

## **ATTACHMENT A: PERFORMANCE STANDARDS**

### **Standard: Qualifications**

To be eligible to serve as an impartial due process hearing officer, an individual must:

1. Hold a law degree and be licensed to practice law in the State of Arkansas or hold an advanced degree and have had paid professional experience in education, special education, educational administration, psychology or a related field.
2. Have knowledge of and the ability to understand the provisions of the Individuals with Disabilities Education Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts.
3. Have the knowledge and ability to conduct hearings in accordance with standard legal practice.
4. Have the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.
5. Be able to demonstrate competencies in due process, special education law, effective writing and speaking, decision-making, and related areas, as evidenced through verified experience.
6. Complete an ADE-sponsored training program specifically for impartial due process hearing officers.
7. Be sufficiently free of other obligations to complete the duties and responsibilities of the impartial due process hearing officer, including conducting impartial due process hearings that will require in-state travel.
8. Adhere to timelines and render decisions within a timely manner as required by Federal and State regulations.

### **Standard: Criteria for Continued Eligibility**

To maintain eligibility on the impartial due process hearing officer rotation list and to be eligible to be selected for the impartial hearing officer rotation list in subsequent years, an individual must continue to meet the established minimum qualifications and:

1. Attend all periodic in-service training offered by the Arkansas Department of Education, unless attendance is waived due to extenuating circumstances;
2. Formally decline no more than three (3) appointments offered (excluding expedited hearings) between July 1 and June 30 (Note: declining a case in which a conflict of interest precludes acceptance of appointment is not counted as a declined appointment. The Arkansas Department of Education may allow a larger number of appointments to be declined in the event of extenuating circumstances.)

3. Demonstrate:
  - a. The ability to accurately interpret the Act;
  - b. Procedural compliance with the requirements of the Act and Arkansas Special Education rules and regulations; and
  - c. Administrative efficiency and economy in the conduct of due process hearings (as evidenced in hearing records, transcripts, and written decisions)

Eligibility to be on the list for one year does not guarantee continued eligibility for inclusion on the list in subsequent years.

Procedure:

1. The Arkansas Department of Education will evaluate each impartial due process hearing officer on an ongoing basis in accordance with the established criteria for continued eligibility. Failure to satisfy the established criteria may result in the removal of an individual's name from the list of impartial hearing officers at any time. The Arkansas Department of Education will contact the impartial hearing officer if any issues arise.
2. The Arkansas Department of Education will conduct quarterly and annual reviews of the impartial hearing officer's performance based on the following information:
  - a. The extent of participation in any in-service training conducted or required by the Arkansas Department of Education;
  - b. The number of cases declined between July 1 and June 30 (excluding expedited hearings and cases in which a conflict of interest precluded acceptance of the appointment);
  - c. The timeliness of conducting the due process hearing and rendering a written decision; and
  - d. Feedback from participant surveys
3. Upon completion of the annual review and no later than June 1, the Arkansas Department of Education will determine whether the impartial hearing officer continues to meet the established requirements for continued eligibility and notify the individual accordingly. An impartial hearing officer who has satisfied the established criteria for continued eligibility will be asked if he or she would like to be included on the list for the upcoming year. The individual may accept or decline the opportunity.

Standard: Training

To maintain eligibility on the impartial due process hearing officer rotation list and to be eligible to be selected for the impartial hearing officer rotation list in subsequent years, an individual must attend:

Annual in-service training(s) conducted or sponsored by the Arkansas Department of Education for impartial hearing officers. The Arkansas Department of Education will notify impartial hearing officers of the in-service training within a reasonable time and may waive an individual's attendance at the in-service training when extenuating circumstances exist.

Standard: Conflicts/Bias

An impartial due process hearing officer should recuse himself/herself from both real and perceived conflicts of interest. Generally, this means that an impartial hearing officer should not participate in a hearing where a party is a member of his/her household, a close relative, the employer of his/her spouse, parent or dependent child, someone with whom he/she has a business relationship, or a former employer (within the past year). If, however, the impartial hearing officer determines that no reasonable person knowing all the facts would question his/her impartiality, the impartial hearing officer may proceed with the hearing after disclosing to the parties the relationship and explaining the reasons why he/she does not believe there is a conflict.

An impartial hearing officer should not participate in any conduct during the hearing that presents the appearance of or demonstrates actual bias in favor of or against one of the parties. For example, it is improper for an impartial hearing officer to eat lunch with a representative of one party during the course of the hearing. If a party or witness alleges that the impartial hearing officer is biased during the course of the hearing, the hearing officer should document the allegation(s) and his/her response on the record.

In the event that an impartial hearing officer agrees with the request for recusal, upon request of a party and agreed to by the opposing party, the Arkansas Department of Education will assign another impartial hearing officer to the case and will try to utilize the dates already scheduled for the proceedings. Once the Arkansas Department of Education has assigned another impartial hearing officer, the case will continue to its conclusion.

Standard: Meeting Timelines

An impartial due process hearing officer must comply with all legal and contractual timelines, including but not limited to the following:

1. Promptly after being assigned a case, the impartial hearing officer shall schedule and hold a prehearing conference, unless the interests of justice require otherwise.
  - A. Purpose of the Pre-Hearing Conference  
At the pre-hearing conference the impartial hearing officer may:
    1. Advise the parties of Hearing Procedures;
    2. Explain applicable burdens of proof;
    3. Discuss and clarify the issues on which the hearing will be held;
    4. Stipulate to facts not in dispute;
    5. Explore settlement options;
    6. Discuss the number of witnesses;

7. Submit the order of witnesses, showing the expected length of direct and cross examination for each witness;
8. Arrange for telephone testimony;
9. Make discovery requests;
10. Rule on outstanding motions;
11. Rule on the admissibility of exhibits;
12. Obtain stipulations of fact and stipulations as to the authenticity of documents;
13. In special education cases, determine whether the parent has been provided the opportunity to inspect their child's educational records;
14. Determine the timing and manner by which evidentiary disclosures will be made;
15. Determine the manner and date by which subpoenas must be requested;
16. Discuss other issues associated with the hearing, including:
  - a. In hearings involving a child, whether the child will be present;
  - b. Whether witnesses should be sequestered;
  - c. Whether a participant requires special accommodations, assistive technology, or an interpreter to participate in the hearing process;
  - d. Whether closing submissions will be oral or submitted in writing;
  - e. Any other matters of importance the parties would like to bring to the hearing officer's attention.

**B. Failure to Appear at a Pre-Hearing Conference**

If a party fails to appear for a pre-hearing conference, the impartial hearing officer may proceed with the conference and may also dismiss the case or rule by default for the opposing party.

**C. Telephone Conference**

At the discretion of an impartial hearing officer, a pre-hearing conference may be conducted by telephone.

**D. Impartial Hearing Officer Letter Confirming Results of Pre-Hearing Conference**

After the pre-hearing conference, the impartial hearing officer will prepare a letter summarizing the matters discussed, agreed upon or otherwise decided during the conference. This letter will serve as a pre-hearing order, will control the balance of the proceedings and will become part of the administrative record.

2. For hearings conducted under 34 C.F.R. §§ 300.507 through 300.513, the impartial hearing officer shall render a final decision no later than 45 days after the expiration of the 30-day period under 34 C.F.R. § 300.510(b), or the adjusted time periods described in 34 C.F.R. § 300.510(c), unless the deadline for a final decision has been extended by the impartial hearing officer at the request of a party as provided by 34 C.F.R. §300.515(c).
3. The impartial hearing officer shall only permit extensions upon the request of a party and shall not grant an extension without a request from a party.
4. If an extension of time is granted, the impartial hearing officer shall render a written order stating the good cause grounds for the extension and the specific date by which the final decision is due. The written order must be mailed to the parties within five business days of the date on which it is rendered.
5. The impartial hearing officer shall email all orders extending the timeline for rendering a final decision and all dispositive orders (e.g., orders of dismissal, summary judgment orders, orders following a hearing, etc.), to the Arkansas Department of Education on the day that the order is rendered.

6. For hearings requested under 34 C.F.R. § 300.532, the impartial hearing officer shall conduct the hearing in an expedited matter within 20 school days of the date the complaint requesting the hearing is filed and render a decision within 10 school days after the hearing as provided by 34 C.F.R. § 300.532(c). The impartial hearing officer shall not grant any extensions of time in a hearing requested under 34 C.F.R. § 300.532.
7. The impartial hearing officer shall mail a final written decision or any dispositive order to the parties on the date the decision or order is rendered;
8. The impartial hearing officer shall return individual case files to the Arkansas Department of Education within 15 days of rendering a final decision or a dispositive order that disposes of all of the issues in a hearing; and
9. Upon notification that the Arkansas Department of Education has received a request for a document pursuant to the Arkansas Freedom of Information Act, the impartial hearing officer shall provide the relevant document to the Arkansas Department of Education immediately.

Standard: Continuances

All hearings must be held within the statutory timelines unless the impartial hearing officer grants specific extensions of time.

Impartial hearing officers are encouraged not to allow parties to automatically waive timelines. Continuances must be the exception, not the rule. Extensions of time can only be granted on a case-by-case basis.

Except in extraordinary circumstances, parties seeking a continuance are requested to make such written request to the impartial hearing officer at least five (5) business days before the scheduled hearing date. It is preferable, although not required, that both parties agree to a continuance in order for a hearing to be continued.

If the impartial hearing officer allows the continuance, the hearing officer will issue a new hearing date by order to both parties with a copy to the Arkansas Department of Education. The order shall indicate: who requested the continuance; the reason for the continuance; the date the matter was continued to; and the new end date on which the final decision is due.

A continuance will not occur if the impartial hearing officer does not issue an order allowing the continuance.

The impartial hearing officer shall return individual case files to the Arkansas Department of Education within 15 days of rendering a final decision or a dispositive order that disposes of all of the issues in a hearing.

Standard: Conducting Hearing

There is no standard model for a formal administrative hearing. It should have dignity and order similar to a judicial proceeding, but should be conducted less formally. The organization and form of a hearing depends on the type of case, the relevant statutes and regulations, the issues, the number of witnesses, agency past practice, and the impartial hearing officer's preference. The goal is to develop a fair, accurate, and concise record. The hearing should move as rapidly as possible, consistent with the fundamentals of fairness, impartiality, and thoroughness.

Impartial hearing officers have the duty and power to:

1. Administer the oath or affirmation to anyone who will testify at the hearing;
2. Assist all those present in making a full and free statement of the facts in order to bring out all the information necessary to decide the issues involved and to determine the rights of the parties;
3. Ensure that all parties have a full opportunity to present their claims orally, or in writing, and to get witnesses and evidence to establish their claims;
4. Receive, rule on, deny, or limit evidence;
5. Introduce into the record any regulations, statutes, memoranda, or other materials relevant to the issues at the hearing;
6. Change the date, time, or place of the hearing at the mutually agreeable request of the parties and continue the hearing to a subsequent date to permit either party to produce additional evidence, witnesses, and other information, in adherence with regulatory timelines;
7. Request a statement of the issues and define the issues;
8. Regulate the presentation of the evidence and the participation of the parties for the purpose of ensuring an adequate and comprehensible record of the proceedings;
9. Regulate the presentation of the evidence based on disclosed issues. Parties should not present evidence on an undisclosed issue;
10. Issue subpoenas upon request of any party to secure the presentation of evidence or testimony;
11. Examine witnesses and ensure that relevant evidence is secured and introduced;
12. Rule on any requests or motions that may be made during the course of the proceedings;
13. Order additional evaluations at public expense under appropriate circumstances;
14. Order written briefs to be submitted by the parties, establish the issues to be addressed by the briefs and set the deadline for their submission;
15. Reconvene the hearing for any purpose at any time prior to the issuance of a decision or pursuant to a post-hearing motion;
16. Ensure that all participants conduct themselves in an appropriate manner.

Hearings should adhere to the following agenda, which may be modified at the impartial hearing officer's discretion:

1. Formal Call to Order
  - a. Date, time and place
  - b. Statement such as: "We are here in the matter of *[Student's first name last initial/LEA – Number]*
2. Introductory Statement by Impartial Hearing Officer
  - a. Introduction of impartial hearing officer
  - b. Statement of open or closed hearing
  - c. For the recorded record, I request that parties speak loud and clear and only one at a time
  - d. Introduction of participants for record
    - Request that parties spell their name for the record
  - e. Purpose of the hearing

- f. Explanation of hearing procedures
- 3. Opening of Formal Testimony
  - a. Opening Statement
  - b. Presentation of Written Evidence and Testimony
  - c. Closing Arguments (when presented orally)
- 4. Closing Comments by Hearing Officer

### Maintaining Order at the Hearing

The impartial hearing officer has the authority and obligation to ensure that appropriate standards of conduct are observed and that the hearing is conducted in a fair and orderly manner. If the conduct of a party or witness disrupts, detracts from or jeopardizes the integrity of the hearing, the impartial hearing officer must take appropriate action to address the misconduct. This action should include warning the offending party to abstain from the conduct with notice of the sanction which will follow if the conduct continues. Where sanctions are appropriate, the impartial hearing officer should consider the nature and severity of the misconduct. If the impartial hearing officer imposes sanctions, the hearing officer must document the record by describing the misconduct in detail, the warnings given to the offending person, the sanction issued, and the reasons for issuing the sanction. In case of repeated or flagrant improper conduct by a party, the impartial hearing officer may consider expulsion of the party or party's representative from the hearing.

### Techniques of Presiding

Controlling the Hearing. The impartial hearing officer must control the hearing. The impartial hearing officer has the responsibility to conduct a trial-like adjudication in a fair manner and to make decisions needed to expedite the adjudication, including ruling on the admission and exclusion of evidence. The impartial hearing officer may place reasonable time limits on the presentation of evidence. Prompt rulings on motions and objections are essential.

If an altercation threatens to disrupt the hearing, the impartial hearing officer should call a recess, go off the record, and restore order to the proceeding. If a participant in the hearing becomes unruly or offensive in remarks or manner, the impartial hearing officer should express disapproval of the conduct and warn against repetition. The impartial hearing officer should require all participants to address each other, and the witnesses, respectfully. The impartial hearing officer sets the tone of the hearing through use of calm authority. The impartial hearing officer should not engage in arguments with the parties or witness, but should listen to objections made, decide, and then move on.

### Final Decision of the Impartial Hearing Officer

The Arkansas Department of Education must make impartial hearing officer decisions available to the public. To accomplish this, all hearing officer decisions are available on the Department's website and are provided upon request. In providing such decisions to the public it is imperative that all personally identifiable information that would identify the student is removed. In order to accomplish this, impartial hearing officers are required to provide an electronic copy of the decision with all personally identifiable information redacted.

Standard: Ex Parte Communication

Parties to hearings must not engage in ex parte communication with the impartial hearing officer. All contact with the impartial hearing officer must be in writing with a copy to the other party. If a party wants to initiate a telephonic conversation with the hearing officer, they are requested to first write (fax or e-mail) to the impartial hearing officer, with a copy to the other party, requesting an opportunity to speak with the impartial hearing officer. The impartial hearing officer shall not respond to ex parte communications except for emergency discussions regarding new dates.

The impartial hearing officer should avoid being in the hearing room or having other contacts with only one party in order to avoid the appearance that the merits were discussed on that occasion.

Ex parte communications do not automatically void a hearing officer's decision but instead render the decision voidable. It is often possible to cure an ex parte communication. To cure an ex parte communication, the hearing officer should immediately:

1. Make a record of what was communicated;
2. Disclose the communication to the other parties, giving them an opportunity to respond;
3. Give the parties an opportunity to lodge a challenge against the hearing officer; and
4. Take the opportunity to remind the parties of the rule against ex parte communications.

A party represented by counsel who attempts to contact the impartial hearing officer directly should be immediately advised to contact counsel and have the counsel make the contact. The impartial hearing officer should also advise the party's counsel and the opposing parties' counsel of the attempted contact.

Pro se parties frequently forget the necessity to copy the opposing parties when sending communications to the hearing officer. Consequently, the impartial hearing officer should be diligent to ensure that each communication received has been copied to opposing parties.

#### Standard: Resolution Tracking/Reporting

Impartial hearing officers must track resolution sessions including but not limited to:

1. Maintaining documentation from the LEA that a resolution meeting occurs within fifteen days of the LEA receiving notice of the due process complaint; and
2. Maintaining documentation from the LEA that a prior written notice has been sent to the parent within ten (10) days of receiving the due process complaint, if not previously provided.

The impartial hearing officer must proceed with the due process hearing if the LEA has not resolved the complaint to the satisfaction of the parent(s) within 30 days. The timeline for issuing a final decision begins with the expiration of this 30-day period.

Adjustments to 30-day resolution period:

1. The 45-day timeline for the due process hearing in 34 CFR 300.515(a) and §10.01.17 starts the day after one of the following events:
  - a. Both parties agree in writing to waive the resolution meeting;
  - b. After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;
  - c. If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

Standard: Decision Writing

An impartial hearing officer must comply with the decision format requirements set by the Arkansas Department of Education. Specifically, decisions must meet the following requirements:

1. Contain correct grammar, punctuation, and spelling usage;
2. Include findings of fact that are clear and concise, supported by the evidence, and necessary to resolve an issue properly before the impartial hearing officer;
3. Include conclusions of law that accurately apply the law to the findings of fact and that are necessary to resolve an issue properly before the impartial hearing officer;
4. Include discussion to explain a rationale not otherwise apparent from the findings and conclusions;
5. Include an order that rules on all requests for relief and that does not require the parties to refer to any other part of the decision to implement the mandates in the order; and
6. Include a synopsis of the case that includes each issue decided, the prevailing party on that issue, and a supporting citation to a provision of the IDEA regulations in 34 C.F.R. Part 300, the Arkansas Education Code, or Arkansas Department of Education rules and regulations.

The impartial hearing officer must provide:

1. Updates on case activities for each case file to the Arkansas Department of Education on the 15<sup>th</sup> day of each month; and
2. A final written decision, as well as a redacted copy of the final decision within the timeframe required by law.

Standard: Misfeasance, Malfeasance or Nonfeasance

Procedures for Suspension or Termination of Impartial Hearing Officer Contract

In order to ensure uniform standards for acceptable conduct by impartial hearing officers, all impartial hearing officer contracts are subject to suspension or termination on the grounds of misfeasance, malfeasance, or nonfeasance. An investigation into allegations of misfeasance, malfeasance, or nonfeasance may be initiated by an allegation by a participant in the hearing process or the Arkansas Department of Education's own volition.

Penalties:

The impartial hearing officer shall understand and agree that conducting due process hearings in accordance with the timelines set forth by federal and state law and Arkansas Department of Education rules and regulations is considered critical to the efficient operations of the due process hearing process. However, since the amount of actual damage would be difficult to establish in the event the impartial hearing officer fails to comply with the timelines, the impartial hearing officer shall agree and understand that the amount identified below as liquidated damages shall be reasonable and fair under the circumstances.

1. In the event the impartial hearing officer fails to complete the due process hearing, including the rendering, writing, and mailing of the decision and order, within the timeline allowed by statute, or the extended timeline if such has been approved by the impartial hearing officer, the state agency shall assess liquidated damages in the amount of \$100.00 per day against the impartial hearing officer for each day beyond the statutory timeline or the approved extended timeline until the completion of the due process hearing.

2. The impartial hearing officer shall agree and understand that such liquidated damages shall either be deducted from the total amount due to the impartial hearing officer or paid by the impartial hearing officer as a direct payment to the state agency at the sole discretion of the state agency.
3. The impartial hearing officer shall agree and understand that all assessments of liquidated damages shall be within the discretion of the State of Arkansas and shall be in addition to, not in lieu of, the rights of the State of Arkansas to pursue other appropriate remedies.