



Massachusetts Department of Elementary and Secondary Education

350 Main Street, Malden, Massachusetts 02148-5023

Telephone: (781) 338-3000
TTY: N.E.T. Relay 1-800-439-2370

Mitchell D. Chester, Ed.D.
Commissioner

October 7, 2008

The Honorable Margaret Spellings
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

**RE: Hearing Officers and Mediators as Employees of the State Education Agency
under IDEA**

Dear Secretary Spellings:

I am the new Commissioner of Elementary and Secondary Education (Commissioner) and assumed this position in Massachusetts in May of this year. In Massachusetts, hearing officers and mediators under the Individuals with Disabilities Education Act (IDEA) are employees of the state educational agency (SEA) and report to an administrator in the SEA. My experience in and knowledge of other states leads me to conclude that Massachusetts is one of the only states, if not the only state, to structure special education hearings in this way. Therefore, I have questions regarding the structure for special education hearings in Massachusetts and asked senior managers of the Department of Elementary and Secondary Education (Department) to brief me on our current practice and how that practice may have changed over time. This letter provides you a summary of how Massachusetts employs and supervises hearing officers and mediators in relation to the standards for their employment under IDEA.

Hearing Officers and Mediators in Massachusetts

In Massachusetts, both hearing officers and mediators are employees of the Department, the SEA. This structure was established years prior to the enactment of IDEA under the state special education statute, Mass. General Laws c. 71B, which predates enactment of the federal special education law. The Bureau of Special Education Appeals (BSEA) conducts due process hearings and mediations. The director of the BSEA is supervised by an associate commissioner of the Department, and the director manages the BSEA. The director and an assistant director are responsible for supervising, evaluating, and disciplining both hearing officers and mediators and managing mediations and due process hearings. The BSEA is currently staffed by seven hearing officers and eight mediators, all of whom are employees of the Department and members of collective bargaining units.

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I understand that in 1992, the United States Department of Education, Office of Special Education Programs (OSEP), reviewed and approved the operations of the BSEA conditioned on the director of the BSEA being jointly supervised by the Department and by the Dean of the School of Education at the University of Massachusetts Boston (UMass Boston). The Department entered into an interagency agreement with UMass Boston on May 28, 1992. Under this agreement, the dean of UMass Boston was to be responsible for evaluating the performance of the BSEA director and the director would have sole responsibility for supervising and evaluating BSEA staff and establishing BSEA policies and procedures. The Commissioner retained authority to hire the BSEA director and to take disciplinary action against the director upon the recommendation of the dean. The Commissioner further retained authority, upon recommendation of the BSEA director, to hire hearing officers, mediators, and other BSEA staff and to take disciplinary action against them.

In the intervening sixteen years, this interagency agreement has fallen into disuse for several structural and pragmatic reasons. It is difficult at best to manage such a complicated reporting structure, with staff members reporting to the SEA for some purposes and an administrator in an independent state authority for others. Additionally, the Department and UMass Boston are no longer physically proximate to each other and are now on opposite sides of Boston. The combination of these factors has simply made the arrangement unworkable.

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

Impartiality of Hearing Officers and Mediators under IDEA

The IDEA requires the state or local educational agency to establish a system for conducting impartial due process hearings to resolve special education disputes. 20 U.S.C. 1415(f)(1)(A) (“an impartial due process hearing, . . . shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.”) Under the IDEA, a due process hearing may not be conducted by an employee of the SEA or the local educational agency (LEA) involved in the education or care of the child. 20 U.S.C. 1415(f)(3)(A) (“[H]earing[s] . . . may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child.”); 34 CFR § 300.511(c) (“[a] hearing officer . . . must not be . . . [a]n employee of the SEA or the LEA that

is involved in the education or care of the child; or . . . [a] person having a personal or professional interest that conflicts with the person's objectivity in the hearing").

Although this language was initially interpreted narrowly by OSEP, courts have interpreted this language to preclude most employees of state agencies involved in any aspect of education of children from being hearing or state review officers.¹ The courts are concerned about structural bias and personal conflict of interest among hearing officers and have consistently imposed strict standards for impartiality. *See, e.g., Mayson v. Teague*, 749 F.2d 652 (11th Cir. 1984) (prohibited any employee of a public school in the state or of a university that had participated in the formulation of policies and regulations affecting disabled students from appointment as a hearing officer); *Robert M. v. Benton*, 634 F.2d 1139 (8th Cir. 1980) (court concluded that because the Congressional conference committee deleted the word "directly" from "directly involved" in the final bill, Congress intended to prohibit employees of the SEA from serving as impartial hearing officers because the agency is involved indirectly, in education of the child); *Muth v. Central Bucks Sch. Dist.*, 839 F.2d 113 (3d Cir. 1986) (officials with direct responsibility for setting policy and for financial and programmatic supervision of local education agencies are not impartial), *aff'd on other grounds sub nom. Dellmuth v. Muth*, 491 U.C. 223 (1989).

IDEA also requires that states offer mediation as part of the due process system. The IDEA regulations were amended in 2006 to establish standards for impartiality of mediators that are now virtually identical to those for hearing officers. Mediators may not be employees of the SEA or the LEA involved in the education or care of the child. 34 CFR 300.506(c)(1).² Previously, the regulation only prohibited those employees of an agency providing direct services from serving as mediators. The change made in 2006 seems to indicate that the standards for impartiality are now the same for both hearing officers and mediators. Thus, IDEA and its implementing regulations as interpreted by courts appear to preclude employees of an SEA from serving as hearing officers or mediators.

Request for Opinion

For these reasons, given the changes in the law and in the Department's operations since 1992, and my interest in ensuring that practice in Massachusetts is consistent with federal law, I seek your guidance regarding whether the current practice of the Department with respect to hearing

¹ The decisions have been reported and discussed in a comprehensive article by Elaine A. Drager and Perry A. Zirkel, "Impartiality Under the Individuals with Disabilities Act," 86 Educ. L. Rptr. 11 (1993).

² Section 300.506(c)(1) of the IDEA regulations now states that "a mediator . . . [m]ay not be an employee of the SEA or the LEA that is involved in the education or care of the child" Previously, this regulation stated that "a mediator . . . [m]ay not be an employee of . . . an SEA that is providing direct services to a child who is the subject of the mediation process." (Emphasis added.)

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officers and mediators meets the requirements of the IDEA and its accompanying regulations. If it is no longer consistent with IDEA, I seek your advice regarding changes we should consider making.

Please feel free to contact me or Kristin E. McIntosh, Deputy General Counsel, at 781-338-3400, should you require any additional information. Thank you for your assistance and I look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read "Mitch D. Chester". The signature is written in a cursive, flowing style.

Mitchell D. Chester, Ed.D.

Commissioner of Elementary and Secondary Education