers that are submitted before the final decision).[2] In fact, some IHOs have rules of procedure similar to those rules promulgated by judges in Court.

[2] Typical motions in hearings in New York City include motions to dismiss based upon statute of limitations (a complex area of the law), res judicata or collateral estoppel, motions for independent evaluations, motions for summary judgment, motions for a contested or substantially similar pendency and motions for interim relief.

Further, many special education hearings involve complex technical clinical and legal issues, which require hearing officers to have a knowledge of law. Many lawyers submit legal briefs of up to thirty pages in hearings, which are filled with legal citations to statutes and regulations, as well as federal and state case law. As the IDEA mandates, IHOs must be able to search for, review, understand and rule upon case law, as they are charged with "knowledge of, and the ability to understand *legal interpretations" of the IDEA by State and Federal Courts. See* 20 U.S.C. § 1415(f)(3)(A)(i)-(iv). Thus, a hearing officer has to have the skills and training to conduct research on state and federal case law in databases such as Westlaw and Lexis, review and analyze case law cited by parties and render a decision interpreting case law that is consistent with or that can distinguish the precedent cited by the parties. These are skills that are generally taught in law school and honed through years of the practice of law. These skills cannot be learned in a brief, turn-key training, or the state would not require lawyers to attend law school, pass the bar and take continuing education courses in order to engage in these activities.

New York Should Not Look to Non-lawyer States To Set Policy

Leaving aside whether permitting most non-lawyers to serve as hearing officers, given the history of problems that non-lawyer hearing officers has caused, the fact that three or four other states may still allow it is not a proper justification for rolling back this change.

New York is supposed to be a leader in the areas of civil rights, disability rights and children's rights. As the Wilkins Memo indicates, an overwhelming majority of states only use lawyers as hearing officers. Other than a few states where non-lawyers have been grandfathered in following policy changes, non-lawyers are used only in Arizona, Oklahoma, Indiana and South Carolina.[3] In general, New York does not look to these states when setting other types of education, civil rights or disability rights policies.

Moreover, the states that currently use non-lawyers have very few hearings, which means that the states do not have an active special education bar. In the most recent data reported by the United States Department of Education (2016-2017), there were only 16 complaints filed in the entire state of Oklahoma, 20 in South Carolina, 76 in Arizona, and 74 in Indiana.[4] That same year, there were 6,282 complaints filed in New York City (s*ee* Merced Report at 13) and, upon information and belief, significantly more have already been filed in New York City for the

Eliminate the Two Year Waiting Period for Lawyers who Represent Parents

Beyond the adoption of a more equitable compensation plan for hearing officers, the pool of qualified hearing officers would expand if the regulations were amended to eliminate the waiting period for a lawyer who represented a parent in a due process hearing in New York City to preside over hearings in the City. Currently, a lawyer who represented a parent in a due process hearing in New York City cannot accept an appointment in New York City for two years. *See* 8 N.Y.C.R.R. § 200.5(j)(3)(i)(c). While it makes sense to have a longer waiting

[3] Jennifer F. Connolly, PhD, Perry A. Zirkel, PhD, and Thomas A. Mayes, JD, "State Due Process Hearing Systems Under the IDEA: An Update," Journal of Disability Policy Studies, March 2019, available at https://journals.sagepub.com/doi/abs/10.1177/1044207319836660

[4] https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html.

period for a lawyer who represented one of the parties (i.e. the school district), there should not be a two-year waiting period for a special education lawyer who handled a due process complaint. This two-year waiting period is arbitrary, as any hearing officer who is assigned to preside over a former client's case would recuse in any event, regardless of when the hearing was held. Given the current situation, it would make far more sense to eliminate this waiting period so that experienced special education lawyers could apply.

Conclusion

It would be a gross deprivation of due process to try to "solve" the systemic problems in the impartial hearing system by reverting to the failed practice of using non-lawyers to preside over IDEA hearings. In light of the fact that this coalition represents significant numbers of the parents who are being affected by the hearing delays, we strongly urge you to reject any regulatory change that would force any of our clients or *pro se* parents to proceed before a non-attorney hearing officer who did not complete law school. Such professionals will not be able to satisfy the requirements of the IDEA.

A list of signatories to this letter is attached.

Sincerely,

THE EMERGENCY COALITION OF
SPECIAL EDUCATION ATTORNEYS
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/s/
By _____

See Attached Signatories

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