REPORT OF THE

STUDY OF NEW YORK STATE'S TWO-TIER SPECIAL EDUCATION DUE PROCESS HEARING SYSTEM

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by

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TABLE OF CONTENTS

PART ONE - DUE PROCESS HEARING SYSTEM FOR STUDENTS WITH DISABILITIES 6

A. INTRODUCTION 6
1. Right to a Hearing 6
2. One-Tier or Two-Tier Hearing System 6
3. Timelines 7
B. PURPOSE OF THE STUDY AND STUDY DESIGN 9
C. A PERSPECTIVE - NATIONAL TRENDS AND NEW YORK 10
1. Number of Due Process Complaints and Adjudicated Hearings 10
2. Timeliness of Adjudicated Hearings 11
3. One-Tier and Two-tier Systems 13
4. Hearing Officers: Employees or Independent Contractors? 13

PART TWO - NEW YORK STATE'S TWO-TIER SYSTEM 14
A. OVERVIEW OF THE TWO-TIER SYSTEM 14
Tier I 14
Tier II 14
B. DURATION OF A DUE PROCESS COMPLAINT THROUGH TIER II 15
C. STATIC SYSTEM? 16

PART THREE. TIMELINESS OF THE HEARING SYSTEM AND THE DURATION OF A DUE PROCESS COMPLAINT AT TIER I 18
A. INCIDENCE OF DUE PROCESS COMPLAINTS 18
B. TIMELINESS 18
Caveat 19
C. DURATION OF TIER I 20
D. POINTS OF DELAY 21
1. Appointment 22
2. Scheduling the Hearing 24
3. Number of Days of Hearing 25
4. Non-consecutive Hearing Days 25
5. Interval from Last Day of Hearing to Decision 25
6. A Closer Look 26
E. OTHER DATA - THE HEARING SYSTEM 28
1. Issue Types 28
2. Pre-hearing Conferences 29
3. Repeat Requests 30
4. Appeals of Hearing Decisions 30
5. Number of Affirmed Decisions on Appeal 31

PART FOUR - THE STATE AND LOCAL INFRASTRUCTURE FOR NEW YORK STATE'S HEARING SYSTEM 31
A. STATE LEVEL GENERAL EDUCATION SUPERVISION 31
1. Qualifications of Hearing Officers 31
2. Training of Hearing Officers 33
3. Certification of Hearing Officers 34
4. Compensation of Hearing Officers 34
5. Manuals, Forms, and Guidance 36
6. Impartial Hearing Reporting System 36
7. System of Evaluation and Investigation of Hearing Officer Complaints 37
a. Evaluation 37
b. Complaints 38
c. Authority to Sanction 38
8. Alternative Dispute Resolution 40
a. National Perspective - Alternative Dispute Resolution 40
b. New York - Mediation and IEP Facilitation 41
B. LOCAL HEARING SYSTEM 42
1. Operation of the Tier I 43
a. Infrastructure at the Local Level 43
b. New York City Impartial Hearing Office 43
2. Appointment of Hearing Officers 44
3. Local Compensation Scale 45
a. New York City's Payment Schedule 45
b. Data Provided From Two Other Local Educational Agencies 46

PART FIVE - THE REVIEW SYSTEM 47
A. INTRODUCTION 47
B. INCIDENCE OF APPEALS AND TIMELINESS OF THE STATE REVIEW SYSTEM 48
1. Number of Appeals 48
2. Timeliness 49
3. Pending Current and Untimely Cases 49
4. Historical Perspective 50
5. Compliance Agreement 51
6. Business Practices of the Office of State Review 52
a. Introduction 52
b. Part 279 53
c. Part 279 Internal Timelines 54
d. Team under the Guidance and Direction of the State Review Officer 55
e. Internal Timelines for the Team 56
7. Staffing of the Office of State Review 57
Backlog Elimination Team 58
8. Qualification of the State Review Officer 59

9. System of Supervision, Evaluation, and Training 60
10. Electronic Filing and Tracking System 60
11. Administrative Hearing Record 61
12. Judicial Appeals 62

PART SIX - OTHER STATES 63
A. OTHER HIGH VOLUME STATE HEARING SYSTEMS 63
1. California 63
2. District of Columbia 66
3. New Jersey 68
B. STATES RECENTLY TRANSITIONED FROM TWO-TIER TO ONE-TIER SYSTEMS 68
1. Pennsylvania 68
Best Practices 71
2. Colorado 71
3. Indiana 72
C. OTHER TWO-TIER STATES 72
1. Kansas 72
2. Kentucky 73
3. Ohio 73
4. Oklahoma 73
5. Nevada 73
6. North Carolina 74
7. South Carolina 74

PART SEVEN - IDENTIFICATION OF THE FISCAL, PROGRAMMATIC, AND TRANSITION IMPLICATIONS FOR NEW YORK STATE'S SYSTEM 75
A. OVERARCHING CONCERN – RESTRUCTURE THE HEARING SYSTEM 75
1. Programmatic/Operational Structure Implications 76
2. Recommendations for Improving Efficiency, Timeliness, and Overall Operation 78
Long-Term 78
3. Fiscal Implications 81
4. Transition Implications 82
The Infrastructure 82
5. Short-Term 84
a. Accountability 85
b. Points of Delay 86
i. Appointment 87
ii. Interval from Last Day of Hearing to Decision 88
c. Pre-hearing Conference 88
d. Compensation Scales 89
e. Hearing Officers and Local Operational Procedures 90

f. Oversight of the System 90
B. AN ALTERNATIVE PATH TO REFORM OF THE HEARING SYSTEM 91
C. IF RESTRUCTURE FROM A TWO-TIER TO A ONE-TIER SYSTEM: THE OFFICE OF STATE REVIEW 92
1. Programmatic/Operational Structure Implications Fiscal Implications 93
2. Transition implications 94
3. Fiscal Implications 95
D. IF THE TWO-TIER SYSTEM IS MAINTAINED: THE OFFICE OF STATE REVIEW 95
1. Recommendations for Improving Efficiency, Timeliness, and Overall Operation 96
a. Internal Timelines 96
b. Capable of Monitoring Timeliness and Adjustment 97
c. Electronic Filing 97
d. Staffing and the Team under the Guidance and Direction of the State Review Officer 98
e. System of Supervision, Evaluation, and Training 99
2. Programmatic/Operational Structure Implications 99
a. Pre-review Conference 99
b. Administrative Hearing Record 99
3. Fiscal Implications 100

PART EIGHT - ADDITIONAL STUDY NEEDED 101
A. TIER I – STATEWIDE SYSTEM IN A TWO-TIER SYSTEM 101
B. STATEWIDE SYSTEM IN A ONE-TIER SYSTEM 101
C. TIER ONE - MAINTAIN A LOCAL LEVEL HEARING SYSTEM 102
D. TIER II IN A TWO-TIER SYSTEM 103

PART ONE - DUE PROCESS HEARING SYSTEMS FOR STUDENTS WITH DISABILITIES

A. INTRODUCTION

1. Right to a Hearing

There is the legal mandate and the inevitability of the need for administrative hearings to resolve disputes between schools and families that cannot be resolved in alternative ways. Pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. and 34 C.F.R. Part 300, each State Educational Agency must ensure that the opportunity for an impartial due process hearing is available to parents of students with disabilities and local educational agencies. The purpose of this hearing requirement is to provide both schools and parents access to a timely and fair administrative hearing system where disagreements over the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child can be resolved. The Laws of New York, Education Law §4404, and Regulations of the Commissioner of Education, Title 8 NYCRR, Parts 200 and 201, provide comprehensive procedures on the New York State hearing system for students with disabilities that, in a number of regards, go beyond the requirements of the IDEA.[1]

2. One-Tier or Two-Tier Hearing System

Under the IDEA, the impartial hearing must be conducted by the State Educational Agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or written policy of the State Educational Agency. (34 C.F.R. §300.511(b))

A decision made in a hearing is final, except that any party involved in the hearing may appeal the decision. (20 U.S.C. §1415(g); 34 C.F.R. §§300.514(a) and 300.532(c)(5)) The forum for an appeal of a hearing decision depends on whether the state system is a one-tier or a two-tier hearing system.

In a two-tier hearing system where the hearing was conducted by a public agency other than the State Educational Agency, any party aggrieved by the findings and decision in the hearing may appeal to the State Educational Agency. If there is an appeal, the State Educational Agency must conduct an impartial review of the findings and decision appealed. (34 C.F.R. §§300.514(b) and 300.532(c)(5)) The decision made by the state reviewing official is final unless a party brings a civil action. (34 C.F.R. §300.514(d)) If

[1] This is an abbreviated description of the due process hearing system under the IDEA and the law and regulations of New York State. (20 U.S.C. §1415; 34 C.F.R. §§300.507 – 300.518 and 300.532 – 300.533; Education Law §4404 and Regulations of the Commissioner of Education, Title 8 NYCRR, Parts 200, 201, and 279) Additional provisions of law and regulation will be cited in the relevant section of the Report.

the State Educational Agency conducts the hearing or in a two-tier hearing system, after the impartial review on appeal, a party aggrieved by the findings and decision may appeal to any state court of competent jurisdiction or in a district court of the United States. (20 U.S.C. §1415(g); 34 C.F.R. §§300.514, 300.516 and 300.532(c)(5))

While every state must comply with the IDEA in the design and implementation of the special education hearing system, the culture of every system and the vision of each State Educational Agency regarding the system are unique. Factors that affect the culture of each state's dispute resolution system include factors such as demographics; litigiousness; accessibility of representation and advocacy for parents; commitment at the state and local level to alternative dispute resolution options; and the promotion and accessibility of those options upon the emergence of a dispute at the local level.[2]

New York State has established a two-tier hearing system with a hearing at the local level and an appeal to a State Review Officer. (Educ. Law §4404(2); 8 NYCRR §§200.5(i)(1) and 200.5(k))

3. Timelines

"The procedural requirements of the IDEA were put in place for a particular purpose, and that purpose was to ensure that disabled students were provided a free appropriate education. Inordinate delays in the decision making process deprive those students of the rights provided to them under the IDEA and cause those students to suffer irreparable harm."[3]

The timelines at both the hearing and review levels are prescribed by the IDEA. Pursuant to Title 34 C.F.R. §300.515(a), no later than 45 days after the expiration of the 30-day resolution period under §300.510(b), or the adjusted time periods described in §300.510(c), a final decision is reached in the hearing; and a copy of the decision is mailed to each of the parties. In a two-tier hearing system, no later than 30 days after the receipt of a request for a review, a final decision must be reached in the review; and a copy of the decision must be mailed to each of the parties. (34 C.F.R. §300.515(b))

Under the IDEA, a hearing or reviewing officer may grant specific extensions of time at the request of either party. (34 C.F.R. §300.515(c)) Title 8, Part 200, of the Regulations of the Commissioner provides additional limitations with regard to the granting of an extension at the hearing level in New York State, including:

- The Hearing Officer may grant a request for an extension only after fully considering the cumulative impact of specific factors affecting: the child's educational interest; a party's fair opportunity to present its case at the hearing in

[2] Richard Zeller, *Why does the Performance of Part B Dispute Resolution Systems Vary?; Looking in the Rearview Mirror: Seven Years of APR/SPP Data*, CADRE National Webinar (December 2, 2011)
[3] Schmelzer ex rel. Schmelzer v. New York, 363 F. Supp.2d 453 (E.D.N.Y. 2003)

accordance with the requirements of due process; any adverse financial or other detrimental consequences likely to be suffered by a party in the event of delay; and whether there has already been a delay in the proceeding through the actions of one of the parties;

- Absent a compelling reason or a specific showing of substantial hardship, a Hearing Officer may not grant an extension because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons;
- The Hearing Officer may not rely on the agreement of the parties as a basis for granting an extension;
- Each extension cannot exceed 30 days and no more than one extension at a time may be granted;
- The reason for each extension must be documented in the hearing record;
- Where extensions of time have been granted beyond the required timelines, the decision must be rendered and mailed no later than 14 days from the date the Hearing Officer closes the record. (8 NYCRR §200.5(j)(5))

Any review of a hearing system or the infrastructure supporting/implementing the system needs to be undertaken with the understanding that the Individualized Education Program (IEP) for a student with a disability must be in effect at the commencement of each school year and must be reviewed and revised, as appropriate, annually. (34 C.F.R. §§300.323 - 300.324) The timelines for the conduct of hearings and expedited hearings under the IDEA are purposefully short. In some administrative hearings a delay of six months is not meaningful to the outcome. In these cases, a delay in the rendering of a Hearing or Review Officer's decision may result in a student being denied a free appropriate public education for a significant portion of the school year at issue.

> ***"Separate from any justice they may produce, hearings seem to have large personal and transactional costs".***[4]

The cost for the conduct of a due process hearing in New York State is not known. However, the United States Department of Education assumes a cost of "between $10,000 and $20,000 per due process hearing."[5] Delays and inefficiencies in the hearing system exacerbate the operational cost of the system. In addition, they prolong the impact of the system on the student with a disability and the relationship between the parent and the school and may result in increased personal and financial costs to parents and schools, including attorney fees, costs of expert witnesses, and the expenditure of time.

[4] Anita Engiles, Marshall Peter, Susan Baxter Quash-Mah and Bonnie Todis, *Team Based Conflict Resolution in Special Education*, (June 1996)
http://www.directionservice.org/cadre/pdf/Team%20Based%20Conflict%20Resolution%20.pdf
[5] Vol. 71 Fed. Reg. pg. 46748 (August 14, 2006)

B. PURPOSE OF THE STUDY AND STUDY DESIGN

The purpose and scope of this Study was set forth by the New York State Education Department (hereinafter the State Educational Agency or NYSED) in the February 2014 Request for Proposals: Study of New York State's Two-tier Special Education Due Process System:

> "To inform needed changes to New York State's special education due process system, NYSED is seeking an identification of the fiscal, programmatic and transition implications that would have to be considered to address both: 1) restructuring the special education due process system in New York State from a two-tier to a one-tier system, with specific recommendations for improving the due process system's efficiency, timeliness and overall operation, AND 2) maintaining the two-tier system but proposing specific modifications to the process to improve the ability to render timely decisions."
>
> This Study was scope and time limited to: ". . . focus solely on identification of the relevant implications, and not an in-depth analysis of those identified implications. The study should include relevant information from other states that have transitioned from a two-tier to a one-tier system and identify areas where additional study is needed."[6]

The State Educational Agency acknowledges in the Request for Proposal for this Study that: "Over the past two years, there has been an increase in the number of due process complaints filed annually in New York State as well as an increase in the number of Hearing Officers' decisions appealed to the Office of State Review. As a result, a number of decisions at both the Hearing Officer and State Review Officer levels have not been rendered in a timely manner in accordance with the timelines for rendering decisions set forth in the IDEA and State statutes."

As described above, the overarching focus of this Study is to ensure the New York State hearing system is a timely system, regardless of whether New York State ultimately decides to operate a one-tier or a two-tier system. Due to the time constraints and purpose of this Study, the study design was based on a comprehensive review of available and requested data, laws, regulations, policies and procedures relating to the operation, the efficiency, and timeliness of the system at the State and local levels.[7] To inform the State Educational Agency's decision with regard to the restructuring or modification of the current two-tier system, this Report is replete with links to referenced information, particularly with regard to relevant information from other states.

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[6] February 2014, RFP Proposal #14-011 New York State Education Department: Study of New York State's Two-tier Special Education Due Process System

[7] The assistance of the Coordinator, Special Education Policy and Professional Development of the State Educational Agency and staff, the Office of State Review, and Senior Attorney, Office of Counsel, in the data collection required for this Study are recognized and appreciated.

This Study did not include the review of work products of Hearing and Review Officers to ascertain whether the conduct of pre-hearing and/or status conferences, hearings and reviews, the consideration and documentation of extensions, the organization and certification of administrative records, and the writing of decisions were in accordance with appropriate, standard legal practice. In addition, this Study did not include interviews with participants in the system, such as local educational agencies, parents, representatives, and Hearing and Review Officers.[8]

Both the review of work products of the Hearing and Review Officers and interviews with participants are important sources of information to inform the design of the system regarding obstacles, including common non-standard practices, which affect the efficiency, effectiveness, and timeliness of the system that may not have been apparent through data review. As such, it is recommended that any additional study undertaken in the design of the New York State hearing system include these components.

C. A PERSPECTIVE - NATIONAL TRENDS AND NEW YORK

1. Number of Due Process Complaints and Adjudicated Hearings

From 2004-2005 to 2011-2012, the overall number of Due Process Complaints filed in the states/entities was down 19%[9]. During that same time period, the number of hearings held was down by 58%. This sharp decline is perceived to be in part because the number of Due Process Complaints decreased and the number resolved without a hearing increased.[10]

A comparison of the number of Due Process Complaints filed from 2006-2011 in the states and the District of Columbia revealed the highest overall filings were in New York, then, in rank order, California, the District of Columbia, New Jersey, and Pennsylvania. The rank order changed when that analysis was done in relation to special education enrollments, with the District of Columbia in the top position, and then, in rank order, New York, Hawaii, California, and New Jersey.[11]

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[8] Unfortunately, neither the participants' input provided at the United States Department of Education's July 16, 2014 public hearing concerning entering into a Compliance Agreement with the State Educational Agency nor comments during the promulgation of the amendments to Title 5 Part 200, effective February 1, 2014, were available for review during the course of this Study.

[9] Where the writer has determined the percentage points based on raw data, the percentages were rounded up at .5 or above.

[10] http://www.directionservice.org/cadre/pdf/DR_Data_Trends_Webinar_13FEB14.pdf; FFY 2011 APR Indicator Analyses 2013 SPP/APR Analyses- Parts B and C- B18/19 indicator: http://www.directionservice.org/cadre/pdf/2013%20Part%20B%20Summary%20Book%20Final%20(1).pdf , pg. 110; http://leadership-2013.events.tadnet.org/pages/660

[11] Perry A. Zirkel, *Trends in Impartial Hearings under the IDEA: A Follow-up Analysis* (2014); See also

Other than the District of Columbia, the percentage of adjudicated hearings in New York State is relatively high as compared to other high activity states: in 2011-2012, 27% of the filed Due Process Complaints were adjudicated in the District of Columbia as compared to New York at 11%[12]; Pennsylvania at 8%; New Jersey at 5%; and California, with approximately half of the number of Due Process Complaints filed in New York, at a remarkable low of 4%.[13] While not ideal, New York State's 11% percent adjudication rate in 2011-2012 was not excessive in a litigious jurisdiction.

However, there is a trend in the past four years of an increase in the number of adjudicated Due Process Complaints in New York State: from 6% of all Due Process Complaints in 2010-2011; to 11% in school year 2011-2012; to 20% in school year 2012–2013 and to 22% in school year 2013–2014. Correspondingly, the number of Due Process Complaints withdrawn has diminished in each of the above cited school years from a high of 70% in 2011–2012; to 64% in 2012-2013; and to 61% in 2013-2014.

This recent trend of increasing numbers of adjudicated Due Process Complaints in New York State is troubling and runs counter to the national trends in this dispute resolution system. Based on the enviable proportion of adjudicated Due Process Complaints in 2011-2012 in California, New Jersey, and Pennsylvania, the alternative dispute resolution practices and Hearing Officers' case management in these other high activity states may be instructive as the State Educational Agency considers the hearing and review infrastructures.

2. Timeliness of Adjudicated Hearings

"Overall, states/entities appear to be getting better at managing the complexities of tracking and managing due process hearing timelines."[14] Nationally, from the baseline

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Perry A. Zirkel and K.L. Gischlar, *Due Process Hearings Under the IDEA: A Longitudinal Frequency Analysis* by. Journal of Special Education Leadership 21,1: 22-31 (2008) and Perry A. Zirkel and Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey* (2010)

[12] This national data are inconsistent with the data provided by the State Educational Agency which showed 19% of adjudicated requests; however, the distinction is likely attributed to the calculation by school year.

[13] 2011-2012 Dispute Resolution Data- state-by-state: https://inventory.data.gov/dataset/7c6916d1-c375-4c4c-9de0-f2b07aac4fc2/resource/5c23f855-4f83-4173-9a08-6928920dd1a6

[14] The historical data files for IDEA-dispute resolution 2006-2007 to 2010-2011: http://tadnet.public.tadnet.org/pages/712 This writer acknowledges the excellent analysis done by CADRE of the SPP/APR data and relies heavily on that analysis in this study. FFY 2009 reported information is derived and/or quoted from the first cited report and FFY 2010 information from the second cited report: http://www.directionservice.org/cadre/pdf/Part%20B%202011%20SPPAPR%20Analysis.pdf, pp. 203- 204 http://www.directionservice.org/cadre/pdf/FFY2010_PartB_Indicator_Analyses_16,17,18,19.pdf, pp. 203 – 205http://www.directionservice.org/cadre/pdf/FFY2010_PartB_Indicator_Analyses_16,17,18,19.pdf, pp. 198, 199, 202; See also: http://www.directionservice.org/cadre/pdf/Part%20B%202011%20SPPAPR%20Analysis.pdf, pp. 198 – 204

year of data in 2004-2005 to 2009-2010, the improvement trend with regard to 100% compliance on timely decisions issued is "overwhelmingly positive."[15]

Thirty-nine states were compliant in 2009-2010 with two additional states in substantial compliance (more than 95%) as compared to 29 states in the baseline year. In the following year: "[S]even states showed progress, five states showed slippage, and 48 states showed no change . . . . "In FFY 2010, of the 39 states that reported due process hearing activity, 33 states were in the 90% to 100% range. Thirty-two of those states were at or above 95%, with 31 achieving the 100% target. Only six states fell below 90%, supporting the overall trend toward compliance."

In Federal Fiscal Year (FFY) 2010, the explanations for progress in the states showing improvement in their hearing systems were largely focused on efforts directed to the timeline requirements. "States that attributed progress or improvement to particular strategies included the following in their explanations or activities charts:

- Provide technical assistance, training, and professional development opportunities to hearing officers, ALJs, and staff at the SEA and administrative hearing office, including focused training on hearing procedures, timelines, and legal issues (29 states).
- Improve systems administration and monitoring, including more frequent and/or effective communications between the SEA's due process coordinator and hearing officers or an administrative hearing office, which may be implemented through the use of agreements or memoranda of understanding (26 states).
- Improve data collection and reporting, timeline tracking, and interagency coordination between the SEA's due process complaint coordinator and the hearing officer or administrative hearing office (15 states).
- Clarify, examine, and/or develop policies and/or procedures related to internal and external due process complaint processes and requirements (10 states).
- Implement or improve evaluations/evaluation processes for the complaint filing and hearing process, hearing officer performance, and outcomes, including asking for feedback and guidance on timelines (10 states)."[16]

"The more hearings that states hold, the more difficult it may become to complete them all within timelines; more active systems are less likely to achieve 100% compliance. However, two of the three states that held in excess of 100 hearings in 2009-2010 achieved between 95% and <100% on this indicator, suggesting that even with high

[15] http://www.directionservice.org/cadre/pdf/Part%20B%202011%20SPPAPR%20Analysis.pdf, pg. 199 Data based on Indicator 17: "Indicator 17: Percent of adjudicated due process hearing requests that were adjudicated within the 45-day timeline or a timeline that is properly extended by the hearing officer at the request of either party or in the case of an expedited hearing, within the required timelines. [20 U.S.C. 1416(a)(3)(B)] Beginning with the FFY 2011 APR, reporting on Indicator 17 is no longer required by the USED as part of the SPP/APR. States report data on the timeliness of State due process hearing decisions as part of the mandatory program data they submit under IDEA section 618."

[16] http://www.directionservice.org/cadre/pdf/FFY2010_PartB_Indicator_Analyses_16,17,18,19.pdf, pp. 200-201

levels of activity these systems can achieve substantial compliance."[17] In the following year, two of the four states that held in excess of 100 hearings achieved between 95% and 100% on Indicator 17.[18]

3. One-Tier and Two-Tier Systems

Currently, all of the high activity states except for New York have one-tier systems. In 1988, 26 states had a two-tier special education hearing and review system. That number fell to 24 states in 1991, 16 states in 2001, and 10 states in 2010.[19] Notably, no state changed in the other direction during that same time period.[20] Currently only eight states maintain a two-tier hearing and review system and New York State is the only one with a substantial population. The states that have transitioned from a two-tier hearing and review system to a one-tier system have cited numerous reasons for that change, but concern regarding timeliness of the system is a constant among those states. For example, the major reasons California abandoned the two-tier system were the high number of appeals from lower level decisions and the inherent delays in a two-tier system; and the transition of Illinois to a single-tier system was motivated by proponents who argued that the two-tier structure was cumbersome and costly. In addition, in Illinois there were concerns regarding the quality of Hearing Officers' decisions, timeliness, and the overall impartiality of the system.[21]

4. Hearing Officers: Employees or Independent Contractors?

"The alternative structures for IDEA hearing officers theoretically fit into a spectrum of three broad categories: 1) part-time contractors; 2) full-time independent contractors, and 3) full-time employees . . . . Taking into account all 50 states, the predominant model is the use of part-time contractors, with a gradual and still far from complete movement toward the full-time employee category."[22]

Currently, 20 jurisdictions have full-time Hearing Officers. (Nineteen states have employee full-time Hearing Officers and the District of Columbia has contractual full-

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[17] http://www.directionservice.org/cadre/pdf/Part%20B%202011%20SPPAPR%20Analysis.pdf,pg. 200

[18] http://www.directionservice.org/cadre/pdf/FFY2010_PartB_Indicator_Analyses_16,17,18,19.pdf, pg. 201

[19] Katsiyannis, A., & Klare, K., *State practices in due process hearings: Considerations for better practice*, *Remedial and Special Education*, 12-2, pp. 54-58 (1991).

[20] See early trend analysis by *Eileen Ahearn*, Due Process Hearings: 2001 Update, NASDSE Project Forum (April 2002): http://www.nasdse.org/DesktopModules/DNNspot-Store/ProductFiles/131_ffb7747b-2f2e-4887-97a7-137cc145dd1b.pdf

[21] *Evaluation of the Illinois' Due Process Procedures Public Act 89-652 105ILCS 5/14-8.02a January 1, 2002 – June 30, 2004* by Special Education Services – Springfield June 16, 2004; http://www.isbe.net/spec-ed/pdfs/dp_study.pdf; See also: Eileen Ahearn, Ph.D. , *Due Process Hearings: 2001 Update April 2002* http://www.gpo.gov/fdsys/pkg/ERIC-ED466060/pdf/ERIC-ED466060.pdf

[22] Perry Zirkel, *Evaluating Organizational Options for Special Education Hearings and Mediations: A Report to the Massachusetts Commissioner of Elementary and Secondary Education*, pg. 6 (May 27, 2009)

time Hearing Officers.) Thirty-one of the states have part-time Hearing Officers.[23] New York State is the only high activity jurisdiction with part-time contractual Hearing Officers. Other than the District of Columbia, the other high-activity jurisdictions employ the full-time Hearing Officers through a state office of administrative hearings. (See the detailed discussion below of the other high-activity jurisdictions.)

PART TWO - NEW YORK STATE'S TWO-TIER SYSTEM

A. OVERVIEW OF THE TWO-TIER SYSTEM

Education Law §4404 establishes a two-tier special education impartial hearing and review system for New York State. Education Law §4404 and Parts 200, 201, and 279 of Title 8 of the Regulations of the Commissioner establish the procedures for impartial hearings and reviews.

1. Tier I

The Tier I hearing is arranged by the board or agency of the local educational agency. The local board of education appoints a contractual Hearing Officer certified by the State Educational Agency to conduct the hearing proceedings. Any party aggrieved by the findings of fact and the decision of a Hearing Officer may appeal to the Office of State Review of the State Educational Agency. The decision of the Hearing Officer is binding upon both parties unless appealed. (Educ. Law §4404(1); 8 NYCRR §200.5(k))

2. Tier II

The Tier II reviews are initiated and conducted in accordance with the provisions of Part 279 of the Regulations of the Commissioner. (8 NYCRR Part 279) The provisions of Parts 275 and 276 of the Regulations of the Commissioner also govern the practice of the review, except as provided for in Part 279.

The State Review Officers are employees of the State Educational Agency's Office of State Review. (8 NYCRR §§279.1(b) and 279.6) The final determination of the State Review Officer may only be reviewed in a proceeding brought in the State Supreme Court or in a United States district court. (Educ. Law §4404)

[23] Updated information by this writer of data reported in *Due Process Hearing Systems Under the IDEA: A State-by-State Survey* by Perry Zirkel and Gina Scala in 2010.

B. DURATION OF A DUE PROCESS COMPLAINT THROUGH TIER II

In a two-tier system, the administrative review of the hearing decision is a right of a party aggrieved by the decision and is required, with some exceptions, for the exhaustion of administrative remedies. It is recognized that the percentage of decisions rendered after adjudication at the hearing level that were appealed to the Office of State Review has stayed under 20% for the past several years.[24] Notwithstanding this low percentage, it is important to examine how long it typically takes for parents and schools to have a final administration determination in New York State's two-tier system when they elect to exercise their right of appeal.

To ascertain the duration of Due Process Complaints from filing at Tier I through the appeal of an adjudicated case at Tier II in the three years preceding this Study, decisions rendered by State Review Officers at the Office of State Review were selected on a repetitive random pattern for review.[25] In order to provide a perspective of the duration of cases prior to the backlog of untimely cases pending before the Office of State Review as well as during the backlog, cases were reviewed for 2011 through 2013.

The examination of 31 of the final decisions issued in 2011 revealed 26% (eight cases) had a duration from the filing of the Due Process Complaint to the issuance of the appeal decision of more than one year.[26] Three of those cases were in excess of one and one-half years, but no Due Process Complaint had a duration of two or three years.

In 2012 and 2013, there was an increase in the duration of cases from the filing of the Due Process Complaint to the issuance of an appeal decision. Due to the number of pending untimely decisions at the Office of State Review in 2012 and 2013, the rendered decisions in those years may represent the best scenario for timeliness through Tier II for these time periods.

- In 2012, the examination of 30 of the final decisions issued revealed 63% of the cases had a duration of over one year. Seventeen of these cases had a duration from the filing of the Due Process Complaint to the issuance of an appeal decision of more than one year; one Due Process Complaint had a duration of more than two years; and one had a duration of more than three years.
- In 2013, the examination of 19 final decisions issued revealed 42% of the cases had a duration of over one year. Five of these cases had a duration from the filing of the Due Process Complaint to the issuance of an appeal decision of more than

[24] NYSED and Office of State Review data

[25] The calculation of the duration of the Due Process Complaints does include the 35-day time period after the date of the Hearing Officer's decision to file a notice of the intention to seek review. (8 NYCRR §279.2(b)) This appeal time period is recognized as not being under the control of the Office of State Review and should be taken under consideration with regard to the calculations below.

[26] While the benchmark of duration of more than one year for the final administrative resolution of a Due Process Complaint was selected for purposes of analysis, no inference should be made that this writer finds the duration of 1 year as an acceptable time period to resolve these time sensitive disputes with regard to a student with a disability's education.

one year; one Due Process Complaint had a duration of more than two years; and two cases had a duration of just short of three years.

Given the fact that the data from 2012 and 2013 likely represent the best scenario for the duration of a Due Process Complaint through the appeal process, it is concluded that the overall duration of cases in New York State's two-tier system does not provide the parties an expeditious resolution of an educational dispute. (See Part Three, Section C for the data regarding the duration of cases at Tier I only.)

Concern regarding the potential impact of the prolonged duration of the resolution of Due Process Complaints was recently echoed in a report of the United States Government Accountability Office (GAO):

> "…nearly half of all due process hearing decision timelines were extended in school year 2011-12; in California, New York, and Pennsylvania, the large majority of hearing decisions were made under extended timelines. The decisions in these three states accounted for more than 65 percent of all hearing decisions nationally. Despite the more frequent use of extensions in California and New York, in 2011 they achieved about 99 percent and 86 percent, respectively, of the 100 percent performance target that Education established for hearing decision timeliness. Education's current performance measure creates the appearance that most hearing decisions in California and New York were timely even though extended hearings took an unknown amount of time, and no information is available about whether these extended timeframes affected the provision of services to children with disabilities."[27]

C. STATIC SYSTEM?

It is important to note that neither the hearing or review systems in New York are static. Since at least FFY 2005[28], the State Educational Agency has engaged in numerous improvement activities to address the timeliness of decisions and other aspects of the system, including increasing the amount of mandatory training for Hearing Officers and contracting with an outside entity for expanded Hearing Officer training and Hearing Officer complaint investigations.[29] Even as this Study was being conducted, the State

[27] GAO Report*: Special Education: Improved Performance Measures Could Enhance Oversight of Dispute Resolution* (GAO-14-390: Published: Aug 25, 2014. Publicly Released: Sep 24, 2014) http://www.gao.gov/assets/670/665434.pdf

[28] State Performance Plan (SPP) for 2005-2012 - Revised February 2013 - Indicator 17; http://www.p12.nysed.gov/specialed/spp/2013/ind17.htm; For additional detail on activities revised, completed or added in the school year 2010-11, see pp. 124-127 http://www.p12.nysed.gov/specialed/spp/apr2012/rev-august2012.pdf

[29] As a matter of disclosure, this writer is a subcontractor with the contractual entity and responsible for the investigation of complaints of misconduct or incompetence of a Hearing Officer.

Educational Agency continued to be engaged in efforts to improve the hearing and review systems. In particular, the State Educational Agency has repeatedly sought to incorporate not only standard, but best practices in the hearing system, through efforts that include training on best practices in the conduct of the hearing, decision making and decision writing, the provision of approved model forms and templates; and amending the regulations in areas that included changes to the certification and appointment of Hearing Officers, timeliness, withdrawals and consolidation of Due Process Complaints, and preparation of the administrative record.[30] In addition, recognizing that a pre-hearing conference would "provide IHOs[31] with the tools to move the hearing forward in a smooth, orderly fashion, and to render decisions in an efficient and expeditious manner", the State Educational Agency proposed (but ultimately did not adopt) the inclusion of a mandatory pre-hearing conference in the proposed regulations.[32]

As referenced in the section on national trends, the Center for Appropriate Dispute Resolution in Special Education (CADRE) cites the following strategies as the states' explanation for improvement on timeliness in the hearing system, the states now:

1. Provide technical assistance, training, and professional development opportunities;
2. Improve systems administration and monitoring;
3. Improve data collection and reporting, timeline tracking;
4. Clarify, examine, and/or develop policies and/or procedures related to internal and external Due Process Complaint processes and requirements;
5. Implement or improve evaluations/evaluation processes for the hearing process, Hearing Officer performance, and outcomes, including asking for feedback and guidance on timelines.[33]

The State Educational Agency has implemented improvement strategies in the first four categories over the past several years and has recently initiated a process to establish a Hearing Officer evaluation system. (See subsequent discussion of the evaluation of Hearing Officers and Office of State Review personnel.)

In addition, peripheral to, but affecting the system, the State Educational Agency is engaged in a number of developmental efforts in the area of alternative dispute resolution, including the development of a system of Individualized Education Program Facilitation and work with the CADRE on alternative dispute resolution in the State. Related efforts at the local level such as the State Educational Agency's outreach to New

[30] See for example, February 2014 Summary and Guidance on Regulations relating to Special Education Impartial Hearings –Special Education Field Advisory: http://www.p12.nysed.gov/specialed/dueprocess/home.html

[31] In quoted material, the term IHO is used for Hearing Officer or Impartial Hearing Officer, as is OSR for Office of State Review and SRO for State Review Officer.

[32] http://docs.dos.ny.gov/info/register/2012/sep19/pdfs/rules.pdf

[33] http://www.directionservice.org/cadre/pdf/FFY2010_PartB_Indicator_Analyses_16,17,18,19.pdf, pp. 200-201; See also http://www.directionservice.org/cadre/pdf/Part%20B%202011%20SPPAPR%20Analysis.pdf pg. 203

York City on improvement initiatives and those recently announced in New York City to expedite reimbursements to parents for private special education programs may also, in time, have an impact on the hearing and review systems.[34]

The sheer magnitude of this hearing and review system necessitates an efficient infrastructure that incorporates not only standard legal practices, but best legal practices to ensure timeliness. The challenge in this Study was to determine whether, notwithstanding the ongoing efforts of the State Educational Agency, the improvements to the hearing and review system are enough to enhance the efficiency and overall operation of the system and attain timeliness.

PART THREE - TIMELINESS OF THE HEARING SYSTEM AND THE DURATION OF A DUE PROCESS COMPLAINT AT TIER I

A. INCIDENCE OF DUE PROCESS COMPLAINTS

In New York State, from 2004-2005 to 2011-2012, a low of 5440 Due Process Complaints were filed and a high of 6181 Due Process Complaints were filed[35]. In school years 2012-2013, the trend near the upward range held at 6151 Due Process Complaints. However, in school year 2013-2014, the number of Due Process Complaints filed increased to 6549. If this upward trend of Due Process Complaints continues in this current school year, the impact on the hearing and review systems will be significant and, in order to ensure timeliness, the systems must be prepared for this potentiality.

B. TIMELINESS

The percentage of adjudicated hearings completed in a timely manner improved from 81% in FFY 2008 to 84% in FFY 2009.[36] The improvement was maintained in FFY 2010 at 84.25% and then rose to 85.7% in FFY 2011 before beginning a downward trend in FFY 2012 to 83.3%[37] and to 82% in school year 2013-2014.[38]

Regrettably, notwithstanding the numerous strategies the State Educational Agency initiated over the years that are standard and even best practices, New York State has

[34] http://www.nydailynews.com/blogs/dailypolitics/live-mayor-de-blasio-assembly-speaker-sheldon-silver-discuss-bills-special-education-reimbursements-blog-entry-1.1842150; April 9, 2014 Letter from Commissioner King, *supra* pg. 4
[35] http://www.directionservice.org/cadre/pdf/NY-JAN2014.pdf
[36] http://www.p12.nysed.gov/specialed/spp/apr2011/Revised411.pdf
[37] http://www.p12.nysed.gov/specialed/spp/osepdeterminations/ny-APRresponsetable-2014b.pdf
[38] School Year data provided by NYSED

been unable to attain 100% or even substantial compliance[39] with timely adjudicated hearings during the above cited time periods. As a result, the percentage of timely adjudicated Due Process Complaints has been a persistent indicator since FFY 2004 in the determination that New York State needs assistance in implementing the requirements of Part B of the IDEA.[40]

Based on school year data, the number of timely withdrawn cases falls in the 90% range for this same time period: 94% of withdrawn cases were closed timely in 2011-2012; 95% in 2012-2013; and 92% in 2013-2014. While these latter numbers do not attain the goal of 100% timeliness, for one of the three years New York State did attain substantial compliance with regard to withdrawn cases.

Caveat

The reported timeliness numbers of Due Process Complaints that were extended assume the validity of all extensions as documented by the Hearing Officer, including adherence to the mandatory standards in the Regulations of the Commissioner. A review of State Review Officers' decisions raises doubt that this assumption is correct and, therefore, the timeliness numbers may be lower than presumed:

- State Review Officer 11-091: "Here, the parent filed her due process complaint notice on September 15, 2010, yet the impartial hearing officer did not render her decision until June 15, 2011 – 9 months later (Hearing Officer Decision at p. 26; Parent Ex. A). Despite the fact that the student was not receiving any services, the first hearing date, which the parties deemed a prehearing conference (8 NYCRR 200.5[j][3][xi]), did not take place until November 10, 2010 – nearly two months after the parent filed her due process complaint notice (Tr. pp. 1-77; Parent Ex. A) . . . . On at least four occasions, the impartial hearing officer requested the parties to ask for an extension to the compliance date by which her decision was due in direct contravention of the regulations (8 NYCRR 200.5[j][5][iii]; Tr. pp. 67, 114, 439, 757; see Tr. p. 782). On at least one occasion, the impartial hearing officer unilaterally extended the compliance date without undergoing the procedural steps required in the regulations (Tr. pp. 869-70; see 8 NYCRR 200.5[j][5][ii],[iii]). Furthermore, there appear to have been other extensions of the compliance date that were not made part of the hearing record (see Tr. p. 782 [impartial hearing officer states that the compliance date had been extended six times up to that date]). Based on the foregoing, I find that the impartial hearing officer failed to comply with the regulatory requirements for granting and

[39] Between 95% and 100%:
http://www.directionservice.org/cadre/pdf/Part%20B%202011%20SPPAPR%20Analysis.pdf , pg. 200
[40] http://www2.ed.gov/fund/data/report/idea/partbspap/allyears.html#ny;
The latest determination is the June 23, 2014 letter to Commissioner King from the Director of the Office of Special Education Programs; http://www2.ed.gov/fund/data/report/idea/partbspap/2014/ny-acc-aprltr-2014b.pdf

documenting all extension requests in the hearing record (8 NYCRR 200.5[j][5][i], [ii]).”

- State Review Officer 11-125: Footnote 2. “Although the impartial hearing officer's decision indicates that "decision deadlines were extended at the parties' requests" (Hearing Officer Decision at p. 3), the hearing record shows that twice during the impartial hearing, the impartial hearing officer solicited requests for an extension of the compliance date from both parties (Tr. pp. 291, 414). Such solicitations on the part of the impartial hearing officer violate federal and State regulations governing impartial hearings, which provide that requests for extensions be initiated by a party, and that the impartial hearing officer's written response regarding each extension request be included in the hearing record, even if granted orally (34 C.F.R. § 300.515; 8 NYCRR 200.5[j][[5] [emphasis added]).” 08-064). I also caution the impartial hearing officer to comply with the extension documentation requirements.”

- State Review Officer 12-010: Footnote 3. “Regarding extensions, I remind the IHO to comply with the regulatory requirements governing the granting of extensions, including documenting in writing the reason for which each extension is granted, that the Hearing Officer "fully consider[ed]" the relevant factors, and that an extension was not granted solely due to "scheduling conflicts" absent "a compelling reason or a specific showing of substantial hardship" (8 NYCRR 200.5[j][5][i-iv]). Moreover, I find that the Hearing Officer has not demonstrated compliance with the 45-day timeline for issuing the decision absent specific extensions of time insofar as the Hearing Officer was required to draft a written response for each extension request and enter the response into the hearing record (8 NYCRR 200.5[j][5][iv]).”

C. DURATION OF TIER I

In school year 2011, 2% of Due Process Complaints were open for more than a year; 1% was open for more than a year in school year 2012; and 2% were open for more than a year in school year 2013.[41] Notwithstanding these relatively stable numbers, the breakdown of the data reveals that from school years 2011–2012 to 2013–2014, the duration of all Due Process Complaints to resolution at Tier I have steadily increased overall:

[41] The data reported to OSEP by through 2011 – 2012 for the number of hearings and those fully adjudicated were relied upon when available and noted as such. The data provided by NYSED at the request of the writer were based on school year data and may reflect Due Process Complaints filed the prior school year. Like data was compared when possible, but, for some of the detailed hearing data and for 2013 – 2014, the school year data only was available and the reader should take that into consideration in the trend analyses.

- For adjudicated cases in school year 2011-2012, 86% of these case lasted more than 75 days; that number fell to 85% in 2012–2013; but rose to 90% in 2013–2014. In 2013-2014, a closer examination reveals of these 90% of cases, 8% lasted from 76 – 100 days; 42% lasted 101 - 209 days; 33% lasted from 210 – 365 days and 7% lasted more than 365 days.
- For withdrawn cases in school year 2011-2012, 46% of these case lasted more than 75 days; that number fell to 44% in 2012–2013; but rose to 60% in 2013–2014. For 2013-2014, a closer examination reveals of these 60% of cases, 17% lasted from 76 – 100 days; 34% lasted 101 - 209 days; 8% lasted from 210 – 365 days and 1% lasted more than 365 days.

Based on this data, not only is the overall duration of the cases appealed to Tier II excessive in New York State, the duration of the Tier I hearing process also does not provide the parties an expeditious resolution of an educational dispute through adjudication and, in some cases, through withdrawal.

Without regard to whether the procedures at the hearing were consistent with the requirements of due process or the substantive merits of any of the hearing decisions, which is the job of a State Review Officer or a reviewing court, this data depict a system that is improving in some regards, but has not been able to rectify the lengthy duration to resolve a dispute.

There is no empirical data regarding the impact of these delayed decisions on the education of the students with disabilities whose education is at issue in the filed Due Process Complaints. However, as previously discussed, a delay in the rendering of a Hearing or Review Officer's decision may result in a student being denied a free appropriate public education for a significant portion of the school year at issue. In addition, the prolongation of these disputes:

- Exacerbates the cost of the system, including the transactional costs;
- Complicates the evidentiary orderliness of the process as important witnesses disappear and new evidence emerges as the student's educational needs change; and
- Encourages the multiplicity of disagreements over several annual IEP cycles and causes lengthy and complicated hearings.

D. POINTS OF DELAY

Title 8 NYCRR Part 200 has numerous protections to ensure timeliness, including the duration of specific intervals such as the initiation of the rotational selection process not later than two business days after the receipt of the Due Process Complaint; the timely conduct of a hearing on consecutive days whenever practicable; the timely issuance of the decision after the record is closed; and the granting of extensions of a short duration for good cause, including specific delineated exclusions. (8 NYCRR §§200.5(j)(3)(i)(a),

200.5(j)(3)(iii), 200.5(j)(3)(xiii), 200.5(j)(5), 200.5(j)(5)(i) and 200.5(j)(5)(ii)) By design, these numerous protections should cause this system to be in, at least, substantial compliance with timeliness. Therefore, a closer look at the intervals in this hearing process was required to ascertain any points of delay in this system that impede the timeliness of the process.

1. Appointment

At the outset, it is important to recognize the magnitude of the volume of cases filed on a daily basis in New York State. In the first seven business days in September 2014, for example, the number of Due Process Complaints filed ranged from a low of 48 to a high of 228, with four days in the range of 100 filings or above.[42] These are extraordinary numbers as compared to other state hearing systems.

The volume of filings in New York State's system may explain a delay in the appointment of Hearing Officers; however, it does not excuse any delay that may cause an untimely resolution of a dispute for a parent and a school. Rather, impediments caused by the magnitude of filings in this system necessitate solutions that address this practical reality, such as an adequate computerized docketing system with case management software that enables an electronic appointment system that includes work load capacities; further augmentation of the number of part-time Hearing Officers; and/or a sufficient number of Hearing Officers available on a full-time basis.

As noted above, Education Law §4404 and Title 8 Parts 200 and 201 establish the procedures for impartial hearings in New York State. The local board of education is required to initiate the Hearing Officer rotational selection process immediately, but not later than two business days after receipt by the district of the Due Process Complaint or mailing of the Due Process Complaint to the parent. (8 NYCRR §200.5(j)(3)(i)(a))

While the IDEA does not prescribe the method for appointing Hearing Officers to a case, New York law and regulations are prescriptive with regard to the rotational selection process for Hearing Officers available to serve in hearings conducted pursuant to Education Law §4404(1), including an exception for a city school district of a city having a population of more than one million inhabitants to the extent it maintains its rotational selection process in effect prior to July 1, 1993. The appointment process is regulated in detail in Title 8 NYCRR §200.2(e)(1)(ii):

> "[A]ppointment of impartial hearing officers pursuant to Education Law §4404(1) shall be made only from such list and in accordance with the rotation selection process prescribed herein and the timelines and procedures in section 200.5(j) of this Part. Such names will be listed in alphabetical order. Selection from such list shall be made on a rotational basis beginning with the first name

[42] NYSED data

> appearing after the impartial hearing officer who last served or, in the event no impartial hearing officer on the list has served, beginning with the first name appearing on such list. Should that impartial hearing officer decline appointment, or if, within 24 hours, the impartial hearing officer fails to respond or is unreachable after reasonable efforts by the district that are documented and can be independently verified, each successive impartial hearing officer whose name next appears on the list shall be offered appointment, until such appointment is accepted. The name of any newly certified impartial hearing officer who is available to serve in the district shall be inserted into the list in alphabetical order."

Title 8 NYCRR §200.5(j)(3)(ii) and (j)(6) provides for a variance in the appointment process for multiple hearing requests and if the party subsequently files a Due Process Complaint within one year of the withdrawal of a Due Process Complaint.

Pursuant to Title 8 NYCRR §200.5(j)(3)(i)(b), a Hearing Officer may not accept appointment unless he or she is available to make a determination of sufficiency of a Due Process Complaint within five days of receiving such a request and to initiate the hearing within the first 14 days of the applicable time period. While this provision requires availability to initiate the hearing, the incorporated subparagraph in the section allows the commencement of either the pre-hearing conference or hearing. (8 NYCRR §200.5(j)(3)(iii)) This distinction is significant and likely reduces the utility of the provision. Further, based on the duration data alone, the Hearing Officers' determination of availability pursuant to this provision may be pro-forma.

Guidance from the State Educational Agency includes a process to ascertain a Hearing Officer's availability prior to appointment, which would include the availability set forth in Title 8 NYCRR §200.5(j)(3)(i)(b).[43] The recent revisions to Title 8 NYCRR Part 200 require that a Hearing Officer must be willing and available to accept appointment to conduct impartial hearings. (8 NYCRR §200.1(x)(4)(vi)) Subsequent guidance from the State Educational Agency clarifies that unavailability means a "temporary period".[44] Given the pervasive culture of the lengthy duration of Due Process Complaints and a persistent pattern of untimeliness in this system, this interpretation of a temporary period may still result in extreme variability.

As discussed under the local appointment process, there were numerous instances when there were several months of delay before an appointed Hearing Officer retained an assigned case in New York City.[45] Based on the State Educational Agency's significant concern regarding the timely appointment of Hearing Officers in New York City, the State Educational Agency reminded the Hearing Officers of the responsibility to notify

[43] Impartial Hearing Process for Students with Disabilities, December 2001
[44] July 2014 memorandum from NYSED, *supra* pg. 2
[45] July 2014 memorandum from NYSED to Hearing Officers who conduct hearings for New York City, pg. 1

the New York City Impartial Hearing Office if the Hearing Officer is temporarily unavailable or needs to be placed on the inactive list. In this memorandum, the State Educational Agency identified the limited instances for a Hearing Officer's recusal after appointment. The unavailability of a Hearing Officer to conduct the hearing within 14 days of the timeline for commencing the hearing or prehearing conference was included as one of the justifiable reasons for recusal.[46]

The Hearing Officer's determination of unavailability after appointment might arise as an exceptional circumstance in an automated appointment process upon the occurrence of an intervening event. However, dependence on the recusal process after appointment would be a significant impediment to an expeditious appointment process and the timely adjudication of Due Process Complaints. (See further discussion under local appointment policies.)

In the course of this Study, there was also some evidence that Hearing Officers may be provided the Due Process Complaint upon their automatic rotational appointment and prior to the Hearing Officers' acceptance of the appointment to the case. Due to the pattern of recusal in this system based on unavailability, this practice raises concerns regarding the unnecessary and impermissible disclosure of personally identifiable information on students and families. In addition, if this practice results in Hearing Officers premising their acceptance of an appointment on the nature of a case and the parties and/or their representatives, this would be an impermissible culling practice violative of due process. Upon being informed of this practice in the course of this Study, the State Educational Agency requested the New York City Impartial Hearing Office revise the process of appointment to only provide the Due Process Complaint to the Hearing Officer who accepts appointment.[47] It is unknown if notification was also provided to the other local educational agencies and the degree to which this practice has been discontinued.

2. Scheduling the Hearing

The average number of days from the appointment of the first Hearing Officer to the first scheduled hearing date ranged from 50 to 58 days in school years 2011-2012 to 2013-2014. Given the 30-day resolution period, unless waived, adjusted, or inapplicable in the case of a Due Process Complaint filed by a local educational agency, this range would still generally allow a Hearing Officer to conduct a hearing and render a timely decision. However, this average range included cases that took over 352 days from appointment of the initial Hearing Officer to the first scheduled hearing date. Therefore, this interval is a cause of delay in some cases and must be addressed to ensure the timely issuance of a decision. (See further discussion regarding the scheduling of a hearing at a pre-hearing conference.)

[46] July 2014 memorandum from NYSED, *supra* pg. 1
[47] NYSED communication to New York City

3. Number of Days of Hearing

From school years 2011–2012 to 2013–2014, the reported average number of days of hearing was three days.[48] In past years, three days of hearing was cited as the average nationally for adjudicated hearings in this system. As a further point of comparison, California hearings ranged from a high of four and a half days in 2007-2008 to a low of three days in 2010-2011.[49] Therefore, without contrary information regarding the conduct of hearings in New York State, the three day average is determined to be consistent with the standard practices of other states.

4. Non-consecutive Hearing Days

Title 8 NYCRR §200.5(j)(3)(xiii) requires that if more than one hearing day is necessary, the additional hearing days must be scheduled on consecutive days wherever practicable. However, as exemplified by the randomly selected cases below in the "Closer Look" section with the 'best' scenario of five hearing days over five months to the 'worse' scenario of eight hearing days over 16 months, this protection does not prevent the evidenced pattern of the scheduling of hearing days on non-consecutive days over non-consecutive months. The failure to conduct hearings over consecutive days not only causes a delay in the issuance of the decision but:

- Causes a loss of continuity in case presentation;
- Results in the inefficient use of hearing time due to unnecessary repetition in case presentation;
- Causes multiple incidences of case preparation; and
- Results in unnecessary attorney's fees.

Therefore, the conduct of hearings in New York State over non-consecutive days over a lengthy time period is a significant impediment in this system. It is unclear based on the available data whether the cause of non-consecutive days is the failure of Hearing Officers to schedule the number of necessary hearing days early enough or some other reason. However, the consistent rolling hearing days over multiple months may certainly be caused by the low incidence of pre-hearing conferences in this system to clarify the hearing issues; discuss the anticipated number of witnesses; and establish and schedule the necessary hearing days at the earliest opportunity. Further study is recommended to ascertain the cause and rectify the problem.

5. Interval from Last Day of Hearing to Decision

The average number of days from the last reported day of hearing to the issuance of the decision has been consistently over 35 days in the past three school years with a possible

[48] NYSED data
[49] http://www.dgs.ca.gov/oah/SpecialEducation/Resources/AvgCaseTime.aspx; http://www.dgs.ca.gov/oah/SpecialEducation/Resources/GraphPage.aspx

increasing trend. In 2011–2012, the average interval was 37 days; in 2012-2013, it was 36 days; and in 2013–2014 it was 40 days. This is a long time in a system that is designed to be completed in 45 days.

As discussed previously, where extensions of time have been granted beyond the required timelines, the Hearing Officer must render and mail the decision no later than 14 days from the date the Hearing Officer closes the record. (8 NYCRR §200.5(j)(5)) The Hearing Officer designates the record close date. Over time the record close date has been described variously as after post-hearing transmissions and the transcript (Impartial Hearing Process for Students with Disabilities, December 2001); limited to "post-hearing submissions" (August 2011 memorandum on IHRS); and "post-hearing briefs", if any, (February 2014 Field Advisory supra).

Written closing argument/briefs are not a right of the parties under the IDEA or New York law or regulation; yet the parties routinely submit them in this system. While permissible, the submission of written closing arguments/briefs is at the discretion of the Hearing Officer. The routine practice of the submission of written closing arguments and/or the failure to restrict the time period for the post-hearing submissions is viewed as an impediment to the expeditious issuance of a decision after the last day of hearing.

In addition, it is unclear whether the Hearing Officers currently designate the record close date without consideration of the time period to receive the transcript of the hearing or delay the close of the record until the electronic and/or written transcript is received. While optimal for the writing of the decision, there is no requirement or right that the Hearing Officer have the transcript of the hearing prior to writing the decision or that a delay for that purpose is good cause. If the Hearing Officers are routinely delaying the record close date for the submission of the written transcript, this delay would also prolong the interval from the last day of hearing to the issuance of the decision.

6. A Closer Look

The scope and time period of this Study did not permit an examination of the standard practices employed by New York State's Hearing Officers in the conduct of a hearing and issuance of a decision. However, the overall duration and interval data above raised questions with regard to the Hearing Officers' implementation of the comprehensive regulatory provisions in Title 8 NYCRR Part 200 and 201 designed to ensure timeliness. Therefore, discernable reported events in some Hearing Officers' decisions from 2012 and 2014[50] were also reviewed to ascertain whether the perceived causes of the lengthy duration were substantiated. The detailed data is provided since it tells the story of the lengthy duration of these cases better than a summary of the findings:

[50] http://www.p12.nysed.gov/specialed/dueprocess/decisions/home.html The first two hearing decisions from each of those three months in 2012 were examined for this purpose. The State Education Agency provided two randomly selected decisions from 2014. It is recognized that this data is a small sample only.

January 2012

- Case One: The duration of this case was 18 months; there were eight hearing days over 16 months; the record close date was almost two months after the last day of hearing; and the decision was dated 12 days from the record close date designated by Hearing Officer and was timely with regard to the record close date.

- Case Two: The duration of this case was over 14 months; there were four hearing days over seven months; the record close date was almost two months after the last day of hearing; and the decision was dated 16 days after the record close date designated by the Hearing Officer.

February 2012

- Case One: The duration of this case was just under 24 months; there were three hearing days over seven months; and the record close date was almost one and a half months after the last day of hearing; the decision was dated before the record close date designated by the Hearing Officer.

- Case Two: This Due Process Complaint was amended more than four months after the date of the initial Due Process Complaint filing. The duration of the case was almost 17 months; there were eight hearing days over six months; the record close date was over four months after the last day of hearing; and the decision was dated 28 days after the record close date designated by the Hearing Officer.

March 2012

- Case One: This Due Process Complaint was 'filed' repeatedly over eight months. The duration of this case was over 17 months from the date of the initial Due Process Complaint; there were seven hearing days over eight months; and the record close date was over eight months after the last day of hearing. The decision was issued five days after the record close date designated by the Hearing Officer appointed after recusal and was timely with regard to the record close date.

- Case Two: The duration of the case was 18 months; there were five hearing days over six months and the record close date was nine months after the last day of hearing. The decision was issued five days after the record close date designated by the Hearing Officer appointed after recusal and was timely with regard to the record close date.

2014

- Case One: The duration of the case was a little over seven months; there were five hearing days over five months. This Hearing Officer was appointed over a

month after the filing of the Due Process Complaint after a series of recusals.[51] The record close date was approximately three weeks after the last day of hearing. The decision was issued eight days after the record close date and was timely with regard to the record close date designated by the Hearing Officer.

- Case Two: The duration of the case was a little over ten months; there were five hearing days over five months. The record close date was one and a half months after the last day of hearing. The decision was issued eight days after the record close date by the Hearing Officer appointed after recusal and was timely with regard to the record close date designated by the Hearing Officer.

The conduct of the hearing in the two cases in 2014 was still over a period of five months, which is excessive in a time sensitive hearing system. However, the conduct of the hearing over proximal months, at least, and the shortened record close dates were the apparent causes of demonstrated improvement in the overall duration of the cases.

It is recognized that there are New York State Hearing Officers who comply with the IDEA and New York State laws and regulations and adhere to standard and best practices. However, the picture that these randomly selected decisions paint is one that impugns the integrity of the system and the diligent work of such Hearing Officers.

Based on the review of these cases and the overall duration and interval data, the points of delay in this system impede the efficiency of the hearing system and unnecessarily prolong the duration of Due Process Complaints.

D. OTHER DATA - THE HEARING SYSTEM

1. Issue Types

Looking at adjudicated hearing decisions at Tier I, from 2005–2006 to 2009-2010, placement issues were raised in an average of 19% of cases and IEP issues were raised in an average of 18% of cases. Tuition reimbursement was raised as a remedy in an average of 22% of adjudicated cases and other reimbursement issues were raised as a remedy on an average of 16% of the adjudicated cases.[52] The tuition reimbursement cases are

[51] Insufficient data were available on the appointment time periods in these cases. As previously discussed, there are numerous instances in New York City where there were several months of delay before an appointed Hearing Officer retained an assigned case.

[52] NYSED – Due Process and Impartial Hearing Updates, April 28, 2011; See also CADRE Conference: *Putting The Puzzle Together: Moving Beyond Quantitative Due Process Hearing Data* by Tracy Gershwin Mueller, Ph.D.: http://www.directionservice.org/cadre/conf2011/Session%204.5%20Putting%20the%20Puzzle%20Together.pdf Nationally, placement issues are raised in hearings at the highest percentage, 25.4%, and IEP issues are the second highest at 23.9%; Tuition reimbursement is raised as an issue in 2.1% of the cases. It is unclear whether this data is based on Due Process Complaints, rather than adjudicated cases and, since

perceived in New York State as a high number of the adjudicated hearings; however, the data reveal that, while high, the number is under a quarter of the cases that proceed to hearing. They do, however, require excellent case management to ensure a timely decision. (There was no publically available data correlating the issue of tuition reimbursement to the timeliness data for adjudicated hearings in New York State.)

2. Pre-hearing Conferences

Pre-hearing conferences are recognized as an effective practice in other state hearing systems to manage the hearing process and timelines and are mandatory in some states.[53] In New York State, the State Educational Agency attempted in 2012 to mandate the conduct of a pre-hearing conference in every case, but was unsuccessful. Therefore, in accordance with Title 8 NYCRR §200.5(j)(3)(xi), a pre-hearing conference remains permissive in New York State.

Unfortunately, as a permissive process, the incidence of cases in which the Hearing Officer conducted a pre-hearing conference is low. The percentage of cases in which the Hearing Officers conducted a pre-hearing conference rose from 16% in 2011-2012 to 37% in 2012-2013 and fell to 33% in 2013-2014. The recent rise in the conduct of pre-hearing conferences is commendable and is likely attributed to the emphasis in that same time period in the Hearing Officer trainings.[54] However, in a system of this magnitude with persistent untimeliness, this incidence of pre-hearing conferences is too low.

Further, these improved numbers reflect only the conduct of a pre-hearing conference, not adherence to standard and best legal practices; for example, whether the issues in the Due Process Complaint were clarified sufficiently in advance of the hearing. This data would be important to ascertain the effectiveness of the conferences with regard to case management.

In the absence of a pre-hearing conference in at least two-thirds of the cases, the likelihood in those cases of a clear statement of the issues of disagreement, a thorough evidentiary record on those issues, and clear and implementable orders are significantly reduced. The low incidence of the conduct of pre-hearing conferences in this hearing system is determined to be a significant factor contributing to the failure of New York State to attain substantial compliance in the timely resolution of Due Process Complaints.

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tuition is a remedy, it is unknown how many of the placement or IEP issues also raise tuition as a proposed resolution.

[53] http://www.directionservice.org/cadre/exemplar/pdef.cfm?id=18 See for example: Virginia: http://www.directionservice.org/cadre/exemplar/artifacts/VA-6%20Managing%20the%20DP%20Timeline.pdf; See also California pre-hearing process: http://www.documents.dgs.ca.gov/oah/SE/SE%20Guide%20to%20understanding%20DPH.pdf

[54] See related discussion in training of Hearing Officers in the conduct of pre-hearing conferences.

3. Repeat Requests

The data on multiple requests for all local educational agencies in New York State was not available. However, the data was available for New York City. Based on 2011 data, there are a high number of repeat requests in New York City. As the primary local educational agency user of the hearing system, this practice in New York City affects the entire system:

> "Another trend seems to be multiple requests being submitted in New York City for the same student. In New York City one third of all requests were repeated requests for the same student. Of those repeated requests almost one third were submitted on the same day or with 31 days of the closing the previous request. Of those repeated cases, two thirds were handled by the same 8 law firms or advocacy groups in New York City. Entering two requests for one student months apart is explainable, but this quick multiple or resubmission of requests appears to put an unreasonable strain on the system."[55]

Multiple proximal Due Process Complaints on the same student are a major impediment to an efficient and effective hearing system, particularly if undetected at the time of filing. Based on the data on the selected Hearing Officers' decisions reported in the "Closer Look" section, the multiple requests may be caused by the long duration of the hearing process and the changing needs of the student while awaiting resolution. If so, an improvement in the duration of the process at Tier I will change this pattern.

However, the multiple requests could also portend engagement in the disfavored practice of "forum shopping." The State Educational Agency recently revised the Regulations of the Commissioner in the areas of consolidation and reappointment of the same Hearing Officer upon the refiling of a previously withdrawn Due Process Complaint within one year of the withdrawal. (8 NYCRR §§200.5(j)(3)(ii)(a), 200.5(j)(6)(iv)) These regulatory changes should diminish this previously identified trend of multiple requests in the next several years. If not, further study would be indicated to ascertain the cause of this practice and to address it accordingly.

4. Appeals of Hearing Decisions

Based on the number of decisions after adjudication at the hearing level, the percentage of appeals to Tier II is relatively low. In 2011, 14% of the decisions after adjudication were appealed to the Office of State Review. In 2012, the number rose to 19% of the adjudicated decisions and, in 2013, the number fell somewhat to 16%.[56]

[55] April 28, 2011 Due Process and Impartial Hearing Updates- PowerPoint Presentation by NYSED

[56] The data provided by NYSED was by school year and the data provided by Office of State Review was by calendar year. Therefore, this data should be viewed as an approximation.

5. Number of Affirmed Decisions on Appeal

Based on a review of State Review Officers' decisions,[57] hearing decisions were modified in whole or in part as much as 65% of the time in 2011. Except for the drop of one percentage point in 2008 to 55%, the percentage has increased steadily every year from 2006 to 2011.[58] The high of 65% is statistically significant.[59] The incidence of remands, if any, from the Office of State Review to the Hearing Officer is negligible.

If the two-tier system is maintained, it is recommended that a representative sample of hearing and review decisions on individual Due Process Complaints be reviewed to ascertain if there is a pattern with regard to the reversals in whole or in part. If the high reversal rate is caused by factors such as a failure of Hearing Officers to ensure that the procedures at the hearing were consistent with the requirements of due process or the failure of the decisions to comport with standard legal practice, the correction of these substandard practices would impact the review process and, in all likelihood, the modification rate.

PART FOUR - THE STATE AND LOCAL INFRASTRUCTURE FOR NEW YORK STATE'S HEARING SYSTEM

A. STATE LEVEL GENERAL EDUCATION SUPERVISION

1. Qualifications of Hearing Officers

In addition to the qualifications in the IDEA, 20 U.S.C. §1415; 34 C.F.R. §300.511(c), New York law and regulations require a Hearing Officer to be an individual admitted to

[57] Data obtained from the State Educational Agency

[58] It is recognized that subsequent judicial review may have determined that reversal of an Hearing Officer's determination was not founded. See for example Scott v. New York City Department of Education, 12 Civ. 3558 (AT); 63 IDELR 43; (S.D.N.Y. 2014): "1. The State Review Officer's Conclusions Are Not Supported by the Record." "As a preliminary matter, the State Review Officer's decision is in large part "thorough and careful." Walczak, 142 F.3d at 129 (noting the appropriateness of deference when a state officer's review has been thorough and careful). However, in situations when a State Review Officer reverses the finding of an Hearing Officer, "the court should give substantial deference to the State Review Officer's views of educational policy, but less to the State Review Officer's factual findings or to its reasoning in general." B.R. ex rel. K.O. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 675 (S.D.N.Y. 2012) (citing M.H., 685 F.3d at 241); see also R.E., 694 F.3d at 189 ("a court must defer to the State Review Officer's decision on matters requiring educational expertise unless it concludes that the decision was inadequately reasoned, in which case a better-reasoned Hearing Officer opinion may be considered instead."). In this case, the State Review Officer's decision is inadequately reasoned and does not merit deference because the State Review Officer: (1) failed to carefully consider significant evidence; (2) failed to address obvious weaknesses and gaps in the evidence; (3) mischaracterized the testimony of two critical witnesses; and (4) made an impermissible credibility assessment.

[59] See also April 9, 2014 Letter from Commissioner King, *supra* pg. 4

the practice of law in the State of New York who is currently in good standing and who has a minimum of two years practice and/or experience in the areas of education, special education, disability rights or civil rights. (Individuals certified by the State of New York as a Hearing Officer on September 1, 2001 were exempted from this requirement.)

In addition, Title 8 NYCRR Part 200 provides some conflict of interest provisions that augment the IDEA's prohibition of a current employee of the State Educational Agency or the local educational agency that is involved in the education or care of the child in the Due Process Complaint at issue. (34 C.F.R. §300.511(c)) Specifically, Title 8 NYCRR §200.1(x) prohibits any individual employed by a school or program serving students with disabilities placed there by a school district committee on special education to serve as a Hearing Officer. Further, no individual employed by such schools or programs may serve as a Hearing Officer for two years following the termination of such employment.

In addition to the general nonemployee requirement, the Hearing Officer must also be independent and not an officer, employee, or agent of the school district or of the board of cooperative educational services of which such school district is a component, or an employee of the Education Department. The Hearing Officer must also not have a personal or professional interest which would conflict with his or her objectivity in the hearing; and must not have participated in any manner in the formulation of the recommendation sought to be reviewed. (8 NYCRR §200.1(x)(3))

In the regulatory revision promulgated in 2014, the State Educational Agency established a new presumption of a conflict of interest in the appointment process:

> "The impartial hearing officer shall not accept appointment if he or she is serving as the attorney in a due process complaint in the same school district or has served as the attorney in a due process complaint in the same school district within a two-year period of time preceding the offer of appointment; or if he or she is an individual with special knowledge or training with respect to the problems of children with disabilities who has accompanied and advised a party from the same school district in a due process complaint within a two-year period." (8 NYCRR §200.5(j)(3)(i)(c))

Notwithstanding these additional conflict of interest provisions, New York State's conflict of interest exclusions are still not as stringent as other jurisdictions with regard to the Hearing Officer's practice in the area of special education law in nonparty jurisdictions.[60] As such, an attorney representing a nonparty district or parents on special education matters in another local educational agency could serve as a Hearing Officer in a local educational agency in which he/she does not practice. It is recognized that this allowable standard may not result in an actual conflict of interest, but the inclusion of

[60] See for example, the District of Columbia that prohibits a Hearing Officer from representing a parent or school in D.C. or in any other jurisdiction in any due process hearing or administrative or judicial proceeding regarding a school or educational matter.

attorneys who practice in this area before other Hearing Officers may result in perceived concerns of fairness and impartiality.[61]

2. Training of Hearing Officers

Since 2011, the State Educational Agency has had a contract with Special Education Solutions, LLC for the conduct of the Hearing Officer candidate training and ongoing training for the Hearing Officers. The trainers are "nationally recognized experts in the field of special education impartial hearings."[62] New York State has a rigorous training program for Hearing Officer candidates prior to being certified as a Hearing Officer. The training includes state and federal law and regulations; significant case law; hearing procedures, with an emphasis on case management and timeliness; special education practices; decision writing; and practical 'hands-on' exercises using typical scenarios. Candidates are currently required to attend a five-day training prior to being eligible for appointment and, at the end of the training, the candidates are evaluated to determine their successful completion of the training program.

Subsequent to certification, the Hearing Officers are required to attend one on-site training and three webinars a year to maintain their eligibility. Since 2011, the Hearing Officers have been provided with training that included: the conduct of a pre-hearing conference, including the subjects to be considered in a pre-hearing conference and model forms; recurrent training on timeliness, including managing the hearing timelines and extensions; efficient case management; the responsibilities and authority of the Hearing Officer; case law updates; practice guidelines, such as a decisional checklist for tuition reimbursement cases; and the writing of decisions and remedial orders.[63]

Notwithstanding the comprehensive pre-training and ongoing training on timeliness, an average of 47% of the appointed Hearing Officers from school year 2011-2012 to 2013-2014 rendered late adjudicated decisions. Similarly, while the training sessions emphasized the importance of the conduct of a pre-hearing conference and included the convenience of model forms, the percentage of cases in which the Hearing Officers conducted a pre-hearing conference rose only to a third in 2013-2014.[64]

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[61] There is emerging discourse in this precise area: See for example the *Impartiality of Hearing and Review Officers under the IDEA: A Checklist of the Legal Boundaries* by Peter J. Maher and Perry A. Zirkel "Therefore, at the state level, the per se standard….this standard should be applied to preclude parental advocates and attorneys who only represent either parents or LEAs from becoming hearing officers because, like LEA employees, they too potentially have a stake in creating precedent in State Educational Agency cases." https://law.und.edu/_files/docs/ndlr/pdf/issues/83/1/83ndlr109.pdf
See also this older study: *Special Education Due Process: Hearing Officer Background and Hearing Officer Background and Case Variable Effect on Decisions Outcomes* by Geoffrey F. Schultz & Joseph R. McKinney 2000 http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1105&context=elj

[62] April 9, 2014 Letter from Commissioner King, *supra*

[63] Hearing Officer Training Agendas and materials.

[64] See related discussion of compensation as a possible contributory factor in the adoption of this practice.

3. Certification of Hearing Officers

In accordance with Education Law §4404(1) and Title 8 NYCRR §200.1(x)(4) all Hearing Officers must be certified by the Commissioner as a Hearing Officer eligible to conduct hearings. In school years 2011-2012 and 2012–2013, there were 117 part-time Hearing Officers and for school year 2013-2014, the number dropped to 107. Of these Hearing Officers, the number of certified Hearing Officers accepting appointments declined over this same time period from 95 in 2011– 2012 to 111 in 2012–2013 and 93 in 2013–2014.[65] Given that the Due Process Complaints rose to 6549 in school year 2013–2014, the case load for 93 part-time Hearing Officers, if evenly distributed, would be 70 new cases per Hearing Officer per year, without consideration of cases that may still be open from the prior school year.

The State Educational Agency is aware of the need to augment the cadre of Hearing Officers and, in June 2014, took action by seeking applications for new Hearing Officers. As a result of this recruitment, 36 candidates were selected to attend the mandatory initial training. At the time of this Study, it was unknown how many candidates would be certified subsequent to the training and what, if any, other attrition is anticipated in 2014-2015 from voluntary retirement of Hearing Officers or rescission of certification for availability or other reasons.

Effective February 1, 2014, Title 8 NYCRR §200.1(x)(4)(vi) provides that, absent good cause, the certification of a Hearing Officer would be rescinded upon a finding that the Hearing Officer was not willing or available to conduct an impartial hearing within a two-year period of time. Due to the reported inclusion of Hearing Officers on the certification list who had not accepted an appointment for a long period of time, this change should result in a more accurate list of active Hearing Officers willing and available to accept appointment and should expedite the appointment process accordingly.

4. Compensation of Hearing Officers

Education Law 4404 provides that the Commissioner must establish maximum rates for the compensation of Hearing Officers subject to the approval of the Director of the Division of the Budget. Consistently, Title 8 NYCRR §200.21(a) provides that Hearing Officers are to be compensated in an amount not to exceed the applicable rate prescribed in a schedule of maximum rates approved by the Director of the Division of Budget.

Effective October 2001, the Division of Budget approved a revised maximum compensation rate for Hearing Officers at the rate of $100.00 per hour for pre-hearing, hearing and post hearing activities. The rate has not changed in the 13 years thereafter.

[65] NYSED data

The maximum hourly rate for pre-hearing, hearing, and post hearing activities is the only level of specificity in the schedule of approved rates. Reimbursable activities are described in a non-exhaustive manner in the 2001 NYSED guidance document for Hearing Officers and clarify that compensation is available for pre-hearing activities for a case that is resolved prior to the conduct of a hearing.[66] Title 8 NYCRR §200.2(b)(9) provides each board of education or board of trustees must adopt a written policy that establishes administrative practices and procedures for the selection and board appointment of a Hearing Officer.

Neither New York law nor regulations require that local educational agencies establish detailed compensation policies, beyond the inferred need to clarify the applicable local hourly compensation rate. However, New York City has opted for a very detailed compensation policy. In addition, the reimbursement of travel and other hearing-related expenses are subject to local board of education policies and vary from local educational agency to local educational agency. (See discussion of Local Compensation Policies and their impact on standard and best legal practices.)

Hearing Officers are deciding disputes that could result in hundreds of thousands of dollars, yet the contractual attorney Hearing Officers are paid a maximum of $100.00 an hour. This rate has not kept pace with escalating prevailing rates for comparable legal services.[67] Further, it is not commensurate with their responsibilities, including the intrinsic awesome responsibility of the position as a decision maker, and is significantly lower than the attorneys who appear before them. In a recent case before the U.S. District Court, Southern District of New York, the Court discussed prevailing community rates:

> "Given their additional experience, the complexity of this case, and the significant relief obtained, a rate of $225 per hour is reasonable for Ms. Dotts, and a rate of $200 per hour is reasonable for Ms. Cox. In light of reimbursement specialist Wince's similar professional experience, a $200 hourly rate is also reasonable for her work in this case. A rate of $175 per hour is reasonable for associate McGinley, who has somewhat less experience than the other three associates. Lastly, $150 per hour is a reasonable rate for Mr. Bertone, Mayerson's senior paralegal, and $125 per hour is reasonable for the other paralegals. *See Tatum v. City of New York*, No. 06 Civ. 4290, 2010 U.S. Dist. LEXIS 7748, 2010 WL 334975 (S.D.N.Y. Jan. 28, 2010) (finding $125 per hour to be a reasonable paralegal rate); *Hnot v. Willis Group Holdings Ltd.*, No. 01 Civ. 6558, 2008 U.S. Dist. LEXIS 28312, 2008 WL 1166309 (S.D.N.Y. Apr. 7, 2008) (finding "$150 per hour as a reasonable rate for paralegals in this District")." E.F. and D.R. o/b/o their daughter, N.R., Plaintiffs, v. New York City Department of Education, 63 IDELR 11;11 Civ. 5243 (GBD)(FM) (U.S.S.D. New York 2014)

[66] Impartial Hearing Process for Students with Disabilities, December 2001

[67] See for example pricing for an investigative attorney for New York City at $250.00 an hour: http://schools.nyc.gov/NR/rdonlyres/47E8B414-BB97-4F0C-84BC-9E5FA319670C/167111/July162014FinalRApackageo.pdf

Hearing Officers choose to serve at a maximum compensation rate of $100.00 per hour and, ethically, they must fulfill the responsibility. Therefore, it is important to note that the above conclusion regarding the level of compensation for Hearing Officers does not excuse any failure to comply with the IDEA and New York State law and regulations, including timeliness.

5. Manuals, Forms, and Guidance

As noted previously, the Regulations of the Commissioner under Title 8 NYCRR Parts 200 and 201 provide extensive requirements designed to implement the IDEA and standard practices in the conduct of these hearings. Subsequent to the promulgation of the revised regulations that were effective February 1, 2014, the State Educational Agency issued Summary and Guidance on Regulations relating to Special Education Impartial Hearings.[68] In addition, the previously referenced guidance document dated December, 2001, Impartial Hearing Process for Students with Disabilities, is still in effect with the stated caveat that the document had not been revised to reflect the amendments of the IDEA in 2004.

As needed, the State Educational Agency has issued periodic advisories such as the previously referenced August 2011 advisory notifying the Hearing Officers and others of changes in the Impartial Hearing Reporting System and the July 2014 memorandum on the appointment process in New York City. As stated previously, the Hearing Officers' trainers have proposed some model forms that have been approved by the State Educational Agency for various aspects of the hearing process and decision writing. However, there are no mandatory forms and templates and no data were available on the incidence of the utilization of these model forms.

6. Impartial Hearing Reporting System (IHRS)

"IHRS is a web-based data collection system designed to record information about the impartial hearing process at critical points, beginning with the initial written request for a hearing . . . . IHRS is a "real time" system and is used to monitor New York State's due process system to ensure that impartial hearings are completed within the time periods required by federal and State law and regulation."[69] IHRS has been in place since July 1, 2002. The reporting and tracking capabilities are described by State Educational Agency as follows:

> "School districts are required to report data regarding the impartial hearing process, including Hearing Officer appointments, timelines, extensions, and closures through Impartial Hearing Reporting System (IHRS). IHRS is a web-

[68] February 2014 Field Advisory *supra* pg. 7
[69] May 14, 2014, NYSED website: http://www.p12.nysed.gov/specialed/dueprocess/IHRS.htm

based system and provides real time information. Each school district and Hearing Officer has access to information on any case in which they are involved.

IHRS is used to monitor the timeliness of BOE appointments of Hearing Officers and whether a decision is rendered within the timelines specified above. On a daily basis, IHRS sends an initial notification to any school district that fails to make a timely Hearing Officer appointment and to both the school district and Hearing Officer if a decision is not received within five days of the appropriate time lines. A second notification is sent to the school district and the Hearing Officer if a decision continues to be late for four days beyond the initial notification date. E-mail responses to the initial and second notifications are monitored. If either the school district or Hearing Officer fail to respond to the notifications, personal contact is made to determine if the lateness is a school district data entry issue or if the Hearing Officer has failed to render the decision within the timeline or extended timeline."[70]

Over time, the IHRS has been augmented to provide additional data and oversight over the timeliness of the system, including:

- Hearing Officers' access to Reports with an activity summary of the total number of cases to which they were appointed and whether those cases were addressed in a timely manner. Trend information is also provided.
- A reminder to the Hearing Officers of the 14-day initial pre-hearing/hearing requirement if initial meetings are not scheduled by the ninth day after the end of the resolution session or after appointment for district initiated cases.
- Notices and adjustments to extensions to the Hearing Officers if the extensions they approve are in conflict with the New York State standards including extensions greater than 30 days or if an extension is granted prior to the allowable time frame.
- A reminder to the district and the Hearing Officer that action is required if the end of resolution information is not entered within three days of the end of the 30-day period.[71]

7. System of Evaluation and Investigation of Complaints

a. Evaluation

There is no hearing survey/questionnaire from parties or other participants in the hearing process or other systematic and consistently employed evaluation system for Hearing Officers in New York State other than the State Educational Agency's systematic review of data through IHRS. The State Educational Agency recently initiated a process to

[70] State Performance Plan (SPP) for 2005-2012 - Revised February 2013 - Indicator 17
http://www.p12.nysed.gov/specialed/spp/2013/ind17.htm
[71] 2008 Annual Performance Report:
http://www.p12.nysed.gov/specialed/spp/apr2008/gensupervision.htm#ind17

establish a Hearing Officer evaluation system. However, at the time of this Study, the process of evaluation, including data sources, criteria, and measurements, the evaluator, and consequences for failure to meet the criteria, had not been established.

b. Complaints

New York law and regulations provide a process to investigate complaints alleging the misconduct or challenging the competence of a Hearing Officer. While the filing of a complaint is not limited to parties to a hearing or their representatives, as a general matter, they are the primary users of this system. Each complaint accepted by the State Educational Agency is investigated and an Investigation Report is provided to the State Educational Agency.[72] The decision on the complaint is made by the State Educational Agency, including the appropriate corrective action if noncompliance is found.

c. Authority to Sanction

The Commissioner has extensive authority to sanction a Hearing Officer for good cause. Upon a finding that good cause has been established of either misconduct or incompetence on the part of the Hearing Officer, the Commissioner, must revoke or suspend the certification of the Hearing Officer, except that the Commissioner may, in his or her discretion, issue either a warning or a conditional suspension of certification pending completion of a specified course of training where the imposition of a more severe penalty would not be justified. (Educ. Law §4404(c); 8 NYCRR §200.21(b)(5); See also Tyk v. New York State Dept. of Ed, 44 IDELR 96 (NY Sup Ct 2005) upholding the statutory procedure of notice and an opportunity to be heard as meeting the fundamental requirements of due process.)

As a result of the aforedescribed complaint investigation, if, upon a review of the facts, the Commissioner finds misconduct or incompetence on the part of the Hearing Officer, the Commissioner may issue a warning letter to the Hearing Officer containing an order for corrective action, or, depending on such factors as the level of misconduct or incompetence and the number of prior findings of misconduct or incompetence against the Hearing Officer, the certification of the Hearing Officer may be suspended or revoked. (8 NYCRR §200.21(b)(3)(vi))

In addition to complaints, the Commissioner, on his or her initiative, may suspend, revoke or take such other appropriate action with respect to the certification of the Hearing Officer upon a finding that:

> "(i) the impartial hearing officer failed to comply with an order of the commissioner; (ii) the impartial hearing officer failed to issue a decision in a

[72] As noted previously, this instant writer is a subcontractor of the training/complaint investigation entity and has served as the complaint investigator for the NYSED since June 1, 2011.

> timely manner where such delay was not due to extensions granted at the request of either party as documented in the record; or (iii) the State Review Officer determined that an impartial hearing officer engaged in conduct which constitutes misconduct or incompetence." (8 NYCRR §200.21(b)(4))

The State Educational Agency monitors and utilizes the IHRS to track timeliness and intervenes with notifications and directives, including directing Hearing Officers to render decisions that have become untimely or to present cause. (Failure to comply with the directive will result in an Order from the Commissioner and failure to comply with a Commissioner's Order results in decertification.)

The number of Hearing Officers with five or more late decisions after adjudication was reduced from 13 in school year 2007-2008 to six in 2008-2009 and five in 2009-2010. However, the number of Hearing Officers who rendered untimely decisions after adjudication increased in school year 2011-2012 to 46 Hearing Officers and stayed in that range in 2012-2013 at 43 Hearing Officers and in 2013-2014 at 44 Hearing Officers. Given that the number of certified Hearing Officers accepting appointments declined over this same time period that means that 48% of all Hearing Officers appointed to a case in 2011-2012 rendered an untimely decision; 38% appointed in 2011-2012 rendered an untimely decision; and 47% appointed in 2013-2014 rendered an untimely decision.[73] These numbers portend a pervasive culture of untimeliness among almost half of the active Hearing Officers in the New York State hearing system and that is a significant impediment.

The authority to sanction a Hearing Officer under New York law and regulations upon a finding that good cause has been established is sufficient to address a Hearing Officer's misconduct or incompetence. However, notwithstanding a recurrent pattern of untimeliness among some Hearing Officers, since 2008 only two Hearing Officers have been suspended and two have had their certifications revoked. No Hearing Officer had their certification revoked in school years 2011-2012 and 2012-2013 for that reason.

Other than the aforedescribed processes, there is no systemic oversight of the Hearing Officers that includes ongoing technical assistance, supervision, intervention, and accountability. The absence of an evaluation system and such oversight is seen as a major systemic flaw in a system of this magnitude with a pattern of untimeliness and a lengthy duration. The challenge for other state educational agencies has been in the establishment of a system of oversight for contractual Hearing Officers that is immune from actual, or even the appearance of, improper influence and control. It has been done successfully in other jurisdictions with part-time Hearing Officers, but as discussed previously, New York State is the only high activity state with contractual part-time Hearing Officers.

[73] It is recognized that due to the previously described impediment of recusal for unavailability in the appointment process, the Hearing Officer who rendered the decision may have been appointed after the recusal of multiple Hearing Officers and, as such, may have inherited an already untimely decision.

8. Alternative Dispute Resolution

"[F]ederal policymakers have recognized the often adversarial and costly nature of escalated disputes between parents and school districts—especially those that involve due process hearings. Similarly, Education has observed that due process hearings generally are expensive for all parties, time-consuming, and are universally understood to be a marker of serious unresolved differences about a student's need for special education and related services or the nature or location of services."[74]

The IDEA hearing system was never intended to be the recourse of first resort. To the contrary, since the early days of the Education for All Handicapped Children's Act, the IDEA has been repeatedly revised to ensure a range of alternative dispute resolution processes were available to schools and families, including the most recent changes in IDEA 2004 to include resolution meetings after the filing of a Due Process Complaint by a parent and the expansion of voluntary mediation. The predominant wisdom in the area of dispute resolution in special education is that the best way to resolve a special education dispute is to prevent the development of the dispute in the first place.[75] When a disagreement does arise between a school and family, the closer to the emergence of a dispute and the earlier in time it is resolved the greater the likelihood an impasse will be avoided that can only be resolved through formal dispute resolution processes.

a. National Perspective - Alternative Dispute Resolution

"In addition to mediation and resolution meetings, states and territories we surveyed reported voluntarily offering a variety of other alternative dispute resolution methods, with two-thirds (33 out of 51) of them reporting offering three or more such methods. Among the most common of these were (1) dispute resolution helplines, (2) facilitated IEP meetings, (3) facilitated resolution meetings, (4) parent-to-parent assistance, and (5) conflict resolution skills training."[76] "In FFY 2010, 11 states . . . attributed the reduction of due process complaints filed and the increase in complaints resolved without a hearing to the implementation of early DR options and conflict management processes."[77]

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[74] GAO, Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts, GAO-03-897 (Washington, D.C.: Sept. 9, 2003); GAO Report: Improved Performance Measures Could Enhance Oversight of Dispute Resolution (GAO-14-390: Published: Aug 25, 2014. Publicly Released: Sep 24, 2014.) http://www.gao.gov/assets/670/665434.pdf

[75] *Evaluating the Fairness of Special Education Hearings* by Steven S. Goldberg and Peter J. Kuriloff citing Handler, J. (1986) *The Conditions of Discretion, New York: Russell Sage Foundation*

[76] GAO Report, *supra* pg. 16; See also models from other states: http://www.directionservice.org/cadre/exemplar/; http://nasdse.org/DesktopModules/DNNspot-Store/ProductFiles/28_40952f55-7269-45cf-bd7a-729008ad403d.pdf

[77] http://www.directionservice.org/cadre/pdf/Part%20B%202011%20SPPAPR%20Analysis.pdf, pp. 203-204 http://www.directionservice.org/cadre/pdf/FFY2010_PartB_Indicator_Analyses_16,17,18,19.pdf, pp. 203 – 205

b. New York - Mediation and IEP Facilitation

In New York State, since 2004-2005, the dispute resolution process that is the most contentious and expensive, both emotionally and financially, for schools and parents has been the dispute resolution process of choice. Over 90% of all disputes regarding a student's education under the IDEA results in a Due Process Complaint, rather than a State Complaint or Mediation, and that number reached 95% in 2011-2012.[78] Given the litigious nature of special education hearings in New York State and the low rate of settlement of these disputes, the establishment of viable alternatives to the formal dispute resolution options under the IDEA is essential.[79]

The State Educational Agency contracts with the New York State Dispute Resolution Association (NYSDRA) to oversee the special education mediation process. The mediators are furnished by a Community Dispute Resolution Center through the Office of Court Administration. The State Educational Agency and NYSDRA jointly develop training programs, which NYSDRA provides to the mediators.[80]

In 2011-2012, there were 253 mediation requests in New York State and only 157 were held. The mediation success rate was 86% with 135 mediation agreements. Of those agreements only five were related to a Due Process Complaint. In 2012-2013, the mediation success rate rose to an impressive 92% of the mediations held.[81]

Mediation is underutilized to resolve special education disputes in New York State. Looking at the data since 2004–2005, other than a slight increase in mediation requests in 2011-2012, there has been a steady trend of decreasing requests for mediation, from a 'high' of 511 requests in 2004-2005 with a 71% success rate of 362 mediation agreements. However, it is important to note that New York State's mediation utilization rate is comparable to other states and its success rate is comparable or higher than other states:

- "A significant group of states have moved away from mediation to resolve conflicts, especially mediation related to due process complaints."
- "While there is a range in performance, States holding ten or more mediations generally have mediation agreement rates between 60% and 90%."[82]

In the past several years, the percentage of Resolution Agreements for Resolution Meetings held for all Due Process Complaints has hovered around 10%: 10% in 2009-

[78] http://www.directionservice.org/cadre/pdf/NY-JAN2014.pdf
[79] See the excellent document from CADRE on the guiding principles that are essential to the management of a coordinated dispute resolution system: CADRE: Dispute Resolution Integration and Performance Enhancement
http://www.directionservice.org/cadre/pdf/A%20DR%20SIPE%20Workbook%20Revision%208-07.pdf
[80] http://www.p12.nysed.gov/specialed/spp/osepdeterminations/ny-APRresponsetable-2014b.pdf
[81] http://www.directionservice.org/cadre/pdf/NY-JAN2014.pdf
[82] Seven Years of APR/SPP Data, *supra*

2010; 9% in 2010-2011; and 9% in 2011-2012. However, this rate fell to 6% in 2012-2013.[83] The overall number of Due Process Complaints closed by settlement was: 11% in school year 2011-2012; 8% in school year 2012–2013; and 7% in school year 2013-2014. Therefore, once an impasse has been reached and a Due Process Complaint has been filed in New York State, the successful resolution of a dispute through settlement is extremely low. Given the long duration of withdrawn Due Process Complaints, for cases withdrawn due to settlement, the point at which these settlement agreements are reached is an important factor for the timely resolution of the dispute for the child.

As discussed previously, the State Educational Agency is currently engaged in the development of alternative dispute resolutions options beyond those required under the IDEA. Specifically, the State Educational Agency has established 14 Special Education Parent Centers throughout the State to provide assistance to parents and is working with CADRE on enhancing the availability and use of alternative dispute resolution in the State, including the development of a system of IEP Facilitation.[84]

The efforts of the State Educational Agency to expand the availability and use of alternative dispute resolution to avoid an impasse between parents and schools or, if that is not successful, to resolve a dispute at the earliest stages may not only avoid the unnecessary fiscal escalation of the cost of the hearing system in the future, but may ultimately result in cost savings through a reduced utilization of the hearing system to resolve a dispute. As such, the State Educational Agency's enhancement and implementation of alternative dispute resolution processes available to parents and schools are fundamental to the management of the escalating number of Due Process Complaints and the duration of those Complaints.

B. LOCAL HEARING SYSTEM

In 2012-13, approximately 92% of the filed Due Process Complaints were from New York City.[85] As such, New York's hearing system is predominantly influenced by the operation of the system in New York City. However, regardless of whether a local educational agency has one Due Process Complaint or 5500, the infrastructure must ensure a timely, efficient, and effective operation of the system for all parents and schools. Therefore, in addition to New York City, operational procedures on the local hearing system of three other representative local educational agencies were examined during this Study.

[83] 2014 NYSED SPP/APR

[84] April 9, 2014 Letter from Commissioner King to Dr. Melody Musgrove, Director, Office of Special Education Programs, United States Department of Education, pg. 3; information from NYSED on the status of IEP Facilitation project; http://www.p12.nysed.gov/specialed/publications/policy/parentcenter309.htm

[85] NYSED data

1. Operation of Tier I

a. Infrastructure at the Local Level

Limited information was available from local educational agencies during the course of this Study on the operation of Tier I at the local level. If the current local level hearing system is retained by New York State, it is recommended that additional study be conducted on the hearing practices among the local educational agencies, including the identification of any practices that are inconsistent with standard and best legal practices and/or may impede the timeliness and efficiency of the hearing system.

b. New York City Impartial Hearing Office

New York City is the only local educational agency in New York State that has an office dedicated to the conduct of these hearing proceedings. The Impartial Hearing Office is tasked by the New York City Department of Education to oversee the clerical and administrative aspects of the impartial hearing process and is administered through the Division of Finance in the New York City Department of Education.[86]

As of September 19, 2014, staffing of the New York City Impartial Hearing Office included: a Chief Administrator; a Deputy Chief Administrator; an Operations Manager; an intake manager; a data manager and a "IHSystem" manager; a Hearing Room Coordinator; five case managers; two decision managers; two redaction processors; a recusal processor, and an appeals processor.[87] The operational costs of the Impartial Hearing Office were not made available during this Study.

Based on the New York City's Standard Operating Procedures Manual (SOP), the New York City Impartial Hearing Office conducts some of the tasks performed by Hearing Officers in other jurisdictions, including:

- The Office offers "processing and delivery services" to the Hearing Officers that includes orders and the final decision. The Hearing Officers are directed to submit the orders and decision five business days prior to the compliance date and the Office verifies it is properly "formatted" and uploads it into the IHRS and issues it to the parties. (Sections 2-10 and 4-10 of the SOP)
- The Office processes evidence and hearing materials submitted by the Hearing Officer to the Office with a signed Evidence Description form. (Section 2.11 of the SOP)

[86] http://schools.nyc.gov/Offices/EnterpriseOperations/ChiefFinancialOfficer/DFO/ImpartialHearingOffice/default.htm; New York City Department of Education-Standard Operating Procedures Manual of the Impartial Hearing Office – December 14, 2009

[87] http://schools.nyc.gov/NR/rdonlyres/281CB80C-FB45-4842-B283-E60C4D29A400/0/IHOfficeContacts.pdf

- Upon appeal to the Office of State Review, the Office prepares and certifies the record is a true and complete copy of the record before the Hearing Officer. (Section 2.12 of the SOP)
- The Office redacts the decision of the Hearing Officer. (Section 6.02 of the SOP)
- The Office closes cases and, in the absence of a final closing order, the Office will close the case pursuant to procedures that include judgments such as whether a resolution agreement is a complete or partial resolution of the issues in the Due Process Complaint. (Section 2.13 of the SOP)
- For resolution, the Office closes the case prior to the running of the voiding period of three business days and will "reopen" a case if the resolution agreement is voided. (Section 2.14.1 of the SOP)

While Section 2.07 of the SOP indicates the Case Manager schedules the hearing after contacting the parties, the Office clarified that the Case Managers only enter the data into IHRS for the Hearing Officers. Similarly, notwithstanding the procedures above regarding closing orders, the closing of cases described in Section 2.13 of the SOP was characterized as a record keeping function only. Based on these practices, New York City's current written operational procedures either lack clarity or are inconsistent with the actual practices of the Office in some regards.

2. Appointment of the Hearing Officer

The involved local educational agency is responsible for the appointment of a Hearing Officer from the list of Hearing Officers certified by the Commissioner pursuant to Title 8 NYCRR §200.1(x)(4) and available to serve in the district. (8 NYCRR §200.2(e))

Upon notification of appointment in New York City, the Hearing Officer either retains the case or recuses himself/herself. As discussed previously, a recognized basis for recusal is when the Hearing Officer would not be available to timely commence the hearing or pre-hearing conference.[88] The State Educational Agency reports that in New York City over a three-month period of time, there were 2,443 instances in 691 cases when a Hearing Officer recused him/herself. More than half of the cases had three or more recusals of appointed Hearing Officers and 49 of these cases had between 10-25 successive recusals.

There were numerous instances when this appointment practice in New York City caused several months of delay before an appointed Hearing Officer retained the case.[89] Assuming unavailability of the Hearing Officer as the cause in a large proportion of these cases, this data exemplify the impact of this previously identified impediment to an expeditious appointment process. At the time of this Study, it was unknown if the State

[88] July 2014 memorandum from NYSED to Hearing Officers who conduct hearings for New York City, pg. 1

[89] July 2014 memorandum from NYSED to Hearing Officers who conduct hearings for New York City, pg. 1

Educational Agency's July 2014 guidance[90] on the appointment process had rectified the successive recusals of Hearing Officers and the resultant pattern of delay in New York City.

In contrast to New York City, other local educational agencies in New York State employ the appointment process described in the December 2001 guidance: Impartial Hearing Process for Students with Disabilities.[91] This document clarifies that a local educational agency may simultaneously contact several Hearing Officers to ascertain their availability. However, the selection of the Hearing Officer must be based on the rotational list, regardless of which Hearing Officer first responds within a 24-hour period. This practice has not been identified by the State Educational Agency as causing inordinate delay in the appointment process.

The information provided by a school district outside New York City included a form letter to be utilized when a Hearing Officer declined to serve as a Hearing Officer for the district due to the district's reimbursement policy. Title 8 NYCRR §200.1(x)(4)(vi) requires a Hearing Officer to be willing and available to accept appointment to conduct impartial hearings. Once a Hearing Officer has designated availability to serve on a school district's rotational selection list[92], this basis for a Hearing Officer's refusal of an appointment is contrary to the requirement that a Hearing Officer be "willing and available" and is an impediment to an efficient and effective appointment process.

3. Local Compensation Scale

As discussed previously, Title 8 NYCRR §200.2(b)(9) requires each board of education or board of trustees to adopt a written policy that establishes administrative practices and procedures for the selection and board appointment of a Hearing Officer. The reimbursable activities of the Hearing Officers and the reimbursement of travel and other hearing-related expenses are currently pursuant to the local board of education policy and vary from local educational agency to local educational agency.

a. New York City's Payment Schedule

The New York City payment schedule is task oriented with caps for the various duties performed by a Hearing Officer. The schedule also includes fee reductions for various events such as a Hearing Officer's tardiness to a scheduled hearing.

The Impartial Hearing Office encourages pre-hearing conferences; however, the compensation scale limits compensation to $40.00 per pre-hearing conference with no more than one per case unless the case has been amended. Assuming one case scheduled

[90] July 2014 memorandum from NYSED, *supra* pg. 2
[91] Information provided by NYSED.
[92] Impartial Hearing Process for Students with Disabilities, December 2001, pg. 7

for a hearing in a day, compensation for the conduct of the hearing is $300.00 per day in a case, regardless of the number of hours of hearing in the day.

It is well-established that a thorough and well-reasoned Hearing Officer's decision merits judicial deference.[93] In New York City, compensation for a day of writing for a final decision per case is $300.00. Additional compensation is provided for subsequent hearing days lasting more than four hours.[94] Assuming a day of hearing and the $100.00 an hour maximum compensation rate, a Hearing Officer would be compensated for only three hours of the important work of decision writing.

Given the recurrent practice of non-consecutive days of hearing over multiple months, New York City's compensation scale may have the unintended impact of unnecessarily prolonging the conduct of a hearing over multiple days and/or the length of a hearing on a given day. However, no data were available to ascertain with any certainty if there is a causal relationship.

b. Data Provided From Two Other Local Educational Agencies

In contrast, another local educational agency compensates an appointed Hearing Officer on an hourly basis with itemization in one-tenth of an hour, with no cap per task. The following duties are compensated: scheduling the hearing; scheduling letters; pre-hearing conference calls, "if necessary"; conduct of the hearing; and preparing the decision, including interim decisions. The compensation is up to the maximum rate of pay set by New York State ($100.00 per hour). The agency will reimburse travel expenses for the least expensive mode of automobile transportation with mileage reimbursement in accordance with the rate set by the Internal Revenue Service.

A second local educational agency's compensation policy is also on an hourly basis at the maximum rate of pay set by New York State. The compensation policy requires incremental billing and limits the categories only by pre-hearing, hearing and post-hearing activities, but does not include reimbursement for travel expenses.

There is currently no independent appeal process for a party local educational agency who questions a Hearing Officer's invoice. While the scope of this Study did not include the review of Hearing Officers' invoices, two paid invoices were provided by a local educational agency. One invoice included some anomalies that were inconsistent with standard practices; specifically, the invoice included 28.5 hours of decision writing for a five hour hearing and the five hours of hearing were itemized over eight specified days, two of which were a Saturday and a Sunday. It is acknowledged that this referenced

[93] See for example: C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826 (2nd Cir. 2014)); Gagliardo v. Arlington Central Sch. Dist., 489 F.3d 105 (2nd Cir. 2007) Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 196 (2d Cir. 2005); v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 (2d Cir. 1998); M.H v. New York City Dep't of Educ., 685 F.3d 217, 244 (2d Cir. 2012)

[94] New York City–FY 2014 Impartial Hearing Officer Compensation Policy

invoice may be appropriate notwithstanding the impression upon review and may not be reflective of invoices overall.

Based on the information above, the current local compensation policies for Hearing Officers are inconsistent in New York State. Distinctions among the local compensation policies, such as the exclusion of per diem reimbursement, may impact the availability of Hearing Officers for a local educational agency and are an obstacle to an efficient appointment process. In addition, the current monetary caps on reimbursable activities in New York City are viewed as an obstacle to the implementation of best legal practices, such as the conduct of pre-hearing conferences.

PART FIVE - THE REVIEW SYSTEM

A. INTRODUCTION

The State Educational Agency was found to be out of compliance since April 2012 by the United States Department of Education, Office of Special Education Programs, with regard to the timelines for the issuance of a review decision by the Office of State Review in accordance with the IDEA, 20 U.S.C. §1415(g) and 34 C.F.R. §§300.514(b) and 300.515(b).[95] At the time of this Study, some of the legal consequences of the Office of State Review's recognized noncompliance with the 30-day State review timeline were apparent. Accordingly, in addition to the essential role of the Office, the Office of State Review was simultaneously engaged in litigation regarding the Office of State Review's failure to issue individual decisions in a timely manner in accordance with the IDEA and deliberations with the United States Department of Education, Office of Special Education Programs, on the State Educational Agency's request to be considered a candidate for a compliance agreement.[96]

By April 2014, the Office of State Review also began to implement some measures to eliminate the backlog of untimely cases and attain timeliness with current cases, including a contemporaneous external review of the efficiency of the Office by another independent consultant (hereinafter referred to as the External Reviewer).[97] The External Reviewer had access to operational information not provided during the course of this Study and completed the external review of the Office of State Review prior to the

[95] March 28, 2014 Letter to Assistant Commissioner Delorenzo from Dr. Melody Musgrove, Director, Office of Special Education Programs, United States Department of Education: http://www.sro.nysed.gov/compliance-agreement.html

[96] March 28, 2014 OSEP Letter *supra*; April 9, 2014 Letter from Commissioner King, *supra* pg. 43; Litigation - see for example M.G. v. New York State Education Depart., 1.3-cv-04455 and also U.A. et al. v. The Board of Education of the City School District of New York City et al. 1.3-cv-03077; Walsh v. King, et al., 1:14-CV-1078 (LEK/RFT); 64 IDELR 39 (N.D.N.Y. September 12, 2014)

[97] Deusdedi Merced, Esq., *External Review of Office of State Review - Executive Summary of August 2014 draft report* (Hereinafter, Executive Summary – External Review)

completion of this Study. The State Educational Agency provided the Executive Summary (only) of the findings and recommendations of the External Reviewer during this Study.

Upon consideration that an independent contractor conducted the external review at the State Educational Agency's behest and in the absence of the data and foundational facts relied upon by the External Reviewer, this writer assumes the validity of the findings and conclusions of the External Reviewer as contained in the Executive Summary. Therefore, when applicable to the scope and purpose of this Study, those findings are relied upon and the recommendations are referenced.

B. INCIDENCE OF APPEALS AND TIMELINESS OF THE STATE REVIEW SYSTEM

1. Number of Appeals

As noted previously, the percentage of decisions rendered after adjudication at the hearing level that were appealed to the Office of State Review has stayed under 20% for the past several years. What has changed is the upward trend of the number of cases adjudicated at the hearing level, and the increase of appeals reflects that trend. In 2007, 140 appeals of hearing decisions were filed with the Office of State Review. The number of appeals rose to 158 in 2008 and then dropped to 145 appeals in 2009 and 130 appeals in 2010. In June 2011, the number of appeals to the Office of State Review spiked, resulting in 165 appeals in 2011. The number of appeals increased exponentially in 2012 to 239 and that increase was essentially sustained in 2013 with 238 appeals.

While tuition reimbursement cases are under a quarter of the cases that proceed to hearing at Tier I, they represent the highest proportion of appeals to the Office of State Review. In April 2014, tuition reimbursement cases from New York City alone accounted for approximately 73% of the pending cases before the Office of State Review.[98] The economic impact of a tuition reimbursement case on the non-prevailing party is high. Therefore, it is not surprising that tuition reimbursement cases persist to the appeal level at the highest proportion of cases, and that trend is likely to continue.

A puzzling phenomenon that requires further study is the percentage of withdrawals of appeals filed with the Office of State Review. The withdrawal of appeals in the past three years ranged from 11% to 13% of the cases. This is high given the nature of the appeal cases and the endurance of the cases through the lengthy Tier I process. It is unknown whether the relatively high withdrawals are attributable to the parties delaying settlement until the State Review level; the duration of the appeal process at the State Review level; or some other factor.

[98] April 9, 2014 Letter from Commissioner King, *supra*

If the two-tier system is maintained in New York State, it is recommended that additional study be conducted to ascertain if there is any pattern associated with withdrawals at the State Review level. If the withdrawals are due to the settlement of the dispute, this is late in a costly system and that information may be helpful with regard to the conduct of the pre-review conference, including the discussion of the possibility of settlement (8 NYCRR §279.14), and, possibly, to the State Educational Agency in the further development of alternative dispute resolution processes in the two-tier system.

2. Timeliness

Since the backlog of untimely cases that was the subject of Schmelzer Ex Rel. Schmelzer v. New York, (E.D.N.Y. 2003) 363 F. Supp.2d 453 (E.D.N.Y. 2003) was eliminated in 2003, the Office of State Review maintained 100% compliance through 2011. However, as mentioned previously, commencing April 2012, the Office of State Review has been in noncompliance with the 30-day decision timeline.[99] The United States Department of Education reported the yearly percentage of timely State Review Officer's decisions in 2012 plunged to 39.33%.[100] Based on data from the Office of State Review, as of July 31, 2014, approximately 20% of the 219 open cases were still timely.

The high incidence of untimeliness of these time sensitive cases is exacerbated by the number of days the cases are untimely at the State Review level. Of the untimely cases, 37 of the cases were overdue by more than 510 days and 64 were overdue more than 360 days, including one case that was 748 days overdue.[101] This data further substantiates the previous conclusion that the current two-tier system does not resolve educational disputes for students with disabilities in an expeditious manner.

3. Pending Current and Untimely Cases

The data for pending current and untimely cases in the Office of State Review since 2011 is daunting; however, recent data evidence notable improvement in the issuance of decisions. In 2012, 239 appeals were filed and 94 decisions were rendered and the year ended with 145 decisions still pending. The accumulation of pending current and untimely cases reached a critical point in 2013. Even with the issuance of 115 decisions, the Office of State Review ended the year with 239 decisions still pending after 238 new appeals were filed.

In 2014, through November, 176 appeals were filed, 38 appeals were withdrawn, and 270 decisions were rendered. In the month of October, 49 decisions were rendered. This is the highest number of decisions rendered by State Review Officers since, at least, 2011 and that pace held in November at 45 decisions. While 110 decisions were still pending at the end of November, this data reflect more decisions rendered than appeals filed in 2014.

[99] April 9, 2014 Letter from Commissioner King, *supra* pg.1
[100] OSEP's March 28, 2014 letter: http://www.sro.nysed.gov/compliance-agreement.html
[101] Office of State Review Data 2011-2014 comparison.

The Office of State Review reports as of December 2014, it is also now timely on the 23 pending current cases and only 87 untimely cases remain on the backlog. This recent improvement by the Office of State Review is commendable.

Based on the 110 pending cases as of November 2014 and assuming approximately 17 new cases in December, if the Office of State Review is able to maintain this performance rate through December, the pending current and untimely cases would be reduced to approximately 82 cases by the end of the calendar year. If the performance rate increases and/or the filings in December are lower, of course, a further reduction in pending cases should follow.

As of September 2014, the overdue cases were not systematically processed in order of the date of filing, but were prioritized with litigated cases as the first priority, particularly those under Court Order for the issuance of a State Review Officer decision. While this is a logical prioritization, the remaining parents and children who may lack the resources to litigate are set aside regardless of the time awaiting a decision, and that is not acceptable in a system that is designed for an expeditious resolution of a dispute. Reportedly, the Office of State Review recently changed this processing practice to one that systematically reviews cases in order of the filing date. However, the Office of State Review's prior practice is still pertinent as it relates to the capacity of the system to expeditiously adjust business practices in a systematic manner, augment personnel, and/or reallocate resources to avoid the resultant exponential increase in the backlog of untimely cases.

4. Historical Perspective

As discussed previously, there was a trend in the past four years of an increase in the number of adjudicated Due Process Complaints at Tier I from 6% of all Due Process Complaints in 2010-2011; to 11% in school year 2011-2012; to 20% in school year 2012–2013; and 22% in school year 2013–2014. Based on this increase of fully adjudicated requests at the hearing level commencing in 2011-2012 and the historical percentage of appeals, the increase in appeals, in at least the past two years, was foreseeable and the hearing data would have informed the Office of State Review regarding resource allocation to ensure timeliness. Even if the trend of increasing adjudications at Tier I was not observed by the Office of State Review, the spike in cases in June 2011 that was sustained thereafter signaled a need for the system to adjust accordingly.

It is troubling that history repeated itself with regard to a previous pattern of untimeliness that was violative of the IDEA. In the previously referenced class action case concerning delays in State Review Officer decisions filed in 2001, Schmelzer Ex Rel. Schmelzer v. New York, (E.D.N.Y. 2003) 363 F. Supp.2d 453 (E.D.N.Y. 2003), the District Court granted the plaintiff class full relief by issuing a permanent injunction directing timely

issuance of appeal decisions by State Review Officers. The Court found that the State Review Officer was late on a large majority of the decisions in 2000, 2001 and 2002:

> "In 1999, only 68% of the appeals were decided in a timely manner. In 2000, the State Review Officer decided 10% of the appeals in a timely manner. In 2001, the State Review Officer decided 2% of the appeals in a timely manner, and in 2002, the State Review Officer decided only 3% of the appeals in a timely manner. The Court does note that for the same period of time, the number of appeals increased by more than 20%. Notwithstanding this increase, Defendants are not in compliance with the regulation."
>
> "Defendants request a reasonable opportunity to get into compliance. However, this Court notes that this case was filed in 2001, and Defendants have had more than two years to comply." [102]

The Office of State Review could have been designed/redesigned after the previous periods of noncompliance from 1999 to 2002 to not only discern trends that might impact timeliness, but to enable expeditious intervention to prevent any future prospect of untimeliness. It is of significant concern that the system at Tier II was not capable of such prediction and adjustment to avoid another period of noncompliance and the prospect that students would be left without a timely resolution.

5. Compliance Agreement

The State Educational Agency has requested that the United States Department of Education allow it to enter into a Compliance Agreement to resolve its noncompliance with the timely issuance of State Review Officer's decisions in accordance with the IDEA.[103] The United States Department of Education characterized the situation as follows:

> "Since April 2012, NYSED has not been in compliance with the IDEA Part B requirement to issue within thirty (30) days, unless a party requests and is granted a specific extension, the State-level independent decision in an appeal of an impartial due process hearing officer's decision. (20 U.S.C. § 1415(g); 34 CFR §§ 300.514(b) and 300.515(b)). NYSED has stated that it is not able to correct this noncompliance within one year due to the significant and unanticipated increase in the number of appeals of due process hearing decisions under Part B of the IDEA.
>
> In an April 9, 2014 letter, the NYSED's Commissioner John B. King requested that the Department consider allowing the State Educational Agency to enter into a Compliance Agreement. Specifically, in the April 9, 2014 letter, the State

[102] Schmelzer Ex Rel. Schmelzer v. New York, (E.D.N.Y. 2003) 363 F. Supp.2d 453 (E.D.N.Y. 2003 363 F. Supp.2d 453 (E.D.N.Y. 2003), pp. 12 and 14
[103] King letter, *supra*

Educational Agency: (1) reported that the State was not in compliance with IDEA section 615(g) and 34 C.F.R. §§300.514(b) and 300.515(b) since April 2012; (2) identified several reasons why the State is unable to come into compliance within one year as required in 34 C.F.R. § 300.600(e) and the Office of Special Education's (OSEP) Memorandum 09-02, issued on October 17, 2008; and (3) identified current and proposed actions to bring NYSED into compliance with the 30-day timeline requirement in IDEA section 615(g) and 34 C.F.R. §§ 300.514(b) and 300.515(b) within three years."[104]

At the conclusion of this Study, the outcome of the requested Compliance Agreement remained unknown and would certainly be a factor in the continued improvement of the timeliness of the review system and, possibly, the retention of the two-tier system.

6. Business Practices of the Office of State Review

a. Introduction

"The Office of State Review (OSR) was established in 1990 to assist the New York State Review Officers (SROs). OSR consists of educational specialists, attorneys, and support staff who assist the State Review Officers in rendering their decisions. OSR reviews the hearing records and pleadings to ascertain the educational and legal issues involved in each appeal. The SRO must render a written decision, which like an impartial hearing officer's decision, sets forth the reasons and factual basis for the conclusions reached."[105]

Other than the aforementioned timeline for the issuance of the decision upon review in states with a two-tier system (34 C.F.R. §300.515(b) and (c)), the IDEA has minimal procedures for the conduct of the reviews. In the conduct of an impartial review of the findings and decision appealed, the State Review Officer must:

i. Examine the entire hearing record;
ii. Ensure that the procedures at the hearing were consistent with the requirements of due process;
iii. Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in Title 34 C.F.R. §300.512 apply;
iv. Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;
v. Make an independent decision on completion of the review; and
vi. Give a copy of the written, or, at the option of the parents, electronic findings of fact and decisions to the parties. (34 C.F.R §300.514(b))

[104] http://www2.ed.gov/about/offices/list/osers/notice-of-public-hearing--07-16-2014.html
[105] Office of State Review website: http://www.sro.nysed.gov/aboutus.html

b. Part 279

Title 8 NYCRR Part 279 provides comprehensive regulatory rules of procedure for the appeal process. (See also Title 8 NYCRR Part 275 - Parties and Pleadings and Part 276 - Rules of Practice.) Part 279 has not been amended since October 9, 2008, notwithstanding the recurrent problem with untimely decisions and emerging technologies that have resulted in changed practices in the New York State Unified Court System.[106] Part 279 still prohibits filing by facsimile or electronic transmission (8 NYCRR §§279.4 – 279.6). (See discussion below on Electronic Filing System.)

The procedures under Part 279 provide the parties greater rights than the IDEA in a number of regards, most notably with regard to the pleading rights subsequent to the filing of the appeal. Certainly that is permissible, so long as these greater rights do not impede compliance with the mandatory requirements in the IDEA. As discussed below, it is determined that the extensive pleading procedures and expansive timelines impede the timeliness of the review process in New York State.

The regulations provide some best practices such as the authority for the Office of State Review to conduct a pre-review conference for the purpose of considering the possibilities of settlement, to simplify the issues, to resolve procedural problems, or to discuss any matters which may aid in the expeditious disposition of the appeal (8 NYCRR §279.14); and specifications for pleadings and memorandum of law, including the authority of the State Review Officer to reject documents that do not comply with the regulatory requirements (8 NYCRR §279.8). It is reported that the State Review Officers do not currently avail themselves of the authority to conduct a pre-review conference as a general practice, and, given the purpose to aid in the expeditious disposition of the appeal, that is unfortunate.

In addition to the above described practices, Title 8 NYCRR Part 279 provides significant detail in other areas, such as:

- the initiation of review (§279.4);
- the service of an answer (§279.5);
- additional pleadings (reply by the petitioner to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer) (§279.6);
- verification of pleadings (§279.7);
- record of the proceeding before the impartial hearing officer (§279.9);
- rules of practice, including the absence of jurisdiction over interim rulings of a Hearing Officer (§279.10); and

[106] https://iapps.courts.state.ny.us/nyscef/HomePage; The New York State Unified Court System has established "NYSCEF," a program that permits the filing of legal papers by electronic means with the County Clerk and the courts in certain case types in designated venues, as well as electronic service of papers in those cases. Cases may be commenced using NYSCEF and cases that were initiated in hard-copy form may be converted to NYSCEF matters.

- extensions of time to answer or reply (§279.10(e)).

c. Part 279 Internal Timelines

Title 8 NYCRR Part 279 includes extensive internal regulatory timelines for the already difficult to attain 30-day appeal timeline under the IDEA, 34 C.F.R. §300.515(b) and (c). The inflexibility of these internal regulatory timelines confounds the Office of State Review's ability to timely render a review decision. The Office of State Review reports that these internal timelines did not impede its work in the years when the number of appeals was static. However, as noted previously, this is not a static system and these state imposed regulations must be capable of implementation through inconstancies in the number of appeals.

Specifically, if all the expansive actions specified in Part 279 occur on the last permissible day, the 30-day timeline for the issuance of the decision is reduced as follows:

- §§279.4(b) to 279.5 The respondent files an answer and a cross appeal with the answer on the tenth day after the date of service of a copy of the petition. **20 days left for the State Review Officer to review the pleadings and the record and issue the decision.**
- §279.4(b) and §279.6 The petitioner files the answer to the cross appeal on the tenth day after service of the answer and cross appeal. **Ten days left for the State Review Officer to review the pleadings and the record and issue the decision.**
- §279.11 Service timelines are extended if the last day for service of the answer or response fell on a Saturday, Sunday or legal holiday. If the last day of service fell on a Saturday, this provision would further exacerbate the diminishing time for a State Review Officer to timely issue the review decision. **Eight days left for the State Review Officer to review the pleadings and the record and issue the decision.**
- §279.4(b) and §279.5 If the respondent does not file the cross appeal with the Office of State Review until the permissible two days after service is complete and the petitioner does the same in the answer to the cross-appeal. **Four days left for the State Review Officer to review the pleadings and the record and issue the decision.**

If all the above anticipated events occur in the filing of the appeal and pleadings, insufficient time is left for the State Review Officer to conduct the review of the administrative record and appeal pleadings in their entirety and timely issue the decision. As such, the internal timelines in Title 8 NYCRR Part 279 are viewed as a significant obstacle to the issuance of a review decision in a timely manner in accordance with the IDEA, 34 C.F.R. §300.515(b). Furthermore, the review of ten representative examples of overdue and current cases revealed that in four of the ten cases it took from 39 days to 69 days from the date of appeal to the date the parties filed the last papers. While an

extension of time can be granted to file the answer, interpose a cross-appeal, or reply pursuant to Title 8 NYCRR §279.10(e), such extensions also impact the duration of an appeal and an expeditious resolution.

d. Team under the Guidance and Direction of State Review Officer

"Office of State Review is staffed with educators and attorneys who work as a team to examine the evidence in each case and prepare draft decisions under the guidance of and direction of a State Review Officer (State Review Officer)."[107] Upon the filing of a Due Process Complaint, a State Review Officer is appointed to a case. A team of professionals is also assigned to assist the State Review Officer in carrying out his/her duty to perform a timely review and render a decision. Generally, teams of five individuals write most of the decisions of the State Review Officer. "Each team includes a writer, an educator, a supervising attorney, the education supervisor, and a State review officer.[108]

As described in August 2013, the role of the Associate in Education is to assist the State Review Officers in carrying out their duty to perform timely, independent reviews and render a final quality decision. In that capacity, the educator reviews the appeal files and prepares a written draft report that analyzes the educational issues in the appeal and offers recommendations for deciding the appeals. The role of the staff attorney on the team is also to review the appeal files and prepare a draft decision for the State Review Officer, including the identification of all operative facts, citations, relevant legal and educational issues and the analysis of the parties' arguments.[109]

The process by which an appointed State Review Officer reviews the administrative hearing record, considers the appeal record, and renders a decision is within the discretion of the Office so long as it meets the requirements of the IDEA and New York law and regulation, including timeliness. The establishment of the Office of State Review's 'judicial clerk' approach to the review process at the Office of State Review has been addressed in at least one State Review Officer Decision, No. 12-159:

> "With respect to the parents' negative implication about the employees of the Office of State Review, no authority is cited to support a claim that administrative hearing officers are precluded from having a staff that assists them with their adjudicative duties. It is clear that courts have repeatedly looked to educational expertise by adjudicative decision makers as grounds for the application of deference to thorough and careful decisions of administrative hearing officers (see, e.g., R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189 [2d Cir. 2012]); M.H. v. New York City Dep't of Educ., 685 F.3d 217, 246 (2012); F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *5 [S.D.N.Y. Feb. 14, 2013];

[107] April 9, 2014 Letter from Commissioner King, *supra* pg. 3
[108] Executive Summary – External Review, *supra* pg. 4
[109] Job description of the Associate in Education and Senior Attorney; See also: http://www.oms.nysed.gov/hr/flyers/PIMS_53_00189.htm

McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *9 [S.D.N.Y. Jan. 22, 2013]); C.L. v. New York City Dep't of Educ., 2013 WL 93361, at *5 [S.D.N.Y. Jan. 3, 2013]; see also K.A. v.Chappaqua Cent. Sch. Dist., 09-cv-0699, at *18-*19 n.5 [S.D.N.Y. Mar. 12, 2010] [stating that the content of advice given by Office of State Review staff to an State Review Officer is not relevant to an State Review Officer's ultimate determination because "[i]t is the State Review Officer, not his [or her] staff, who has the authority to review Hearing Officer decisions"]).

It is not unusual for an administrative hearing officer to utilize staff whose function is to assist the adjudicator (see Halle v. U.S., 124 F.3d 216 [10th Cir. 1997] [rejecting a challenge to the use of staff case examiners who assist with adjudicatory functions, similar to the way a law clerk or staff attorney assists a court]; Koster v. U.S., 685 F.2d 407, 414 [U.S. Ct. Cl. 1982] ["it is not objectionable that a staff examiner assisted the board members in their consideration of the case"]; see generally State Administrative Procedure Act § 307 [noting that agency adjudicators "may have the aid and advice of agency staff other than staff which has been or is engaged in the investigative or prosecuting functions in connection with the case under consideration or factually related case"]; Dellenbach v. Letsinger, 889 F.2d 755, 763 [7th Cir. 1989] [noting that judicial adjuncts may assist with discretionary judicial acts without being subjected to claims of improper conduct by disappointed litigants]). It is I, and not my staff, who deliberates and is authorized to render a decision in this case and that my staff may be present to my deliberations or even suggest the same or a different recommendation is irrelevant (see K.A., 09-cv-0699, at *18-*19 n.5)."[110]

It was a finding of the External Reviewer of the Office of State Review that: "[T]he management team engages in substantial rewriting of draft decisions in order to accommodate competing writing styles and the desire to write in a uniform voice."[111] The additional conclusion of the External Reviewer was that while the decisions of the Office of State Review are thorough with references to the record and legal authority that many, if not most of the decisions, could be pared down and the comprehensive summaries of the team of educators that assist in the decision writing are not always necessary.[112]

e. Internal Timelines for the Team

Upon the filing of an appeal, a timeline is set for an initial meeting to identify and agree on components of the draft to be developed and the timeframe. A subsequent meeting with the State Review Officer and team occurs within a designated timeframe to discuss all legal and/or educational issues relevant to the case and information to be included in

[110] http://www.sro.nysed.gov/decisionindex/2012/12-159.pdf
[111] Executive Summary – External Review, *supra* pg. 4
[112] Executive Summary – External Review, *supra* pp. 4 - 6

the draft decision.[113] Sequentially, upon the filing of the last papers in an appeal, the staff attorney completes a first draft of the decision (this interval includes the timeframe for the educator's report) and the draft is then reviewed by the supervising attorney. The State Review Officer reviews the final draft and issues the decision.[114]

From 2012-2014, there were significant delays in the review of the overdue average and complex cases.[115] Of the three representative overdue complex cases in 2012-2014, the draft decisions were completed, respectively, in approximately four and a half months; 11 months; and almost 14 months. The first drafts in the overdue average cases were within approximately two to three weeks. The Office of State Review reports that the delays from 2012-2014 were due to the Office setting aside pending cases to accommodate the increased work load within existing resources.

The reported timeline for representative current cases shows that the review and development of the first draft decision is completed within two to three weeks of the date the last papers are filed. The review by the supervising attorney and review and issuance of the final decision by the State Review Officer ranges from three days to a week.[116]

Based on this data, the time period required for the review and decision writing process has improved significantly and reportedly is reflective of the process prior to the increase of the workload in 2012. However, without a permanent solution to enable the system to adjust for unanticipated fluctuations in the numbers of cases, given the short review time period and the erosion of the time period due to the internal timelines in this system, this improved time period for the work of the team may still not meet and maintain the timeliness of the system in the future.

7. Staffing of the Office of State Review

"In September 2010 the Office of State Review was comprised of 21 employees including one full-time State Review Officer. Since that time the Office of State Review has doubled the number of its employees which now include three State Review Officers."[117] The increase in personnel, particularly the number of State Review Officers, was designed to address the backlog of untimely cases and to increase the capacity of the Office of State Review to timely process a high volume of appeals.[118]

The State Educational Agency has determined the number of Office of State Review personnel necessary to process 260 appeals a year within the mandatory timelines under

[113] Job description of the Senior Attorney
[114] Office of State Review Excel Spreadsheet –Backlog and Current Processing Timelines
[115] Data provided by Office of State Review. Complex cases were defined as one that had more than 1000 pages in hearing transcript pages and exhibits.
[116] Data provided by Office of State Review.
[117] April 9, 2014 Letter from Commissioner King, *supra* pg. 3
[118] Information from NYSED

the IDEA and New York law and regulations. That determination is reflected in an organizational chart dated July 14, 2014. The staffing is as follows: five individuals with State Review Officer in the listed title, with two as current staffing and three others showing as approved for hire, including a supervisor position; four current attorney supervisors with 11 senior attorneys (one is a temporary hire) and three more approved for hire; and two education supervisors[119] with seven educators with approval to hire one more. In addition, there are six education specialists as temporary hires for a period of one year. There are also ten contract positions of individuals with special education adjudication expertise designated as temporary staffing to address the late appeal cases. (See below with regard to the "Backlog Elimination Team.")

As discussed with regard to the case load for employee Hearing Officers in other states, a case load of 10.52 new cases a month per Hearing Officer is standard in California and ten in Pennsylvania. Based on the assumption of a maximum of 260 appeals a year established by the State Educational Agency, if there are only three State Review Officers as fulltime employees, as cited above, each State Review Officer would have an average case load of 7.2 new cases a month. That is doable[120] if the procedures discussed below under Part 279 and the intricate process of decision writing does not get in the way. However, given that there were 238 appeals filed in 2013 and the Commissioner anticipates the upward trend will not decrease in the future,[121] the system needs to be capable of adjustment if the upward trend continues and exceeds the integral assumption of 260 appeals in any year or if the filings in any one month exceed monthly assumptions.

Backlog Elimination Team

The State Educational Agency issued a Request for Proposal[122] for the temporary staffing of Special Education Experts to perform appeals reviews. Ten individuals were selected and the contract term was for one year, anticipated to begin on July 1, 2014 and end on June 30, 2015. The contracts were finally approved November 19, 2014. This delay resulted in the loss of four months of this important assistance. However, based on the significant increase of decisions rendered in October 2014 and the concomitant reduction in pending cases, it appears that the Office of State Review has employed another strategy to address the backlog of untimely cases and the current appeals.

[119] Job description for Supervisor in Education:
https://statejobsny.com/employees/vacancyDetailsPrint.cfm?id=2197
[120] The Executive Summary: External Review, *supra* pg. 5 recommendation is consistent: "The current staffing of the Office of State Review appears justified to address the case filing increases. No significant changes in the current staffing levels are recommended."
[121] April 9, 2014 Letter from Commissioner King, *supra* pg. 1
[122] http://www.sro.nysed.gov/rfq/home.html

8. Qualification of the State Review Officer

As noted previously, pursuant to Education Law §4404(2) and Title 8 NYCRR §279.1(b), a State Review Officer is an employee of the State Educational Agency certified to conduct an impartial State-level review of the determination of a Hearing Officer. State Review Officers are independent of, and do not report to, the Office of the State Education Department responsible for the general supervision of educational programs for students with disabilities. (8 NYCRR §279.1(c)(3)) Further, State Review Officers cannot be designated to conduct a State-level review with respect to a hearing to which the State Educational Agency, or any educational program operated by the State Educational Agency is a party. (8 NYCRR §279.1(c)(1))

Part 279 of the Regulations of the Commissioner establishes additional prohibitions with regard to a conflict of interest:

- A State Review Officer cannot be an individual previously employed by the State Educational Agency in a position requiring routine personal involvement in decisions made by local school districts regarding any aspect of the provision of free appropriate public education to students with disabilities. (8 NYCRR §279.1(c)(5))
- A State Review Officer cannot have a personal, economic or professional interest in the hearing which he or she is assigned to review. A State Review Officer must, on his or her own initiative or on application of any party, recuse herself or himself and transfer the appeal to another State Review Officer in the event that:

  (i) such officer has in any way been substantially involved in the development of any State or local policy or procedure challenged by the hearing;

  (ii) such officer has at any time been employed by a party to the hearing or by the attorney, law firm or other representative appearing on behalf of a party; and

  (iii) such officer has at any time been personally involved in any aspect of the identification, evaluation, program or placement of the student with a disability about whom the hearing is concerned, or of other similarly situated children in the school district which is a party to the hearing. (8 NYCRR §279.1(c)(4))

Contrary to the requirement for Hearing Officers, a State Review Officer is not required to be an attorney. Given the qualifications for Hearing Officers, the litigiousness of the New York State hearing system, and the incidence of legal representation, a State Review Officer should be required to be an attorney. Notwithstanding the absence of this required qualification, a recent posted employment opportunity for Assistant Counsel and State Review Officer did require candidates to have a J.D. degree, be admitted to the New York State Bar, have at least three years of legal experience, as well as a background in

Education Law or significant civil litigation or legal writing experience, such as appellate brief writing or judicial clerkship experience.[123]

9. System of Supervision, Evaluation and Training

In the absence of operational information regarding the system of supervision, evaluation and training at the Office of State Review, this writer adopts the summary findings of the External Reviewer of the Office of State Review who had access to operational information.

With regard to oversight and supervision, the External Reviewer found:

- "The Office of State Review reports directly to the Deputy Commissioner of Performance Improvement and Management Services (PIMS)."
- "The location of the Office of State Review makes it impractical for the Deputy Commissioner to provide day-today oversight and supervision."[124]

With regard to evaluation and supervision, the External Reviewer found that while the Office of State Review had adopted criteria and measurements to assess the performance of personnel, performance evaluations did not occur on a "regular and consistent basis" due to efforts to eliminate the pending backlog of untimely cases. The External Reviewer recommended training on the conduct of annual performance reviews as well as civil service procedures to document incidents of "incompetence." In addition, the External Reviewer found impediments to the oversight of the Office of State Review and recommended restructuring and a refocus on the "core functions and needs" of the Office of State Review and management training.[125]

It is unclear from the Executive Summary whether the Office of State Review has an ongoing professional development program for all team members. However, the External Reviewer recommended a "more structured and consistent training approach of Office of State Review attorneys."[126]

10. Electronic Filing and Tracking System

The Office of State Review has a paper filing system to monitor timeliness.[127] The current electronic tracking system employed at the Office of State Review for tracking appeal timelines is reportedly rudimentary, but does include advance notifications of approaching timelines. It is unknown what redundancies are built into the current paper and electronic systems to ensure these advance notifications are issued to multiple individuals and provide for escalating interventions, as needed, to ensure timeliness. In a

[123] http://www.oms.nysed.gov/hr/flyers/PIMS_68_16654.htm
[124] Executive Summary: External Review, *supra* pp. 3 and 5
[125] Executive Summary: External Review, *supra* pp. 3 and 5
[126] Executive Summary: External Review, *supra* pg. 6
[127] April 9, 2014 Letter from Commissioner King, *supra* pg. 3

system of this magnitude with a history of untimeliness, the absence of an effective electronic tracking system to monitor timeliness is a major impediment.

As discussed previously, electronic filing is prohibited in the practice before the Office of State Review. (8 NYCRR §§279.4 – 279.6) The State Educational Agency is aware of this impediment to an efficient practice and envisions the future use of an electronic filing system to streamline appellate filing and record management and include notifications to all parties of procedural timeframes and other filing requirements.[128]

Based on the findings of the External Reviewer of the Office of State Review with access to operational information, the current docket database is also inadequate with limited report features, some of which are not reliable.[129] As of October 15, 2014, the State Educational Agency had not commenced the process to identify an appropriate vendor to establish and implement an appellate case management system/electronic filing system for the Office of State Review.

11. Administrative Hearing Record

Pursuant to Title 8 NYCRR §279.9, it is the party board of education, whether it is the petitioner or the respondent, that is required to file the certified administrative record with the Office of State Review. When the petitioner is a party other than the board of education, the certified record must be filed with the Office of State Review within 10 days after service of the notice of the intention of review. When the board of education is the petitioner, the board is required to file the record together with the petition for review. (8 NYCRR §279.9(b) and (c))

As noted previously in the discussion of the operational procedures in New York City, the local procedures require the Chief Administrator to certify the administrative record. Based on anecdotal information only, the timely filing of the certified record in accordance with Title 8 NYCRR §279.9 is an obstacle to the timely review of an appeal. It is unknown whether this delay is caused by the failure of the Hearing Officer to timely transmit the record to the local educational agency or the party board of education's failure to timely organize and certify the record. While a State Review Officer has the authority to dismiss an appeal by the board of education when the record is not timely filed (8 NYCRR §279.9(c)), there is no recourse set forth in Part 279 for a petitioner if the respondent board of education fails to timely file the administrative record.

Pursuant to the recently revised Title 8 NYCRR §200.5(j)(5), the appointed Hearing Officer is now required to promptly transit the certified record to the local educational agency. The NYSED's February 2014 Special Education Field Advisory provides guidance on the term "promptly" as meaning "without delay." It is the expectation of the

[128] April 9, 2014 Letter from Commissioner King, *supra* pg. 3
[129] Executive Summary: External Review, *supra* pg. 4

State Educational Agency that the Hearing Officer would transmit the certified record within a week after the decision is sent to the parties.[130] However, in the absence of a system of accountability, this provision will not be a panacea.

Notwithstanding the existence of local procedures with regard to the certifying agent for administrative records on appeal to the Office of State Review, Title 8 NYCRR §279.9 can easily be reconciled with Title 8 NYCRR §200.5(j)(5). Since the board of education is designated only as the agency filing the certified record of the proceeding before the Hearing Officer, the administrative record certified by the Hearing Officer in accordance with Title 8 NYCRR §200.5(j)(5) can be filed.

Both Title 8 NYCRR §279.9(a), with regard to appeals to the Office of State Review, and Title 8 NYCRR §200.5(j)(5)(vi), with regard to the record at hearing, specifically prescribe the contents of the administrative record. Title 8 NYCRR §279.9 includes some organizational/formatting provisions not included in the content of the administrative record in Title 8 NYCRR §200.5(j)(5)(vi), such as an index to the exhibits, a bound copy of the written transcript, and the contents of the certification. However, it was noted that the Sample Certification Form provided by the New York Hearing Officer Trainers to the Hearing Officers in 2014 included an index to the record and the contents of the certification. As such, this is not viewed as an obstacle, but some further guidance to the Hearing Officers may be necessary in this regard.

12. Judicial Appeals

In 2010, the State Review Officer issued 101 decisions and, based on the date of filing for judicial review, 24 judicial appeals were filed (24%); 134 decisions were issued in 2011 and 34 judicial appeals were filed (25%); 94 decisions were issued in 2012 and 55 judicial appeals were filed (59%); 115 decisions were issued in 2013 and 19 judicial appeals were filed (16%); and in 2014 through July 2014, 114 decisions were issued and 43 judicial appeals were filed (38%).[131] Based on this data, on the average, approximately one third of the cases that are filed for review are appealed to Court. However, since the judicial appeal data provided did not distinguish cases on overdue decisions that were filed prior to the issuance of the State Review Officer decision, appeals of the State Review Officer's decisions would be lower than this numerical average.

[130] February 2014 Field Advisory, *supra* pg. 7
[131] Data provided by the Office of State Review.

PART SIX - OTHER STATES

A. OTHER HIGH VOLUME STATE HEARING SYSTEMS

It is recognized that New York State is highly litigious in the area of special education. However, there are other high activity states that have attained substantial compliance in the timely issuance of decisions after adjudication. Information on three such states is provided for the State Educational Agency's consideration, including their alternative infrastructures.

1. California

Since California has a high child count of students with disabilities receiving special education (679,000 in 2011-2012) and a high incidence of Due Process Complaints filed, the examination of their hearing infrastructure and budget is particularly instructive.

Historically, the development of the hearing system in California paralleled a number of other states. Since the early years of the Education for all Handicapped Children's Act (P.L. 94-142), the hearing system has gone through several transformations, including the transition from a two-tier process with a local panel of Hearing Officers and appeal to the Department, to a one-tier system implemented first by part-time Hearing Officers who were independent contractors under the supervision of the Department. Based on emerging case law in other jurisdictions in the 1980s regarding the involvement of the state educational agency in the supervision of independent contractual Hearing Officers, the California Department of Education transitioned to a system of Hearing Officers employed and supervised by an independent entity.[132] California remains a one-tier system.

California Education Code §56504.5(a) requires the California Department of Education to "enter into an interagency agreement with another state agency or contract with a nonprofit organization or entity to conduct mediation conferences and due process hearings in accordance with Sections 300.506 and 300.508 of Title 34 of the Code of Federal Regulations." Education Code §56504.5(c) requires that the Superintendent of Public Instruction adopt regulations to establish specific standards for the interagency agreement or contract.

Between 1989 and July 1, 2005, the California Department of Education contracted with the Special Education Hearing Office from the University of the Pacific's McGeorge School of Law (a private school of law) to conduct and administer due process hearings and mediations in California. The Hearing Officers were employees with annual salaries

[132] It is disclosed that this writer was Staff Counsel for the California Department of Education during the transition from a two-tier to a one-tier system and responsible for the supervision of the various infrastructures of the one-tier system until 1983.

and benefits.[133] That contract expired on June 30, 2005. In July 2005, Education Code §56504.5(c) was amended to require nine separate provisions that would govern the components of the interagency agreement.

As of July 1, 2005, the contract was replaced with an interagency agreement between the California Department of Education and the California Office of Administrative Hearings. The Office of Administrative Hearings has provided the special education hearings since that date and began providing mediation services on January 1, 2006.[134]

The Office of Administrative Hearings has a separate special education division with three regional division offices. There is a Special Education Division Presiding Administrative Law Judge and each regional office has a Presiding Administrative Law Judge.[135]

The Interagency Agreement between the California Department of Education and the Office of Administrative Hearings is comprehensive.[136] In addition to requiring the maintenance of a Special Education Division for the hearings and mediations, the Agreement also includes: the retention and training of administrative, supervisory, information technology and other support staff to operate the administrative hearing and mediation programs; the qualifications, mandatory training, and the obligations of an Administrative Law Judge; the requirements on communications, information sharing, data collection and reporting; the right of the California Department of Education to audit, inspect and review the activities, books, documents, papers and records of the Office of Administrative Hearings during the progress of the work set forth in the Agreement, and five years thereafter; procedures for complaints against the Office of Administrative Hearings regarding this work; and the maintenance of an Advisory Committee to provide recommendations to the Office of Administrative Hearings on special education hearings and mediations.

In 2011-2012, 3114 Due Process Complaints were filed with 112 fully adjudicated hearings. Since 2005-2006, the number of Due Process Complaints has fluctuated annually from a high of 4012 in that year to a low of 2626 in 2007-2008. (The number of Due Process Complaints filed in 2005-2006 is identified as artificially inflated since it reflects the number of active case files transferred to the Office of Administrative Hearings in "off-calendar" status from the previous contractor.)[137]

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[133] Gail ImObersteg, *Evaluation Study of Special Education Dispute Resolution Issues in California*, February 29, 2000

[134] www.cdcan.us/regulations/SpecialEdHearingOfficer/sehoisor.doc

[135] The assistance provided by the Director and Chief Administrative Law Judge of the California Office of Administrative Hearings and Office personnel on the current hearing system are recognized and appreciated.

[136] http://www.documents.dgs.ca.gov/oah/SE/Scopeofwork2011-12--2013-14.pdf

[137] Updated data from the Office of Administrative Hearings; See also http://www.dgs.ca.gov/oah/SpecialEducation/Resources/SEReportArchive.aspx

In 2014, the Special Education Division of the Office of Administrative Hearings had a statewide total of 27 Administrative Law Judges in the Special Education Division and 23 individuals in varying staff support service positions.[138]

As noted above, California's Special Education Division Administrative Law Judges are also responsible for the conduct of special education mediations.[139] In 2013-2014, 3657 new cases, including Due Process Complaints and mediation only requests, were filed.[140] Considering the combined caseload of new cases filed in 2013-2014 and the number of Administrative Law Judges in 2014, the case load was 135.4 cases a year. (This does not consider whether presiding Administrative Law Judges are assigned cases.) As a matter of context, for the first three quarters of 2013-2014, 2558 Due Process Complaints were filed which would be a case load of appropriately 10.52 new hearing cases a month for each Administrative Law Judge.[141]

The 2013-2014 California State Budget provided appropriated funds "up to $1,011,000 for the dispute resolution services, including mediation and fair hearing services, provided through contract for special education programs."[142] The total budget for the 2013-2014 fiscal year, including federal funds, was $11,871,640.

Of the 3114 cases filed in 2012-2013, the issues raised were varied with the highest incidence as follows: 1823 designated instruction; 1712 placement; 1500 assessment; and 1013 speech and language issues.[143] The remedy of compensatory education was proposed in 1374 Due Process Complaints and the remedy of compensatory reimbursement was proposed in 1128.

At 96%, the Office of Administrative Hearings has a high rate of resolution of Due Process Complaints without a need for a hearing. In 2012-2013, the Office of Administrative Hearings issued 114 hearing decisions and 99.1% were issued within the requisite timelines. The timeliness numbers for California over the past several years are consistently in the substantial or meets compliance range: 99.1% in 2011-2112; 100% in

[138] http://www.dgs.ca.gov/oah/about/oahoffices.aspx

[139] However, in no case is an Administrative Law Judge who facilitated mediation permitted to preside over a hearing in the same case. http://www.documents.dgs.ca.gov/oah/SE/Scopeofwork2011-12--2013-14.pdf

[140] http://www.documents.dgs.ca.gov/oah/forms/2008/SE%20Quarterly%20Report%20Q4%20FY%2013-14%20Final.pdf This number reflects the aggregation of data from the following resources: http://www.documents.dgs.ca.gov/oah/forms/2008/SE%20Quarterly%20Report%20Q3%20FY%2013-14%20Final.pdf ; http://www.dgs.ca.gov/oah/SpecialEducation/Resources/GraphPage.aspx

[141] http://www.documents.dgs.ca.gov/oah/forms/2008/SE%20Quarterly%20Report%20Q3%20FY%2013-14%20Final.pdf pg.3

[142] Budget Act of 2013-14- California - Special Education & Related Budget Items; Assembly Bill 110 (Chapter 20, Statutes of 2013) Approved by the Governor on June 27, 2013

[143] The data in the Report are aggregated by all cases filed

2010-2011; and 99% in 2009-2010.[144] As a high activity state, these numbers demonstrate that substantial compliance with timely adjudications is doable.

2. The District of Columbia

The District of Columbia has the dubious distinction of having the highest rate of dispute resolution activity based on the population of students with disabilities, with the vast majority of the activity in the hearing area.[145] For purposes of this Study, the District of Columbia's hearing system is unique in that the contractual Hearing Officers are full-time and there is a full-time contractual Chief Hearing Officer (see discussion below).

A class action lawsuit, Blackman, et al. v. District of Columbia, et al., was filed on July 17, 1997 alleging that the Defendants had failed to timely hold hearings and issue hearing decisions under the IDEA. Upon party agreement and Court Order, a Consent Decree was reached in August 2006.[146] The goal of the Consent Decree was to achieve, as quickly as possible, Defendants' compliance with the requirements of the IDEA for timely due process hearings and timely implementation of Hearing Officers' decisions and Settlement Agreements.

In December 2007, by an agreement of the parties, the State Educational Agency for the District of Columbia, the Office of the State Superintendent of Education, and the other District of Columbia Defendants agreed to secure a consultant to help them improve the operations of the Student Hearing Office, the Office responsible for administering the District's special education hearing system. The initial Scope of Work of the agreed upon Consultant included: defining the qualifications, functions, responsibilities and performance criteria for Hearing Officers; defining the qualifications, functions, and responsibilities for a Chief Hearing Officer and the Student Hearing Office Chief Administrative Officer; providing technical assistance on the case management docketing system; the organization and maintenance of administrative records; the staffing of the Student Hearing Office; developing policies and practices on the scheduling of Hearing Officers to enable case management; and identifying systemic performance lapses and areas where new regulations, policies and practices were needed. [147]

The District of Columbia's improvements in the operation of the Student Hearing Office resulted in the joint motion of the parties to dismiss the Blackman portion of the case in that, consistent with the Consent Decree, during the preceding 12 months, 90% of hearing

[144] http://www.documents.dgs.ca.gov/oah/forms/2008/SE%20Quarterly%20Report%20Q4%20FY%2012-13%20Final.pdf, pg. 12; http://www2.ed.gov/fund/data/report/idea/partbspap/allyears.html#ca

[145] http://www.directionservice.org/cadre/pdf/DC-JAN2014.pdf

[146] Case 1:97-cv-02402-PLF-JMF Document 498 Filed 08/24/2006 -Paragraph 55 and 28 and 29 http://www.bazelon.org/LinkClick.aspx?fileticket=6fCvYmkUCKE%3d&tabid=190

[147] It is hereby disclosed that the agreed upon Consultant was this instant writer who served in that capacity from 2007 – 2011.

requests were timely adjudicated and no hearing requests were more than 90 days overdue. [148] The motion was granted on July 5, 2011.

The trend of decreasing numbers of filed Due Process Complaints paralleled the reform of the hearing system: in 2005-2006, 2971 Due Process Complaints were filed; in 2006-2007, 2883 Due Process Complaints were filed; in 2007-2008, 3281 Due Process Complaints were filed; and in 2008-2009, 2003 Due Process Complaints were filed. By 2011-2012, 1073 Due Process Complaints were filed with 284 fully adjudicated hearings. This downward trend has continued with 702 Due Process Complaints filed in FFY 2013. From October 1, 2012 through August 5, 2014, 524 Due Process Complaints had been filed.[149]

Importantly, after the reform of the hearing system, the percentage of cases timely adjudicated in this previously noncompliant jurisdiction has continued to rise from 97.8% in 2009-2010 to 98.5% in 2010-2011 to 100% timely adjudication in 2011-2012 and 2012-2013. The comprehensive efforts of the District of Columbia to improve the operations of the hearing system and administering office that resulted in the dismissal of the class action case provide another exemplar for New York State.

The Student Hearing Office in the Office of the State Superintendent of Education is administered by a Chief Administrative Officer under the Office of the Chief Operating Officer. For 2013-2014, there were eight full-time contractual Hearing Officers and no part-time Hearing Officers. The full-time contractual Chief Hearing Officer's services include monitoring and supervising the Hearing Officers and facilitated resolution and mediation; monitoring and raising the quality of the hearings, resolution and mediations; and providing technical assistance and evaluating the Hearing Officers. If there is a fluctuation in case filings, the full-time Chief Hearing Officer can be assigned cases, if needed.[150]

The Hearing Officers serve on a flat-fee per case assignment that is capped at an annual amount. There are a total of seven full time employees in the Student Hearing Office and no part-time or temporary staff. The overall budget for the Office is $2,337,474.36, of which $1,479,329.74 funds the Hearing Officers and the Chief Hearing Officer, and the remainder is allocated for other services and employee salaries.[151]

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[148] http://www.bazelon.org/LinkClick.aspx?fileticket=6fCvYmkUCKE%3d&tabid=190 Paragraphs, 28-32

[149] Data provided by the Director of the Office of Dispute Resolution, Office of the State Superintendent of Education, Government of the District of Columbia; See also http://www.bazelon.org/LinkClick.aspx?fileticket=u_sIT_0UnbE%3d&tabid=190, http://legaltimes.typepad.com/files/sundram-report.pdf

[150] http://app.ocp.dc.gov/pdf/DCGD-2014-R-0002_M.pdf The assistance of the Director of the Office of Dispute Resolution, Office of the State Superintendent of Education, in the provision of updated information on the hearing system is recognized and appreciated.

[151] Data provided by the Director of the Office of Dispute Resolution, Office of the State Superintendent of Education, Government of the District of Columbia

3. New Jersey

From 2009–2010 to 2011-2012, the number of Due Process Complaints filed ranged from a high of 913 in 2010-2011 to a low of 811 in 2011-2012. In 2011-2012, of the 811 Due Process Complaints filed, only 43 resulted in a fully adjudicated hearing.[152] New Jersey attained 97.7% timely adjudication in 2012-2013; 97.6% in 2011-2012; and 98% in 2010-2011.[153]

Administrative law judges in the Office of Administrative Law conduct the hearings in New Jersey's one-tier system. This is a long-standing arrangement since at least 1999. The Office of Administrative Law is an independent Executive Branch agency. While located in the Department of Treasury, it is independent of supervision or control by the Department of Treasury.[154]

All hearing and mediation cases are filed with the New Jersey Department of Education and pursuant to the New Jersey Administrative Code §6A:14-2 .7(h)(4), if a request for a special education hearing is not resolved to the satisfaction of the parents within 30 days of the receipt of the petition or is directly transmitted for hearing per parent/district agreement, the Office of Special Education Programs transmits the case to the Office of Administrative Law for a due process hearing.

B. STATES RECENTLY TRANSITIONED FROM TWO-TIER TO ONE-TIER SYSTEMS

1. Pennsylvania

Effective July 1, 2008, Pennsylvania changed from a two-tier to a one-tier system. Fiscal year 2008-09 was the first full year for the one-tier system. There were a few carryover cases from the two-tier system in that year that were handled by the appeals panel until all of its pending cases have been addressed.[155]

Prior to moving to a one-tier system, the Department of Education's Bureau of Special Education conducted numerous awareness and constituency input activities in the construct of the framework of the one-tier system. The change to a one-tier system in Pennsylvania was controversial. However, there was near universal support for the

[152] http://www.directionservice.org/cadre/pdf/NJ-JAN2014.pdf
[153] http://www2.ed.gov/fund/data/report/idea/partbspap/allyears.html#nj
[154] http://www.state.nj.us/oal/about/about/
[155] http://odr-pa.org/wp-content/uploads/pdf/odr0708ar.pdf, http://odr-pa.org/wp-content/uploads/pdf/ODR0809ar.pdf The assistance of the Director of the Bureau of Special Education, Department of Education, and the Director of the Office of Dispute Resolution in the provision of information on the hearing system and insight regarding the transition to the hearing system to a one-tier system are recognized and appreciated.

elimination of the two-tier system in the public input submitted to the State Board of Education during the rulemaking process.[156] (Notwithstanding this support in the rulemaking process, the Office of Dispute Resolution reports that there was a surge in filings of Due Process Complaints prior to the elimination of the two-tier system.)

Pursuant to current regulation, the Secretary of Education may contract for coordination services for hearings for students with disabilities. (Pennsylvania Code, Title 22, Chapter 14, §14.162(p)) The coordination services may include arrangements for stenographic services, arrangements for Hearing Officer services (including the compensation of Hearing Officers), scheduling of hearings and other functions in support of procedural consistency and the rights of the parties to hearings.[157]

The Office of Dispute Resolution is the independent agency responsible for coordinating and managing Pennsylvania's statewide special education dispute resolution system, including facilitations, mediations and hearings for all students with disabilities. The Office is funded by the Pennsylvania Department of Education through a federally-funded project under the IDEA.

The independent counsel for the Office of Dispute Resolution monitors the implementation of the hearing system, including reviewing all decisions rendered and providing input to each Hearing Officer on the legal soundness and conciseness of the decision. In addition, the independent counsel also reviews two entire administrative records each year, observes each Hearing Officer, and provides input on the Hearing Officer's demeanor, the handling of objections and evidence and other hearing procedures.[158]

The Pennsylvania Department of Education contracts with the Central Susquehanna Intermediate Unit for the fiscal administration of the Office for Dispute Resolution. This arrangement involving the Intermediate Unit predates the transition to a two-tier system.[159]

In 2007-2008, the last year of the two-tier system, 822 Due Process Complaints were filed. From 2006 - 2007, the number of Due Process Complaints filed has ranged from a low of 742 a year in 2010-2011 to a high of 864 in 2011-2012.[160] The Office of Dispute Resolution indicated that the Due Process Complaints are generally in the mid-750s a year.

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[156] http://www.pabulletin.com/secure/data/vol38/38-26/1244.html
[157] http://www.pacode.com/secure/data/022/chapter14/s14.162.html
[158] http://odr-pa.org/wp-content/uploads/pdf/PA-State-Profile-English.pdf pg.10
[159] http://odr-pa.org/wp-content/uploads/pdf/odr0708ar.pdf; http://odr-pa.org/wp-content/uploads/pdf/odr0708ar.pdf; http://www.csiu.org/index.cfm?pageid=566
[160] http://www.directionservice.org/cadre/pdf/PA-JAN2014.pdf

In the last year of the two-tier system, 17 independent contractors served as Hearing Officers. In 2014, the Office of Dispute Resolution employed six full-time attorneys throughout the Commonwealth of Pennsylvania to provide services as a Hearing Officer. In addition, the Office of Dispute Resolution contracts with an individual Hearing Officer to serve when Central Susquehanna Intermediate Unit is a party in the due process matter, or when one of the local educational agencies within the Central Susquehanna Intermediate Unit is a party.[161] Upon consideration of the number of employed Hearing Officers and approximately 750 Due Process Complaints filed a year, the average case load per month for each full-time Hearing Officer is approximately 10 cases.

Contrary to the belief of some that the elimination of a two-tier system may exponentially increase the number of judicial appeals, Pennsylvania is a case in point. Commencing 2009, the number of total judicial appeals to both state and federal courts ranged from a high of 38 in 2010 to a low of 19 in 2009 and 2013. Prior to the transition to a one-tier system, the judicial appeals were higher, ranging from a high of 50 in 2005 to a low of 29 in 2008.[162]

Interestingly, although not unexpected, the Office of Dispute Resolution reports that the change to a one-tier system did change the nature of the practice for attorney representatives in anticipation of judicial appeal. Accordingly, new administrative procedures to ensure efficiency, such as time limitations on witnesses, were instituted by the Hearing Officers, when appropriate, in response to this change in practice.

During the last year of a two-tier system, Hearing Officers billed a total of $634,939.91 for hearing officer services to the local educational agency. Appeals Panel members billed a total of $192,404.24 for services rendered.[163] For 2014-2015, including an indirect cost/operational rate, the budget for the Office of Dispute Resolution was $2.5 million. This cost includes hearings and mediations under IDEA Part B as well as non-mandated activities such as a Consultline, IEP Facilitation, Facilitated Resolution Sessions, implementation review, and communications training. In addition, the budget includes funding for the mandatory dispute resolution services for the Early Intervention program under IDEA, Part C, and dispute resolution for gifted programs. The Office of Dispute Resolution is located at the Pennsylvania Training and Technical Assistance Network building and this arrangement eliminates the cost of a separate facility and related costs such as telephone and computers.[164]

[161] http://odr-pa.org/due-process/hearing-officers/
[162] Office of Dispute Resolution Personnel; http://odr-pa.org/wp-content/uploads/pdf/2012-2013-Annual-Report.pdf
[163] http://odr-pa.org/wp-content/uploads/pdf/odr0708ar.pdf
[164] 2014-2015 budget and program narrative and Office of Dispute Resolution personnel.

Best Practices

In 2010, Pennsylvania was profiled as one of four states with an exemplary dispute resolution system in special education by the CADRE.[165] The Pennsylvania Department of Education has established some notable procedures to augment alternative dispute resolution generally and the special education hearing system, including the voluntary Evaluative Conciliation Conferences piloted in 2012-2013.[166]

In the Evaluative Conciliation Conference, the Conference Consultant provides an assessment of the strengths and weaknesses of each party's position based on his/her understanding of the law and on his/her analysis of hearing decision and case law trends for similar types of issues. If the parties agree to engage in the second phase of the Conference, the Consultant will facilitate discussions with the parties which may result in an agreement on some or all of the issues.[167]

In 2009, Pennsylvania established an Office of Dispute Resolution Stakeholder Council to provide input and recommendations on the special education dispute resolution system. The Stakeholders Council also interviews and makes recommendations as to selection of Hearing Officers.

2. Colorado

Colorado's transition to a one-tier system required a legislative change. The law took effect on July 1, 2011 and all Due Process Complaints filed after that date were through the one-tier system.[168] In the two-tier system, the first tier Hearing Officers were contract Hearing Officers and the appeal level was administered by the Colorado Office of Administrative Courts with Administrative Law Judges. In the one-tier system the Colorado Department of Education transitioned to all hearings being conducted by Administrative Law Judges of the Office of Administrative Courts through a Memorandum of Understanding. The Administrative Law Judges also serve as Mediators.[169]

Colorado has a small number of Due Process Complaints filed. In 2011-2012, only 22 Due Process Complaints were filed and none were fully adjudicated. [170]

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[165] http://odr-pa.org/wp-content/uploads/pdf/PA-State-Profile-English.pdf
[166] http://odr-pa.org/wp-content/uploads/pdf/2012-2013-Annual-Report.pdf
[167] http://odr-pa.org/alternative-dispute-resolution/evaluative-conciliation-conference/
[168] http://www.leg.state.co.us/CLICS/CLICS2011A/csl.nsf/fsbillcont3/AA346691179A6B4E872578080080E898?Open&file=061_enr.pdf; See also the proposed regulations to effect this statutory change for Due Process Complaints filed after July 1, 2011: http://www.dora.state.co.us/pls/real/SB121_Web.Show_Rule?p_rule_id=4241
[169] http://www.cde.state.co.us/sites/default/files/documents/cdesped/download/pdf/apr_fy2011.pdf, pg. A-17
[170] http://www.directionservice.org/cadre/pdf/co-JAN2014.pdf

3. Indiana

Indiana transitioned from a two-tier to a one-tier system in 2010. In the two-tier system, the first tier Hearing Officers were Administrative Law Judges and the appeal level was a three member appeals board. In 2010-2011, Indiana had 63 Due Process Complaints filed with only nine fully adjudicated proceedings.[171]

In the one-tier system, the Indiana Department of Education maintains the list of qualified Hearing Officers and appoints Hearing Officers on a rotational basis upon the receipt of a Due Process Complaint. The part-time Hearing Officers are neither employed Administrative Law Judges or under contract with the Department of Education. The Hearing Officers' fees and expenses are paid by the local educational agency involved in the hearing.

The Indiana Department of Education hosts an annual in-service training for the Hearing Officers and monitors for procedural compliance. In addition, the Department has the ability to remove a Hearing Officer from the appointment list for failure to adhere to the timelines for the issuance of a hearing decision.

The change from a two-tier system was effected by regulatory amendment and the transition from a two-tier to a one-tier system was addressed in the following manner: "A request for a due process hearing in accordance with 511 IAC 7-45-3 made to the [sic] prior to the effective date of this amendment shall be governed by this rule as it existed prior to this amendment, including the opportunity for appeal to the state board of special education appeals."[172]

C. OTHER TWO-TIER STATES

1. Kansas

From 2005- 2006 to 2011-2012, Kansas had a high of 51 Due Process Complaints filed and a low of 13 Due Process Complaints filed.[173] The school district is responsible for the first tier, including maintaining a list of qualified Hearing Officers and assigning the Hearing Officers. (K.S.A. 72-973; K.S.A. 72-973a) Kansas' regulations provide a process

[171] http://www.doe.in.gov/sites/default/files/specialed/indicator-16-17-18-19-ffy-2010-apr.pdf
[172] http://www.in.gov/legislative/iac/20100623-IR-511090795FRA.xml.html See the proposed regulation to effect the statutory change at: http://www.in.gov/legislative/iac/20100127-IR-511090795PRA.xml.pdf
See also Michigan as an example of emergency regulations for procedures upon transition to Michigan's State Office of Administrative Hearings and Rules:
http://www.michigan.gov/documents/OSE-EISMemo06-13_165126_7.pdf
[173] http://www.directionservice.org/cadre/pdf/KS-JAN2014.pdf

for parents to strike Hearing Officers from a list of up to three Hearing Officers. The Review Officer is appointed by the State Board of Education.[174]

2. Kentucky

From 2005- 2006 to 2011-2012, Kentucky had a high of 27 Due Process Complaints filed and a low of 17 Due Process Complaints filed.[175] In Kentucky's two-tier system, the contractual Hearing Officers are trained and certified by the Kentucky Department of Education and serve in a part-time capacity. A party that is aggrieved by the hearing decision may appeal the decision to a three member Exceptional Children Appeals Board appointed by the Kentucky Department of Education.[176]

3. Ohio

From 2005-2006 to 2011-2012, Ohio had a high of 206 Due Process Complaints filed and a low of 129 Due Process Complaints filed.[177] In Ohio, the hearings are the responsibility of the school district of residence. The part-time Hearing Officers and the Review Officers are contractual attorneys.[178]

4. Oklahoma

From 2005-2006 to 2011-2012, Oklahoma had a high of 49 Due Process Complaints filed and a low of 14 Due Process Complaints filed.[179] The part time contractual Hearing and Appeal Officers are appointed by the Oklahoma Department of Education.[180]

5. Nevada

Nevada also has a small number of Due Process Complaints filed every year. From 2005-2006 to 2011-2012, the highest number of Due Process Complaints was filed in 2011-2012. In that year there were 86 Due Process Complaints filed with only two fully adjudicated hearings.[181] Nevada's two-tier system is comprised of part-time contractual Hearing and State Review Officers. While the local educational agency is responsible for the costs of the conduct of the Tier I hearing, including the Hearing Officer, the Nevada

[174] http://www.ksde.org/Portals/0/SES/PH/PH-Ch12.pdf
[175] http://www.directionservice.org/cadre/pdf/KY-JAN2014.pdf; http://www2.ed.gov/fund/data/report/idea/partbspap/allyears.html#ky
[176] http://education.ky.gov/specialed/excep/Documents/Kentucky%20Administrative%20Regulations.pdf
[177] http://www.directionservice.org/cadre/pdf/KY-JAN2014.pdf; http://www2.ed.gov/fund/data/report/idea/partbspap/allyears.html#ky
[178] www.education.ohio.gov/getattachment/Topics/Special-Education/Federal-and-State-Requirements/Operational-Standards-and-Guidance/Ohio-Administrative-Code-Rules-3301-51-01-to-09-11-and-21.pdf.aspx
[179] http://www.directionservice.org/cadre/pdf/OK-JAN2014.pdf
[180] http://ok.gov/sde/sites/ok.gov.sde/files/SpecEd-DueProcess.pdf
[181] http://www.directionservice.org/cadre/pdf/NV-JAN2014.pdf

Department of Education recruits, selects and appoints the Hearing Officers, as well as the State Review Officers. The State Review Officers are individuals with recognized expertise in the IDEA and, specifically, the hearing system.

Nevada's infrastructure for the two-tier system is unique among the two-tier states in that, through an independent contractor, it provides a system of oversight over the operation of both tiers.[182] The independent contractor's duties include assistance to the Department in the implementation of the hearing and review systems; complaint investigation system and, if requested, the mediation and IEP Facilitation systems. With regard to the hearing and review systems, the independent contractor's duties include the provision of technical assistance, as appropriate; the provision or arrangement of periodic training; and the supervision and evaluation of the Hearing and Review Officers.[183]

6. North Carolina

From 2005-2006 to 2011-2012, North Carolina had a high of 80 Due Process Complaints filed and a low of 51 Due Process Complaints filed.[184] North Carolina has a unique configuration in that the hearings at Tier I are conducted by the North Carolina Office of Administrative Hearings. The contractual State Review Officers are appointed by the State Board, through the Exceptional Children Division, from a pool of Review Officers approved by the State Board of Education.[185]

The North Carolina Department of Education characterized this unique configuration of the Tier I hearing system as follows in a 1999 response to a survey inquiry: "Back in the late 80's we were forced by the feds to "relocate" the IDEA hearings out of the State agency . . . . We managed finally to get them to approve a system in which the OAH goes first . . . ."[186]

7. South Carolina

From 2005-2006 to 2011-2012, South Carolina had a high of 27 Due Process Complaints filed and a low of nine Due Process Complaints filed. The local educational agency is responsible for conducting the hearings, including assigning the Hearing Officers. The South Carolina Department of Education's Office of General Counsel appoints a contractual state-level Review Officer upon the filing of an appeal.[187]

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[182] It is hereby disclosed that the independent contractor is this instant writer who has served in that capacity since 2006.
[183] Scope of Work of the Independent Contractor
[184] http://www.directionservice.org/cadre/pdf/NC-JAN2014.pdf
[185] http://www.nccecas.org/downloads/downloads/nc-apr-2014b%20for%20dpi%20website.pdf
http://www.ncga.state.nc.us/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_115c/Article_9.pdf
[186] See also the 1999 NSBA survey of the state special education hearing systems:
http://www.law.seattleu.edu/search-results?q=nsba+and+survey+and+delegate
[187] http://ed.sc.gov/agency/programs-services/173/documents/SEPG-03202013.pdf

PART SEVEN - IDENTIFICATION OF THE FISCAL, PROGRAMMATIC, AND TRANSITION IMPLICATIONS FOR NEW YORK STATE'S SYSTEM

A. OVERARCHING CONCERN – RESTRUCTURE THE HEARING SYSTEM

Notwithstanding the State Educational Agency's efforts at continuing to improve the hearing infrastructure, including comprehensive regulations incorporating many standard and best practices and intense initial and ongoing training of Hearing Officers on the hearing process, this system has been unable to attain compliance with regard to the timely resolution of an adjudicated Due Process Complaint. In a system designed to address educational issues for a student with a disability in an expeditious manner, the data on the inordinate delays and duration of all Due Process Complaints in this system are also troubling.

It is generally agreed that a primary advantage of a contractual Hearing Officer model is the maximization of the state educational agency's control in the exercise of its responsibility for general supervision and the implementation of procedural safeguards.[188] (34 C.F.R. §§300.149 – 300.150) Due to the high number of Due Process Complaints in New York State; the concomitant high number of part-time Hearing Officers; and the extensive administrative management of the hearing system at the local educational agency level, the NYSED's control over the implementation of the current hearing system in accordance with the law and standard and best practices is unwieldy, at best. As such, the current model of contractual Hearing Officers is viewed as having minimal significance as an advantage in the exercise of the NYSED's general supervision under the IDEA.

The State Educational Agency could continue to bolster the current part-time Hearing Officer contractual model through augmentation, including a system of State oversight that is immune from actual, or even the appearance of, improper influence and control, such as a contractual Chief Hearing Officer. However, given the pervasive culture of the lengthy duration of Due Process Complaints and the persistent pattern of untimeliness; the magnitude of the system and the attendant unwieldiness of control, further augmentation is not recommended. The apparent disregard of repeated training on standard and best practices by some of the Hearing Officers, as evidenced by the improved conduct of pre-hearing conferences to only a little more than a third of cases, also militates against the perpetuation of the current system model.

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[188] See for example: Perry Zirkel, *Evaluating Organizational Options for Special Education Hearings and Mediations: A Report to the Massachusetts Commissioner of Elementary and Secondary Education*, May 27, 2009, pg. 6 "Control" as an objective advantage refers here to managerial efficiency and accountability."
http://archives.lib.state.ma.us/bitstream/handle/2452/113469/ocn752506007.pdf?sequence=1

Regardless of whether the State Educational Agency elects to maintain a two-tier system or convert to a one-tier system, the overall operation of the conduct of the New York State special education hearing system is in need of substantial restructuring to be an efficient and timely system consistent with standard, and ideally, best legal practices. As such, the recommendations for the hearing system are set forth first.

1. Programmatic/Operational Structure Implications

As discussed previously, the predominant infrastructures in other high activity one-tier states for statewide special education hearings are: full-time employee Hearing Officers with an Office of Administrative Hearings (California and New Jersey[189]) or another free standing state agency (Pennsylvania[190]); or contractual full-time Hearing Officers with a system of oversight (District of Columbia).[191]

There are two other infrastructure models utilizing full-time Hearing Officers worthy of note. As discussed previously, California law provides the flexibility for the California Department of Education to enter into an interagency agreement with another state agency or contract with a nonprofit organization or entity to conduct mediation conferences and special education hearings. (California Education Code §56504.5) The contractual arrangement with the Special Education Hearing Office from the University of the Pacific's McGeorge School of Law from 1989 to 2005 provides an alternative model to an arrangement with a state administrative hearing agency.

The evolution of Massachusetts' special education hearing system is also of interest, particularly if the State Educational Agency elects to move to a one-tier system and wants to incorporate personnel or other aspects of the Office of State Review infrastructure into another configuration. In 2009, the Massachusetts Department of Elementary and Secondary Education reported to the United States Department of Education, Office of Special Education Programs, that for a period of time the Department had been utilizing employees of the Bureau of Special Education Appeals within the Department for special education Hearing Officers and mediators. In order to correct the situation, the United States Department of Education requested that, within a time certain, the Massachusetts Department of Education provide a plan setting out the specific steps it would take to ensure the impartiality of its dispute resolution system and provided one infrastructure example:

[189] The aspect of New Jersey law that delays transmittal of a Due Process Complaint to the Office of Administrative Law in some cases until the end of the resolution period is not recommended since that would impede a Hearing Officer's management of the case and timely ruling on sufficiency challenges or other motions that arise during the 30-day resolution period.

[190] If a standalone agency like the Pennsylvania model is interesting to the State Educational Agency, it is recommended that the agency not be associated with a local or intermediate educational agency since that causes a conflict of interest in some cases.

[191] See 1999 NSBA Survey *supra*

> "Although the IDEA prohibits hearing officers and mediators from being employees of the State Educational Agency, there is nothing in the IDEA that prohibits due process hearing officers or mediators from being State employees. For example, Massachusetts could, consistent with the practice of other States, create a BSEA in a State office that houses administrative law judges who conduct other State administrative hearings. Another alternative would be for the BSEA to become a State office independent of the State Educational Agency. There may be other alternatives that you may wish to consider to ensure that Massachusetts's due process system complies with the requirements in the IDEA."[192]

The Massachusetts Bureau of Special Education Appeals was transferred to the Division of Administrative Law Appeals by Chapter 131 of the Acts of 2010, and is now an independent subdivision of the Division of Administrative Law Appeals.[193] In extensive detail, Chapter 131 addressed the transfer of the Bureau of Special Education Appeals including:

- The transfer of employees without interruption of service, without impairment of seniority, retirement or other rights of the employees, and without reduction in compensation or salary grade and without loss of accrued rights to holidays, sick leave, vacation and other benefits and without change in union representation;
- The continuation of the force and effect of all rules and regulations governing the Bureau of Special Education Appeals which were in force immediately before the effective date of the act until they were superseded, revised, rescinded or canceled by the Board of Elementary and Secondary Education, in consultation with the director of special education appeals and the chief administrative magistrate of the Division of Administrative Law Appeals;
- The operation of the Bureau of Special Education Appeals as a separate subdivision of the Division of Administrative Law Appeals;
- The qualifications and full-time status of the director of special education appeals and appointment in consultation with the Commissioner of Elementary and Secondary Education;
- The issuance of regulatory standards for the dispute resolution system in consultation with the Commissioner of Elementary and Secondary Education;
- The negotiated memorandum of understanding; and
- The allocation of costs between the Department of Elementary and Secondary Education and the Division of Administrative Law Appeals.[194]

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[192] *Letter to Chester* 52 IDELR 106 (OSEP 2009); The use of the term State Educational Agency in this quote is used in the general sense or to refer to the Massachusetts Department of Education.

[193] http://www.mass.gov/anf/hearings-and-appeals/bureau-of-special-education-appeals-bsea/ http://www.mass.gov/anf/hearings-and-appeals/oversight-agencies/dala/

[194] https://malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter131 Section 7, Section 53, and Section 174

There are other interesting arrangements in small one-tier jurisdictions. For example, the Tennessee Department of Education utilizes administrative law judges employed by the Secretary of State. However, in addition, the Secretary of State is authorized to contract on a part-time basis with up to three administrative law judges who were serving in 2007 under an appointment by the Department of Education to hear special education cases.[195] The Oklahoma State Department of Education contracts with an external entity, an institution of higher education, to provide dispute resolution services for its special education programs. On December 1, 2005, the Special Education Resolution Center was established at Oklahoma State University for the purpose of managing the special education hearing system.[196]

It is important to note that if the State Educational Agency elects to maintain a two-tier system and also adopts this recommendation to restructure the local level hearing system to a statewide administrative hearing system, consideration must be given to necessary variations in the recommendations to ensure the statewide system meets the requirements of the IDEA, 34 C.F.R. §300.514(b), including the conduct of the hearing by a public agency (34 C.F.R. §300.33), other than the State Educational Agency. North Carolina's two-tier system provides an approved exemplar.

2. Recommendations for Improving Efficiency, Timeliness, and Overall Operation

Long-Term

Regardless of whether the State Educational Agency maintains a two-tier system or transitions to a one-tier system, it is recommended that New York State's special education hearing system be changed from a part-time contractual Hearing Officer model administered at the local level to a statewide administrative hearing model. The recommendations below are designed primarily for a statewide administrative hearing system in a one-tier system. Therefore, as noted above, the administration of a statewide hearing system in a two-tier system would necessitate variations and additional study is recommended if that is the State Educational Agency's selected configuration of the two-tier system.

If the State Educational Agency elects to transition to a one-tier system, the District of Columbia's model of jurisdiction-wide contractual full-time Hearing Officers and the provision of oversight by a contractual Chief Hearing Officer would be in accord with this recommendation. This model would not be available for the conduct of

[195] http://law.justia.com/codes/tennessee/2010/title-49/chapter-10/part-6/49-10-606

[196] http://www.directionservice.org/cadre/pdf/Oklahoma%20Profile.pdf; See also Perry Zirkel, *Evaluating Organizational Options for Special Education Hearings and Mediations: A Report to the Massachusetts Commissioner of Elementary and Secondary Education;* May 27, 2009, pg. 36 for a discussion of other unique administration arrangements of part-time contractors by an agency other than the state educational agency.

administrative hearings in a two-tier system and is not recommended for New York State in a one-tier statewide hearing system. The reform in the District of Columbia was accomplished with the Office of the State Superintendent's intensive efforts at reforming the system, including the involvement of an independent contractor to assist in the reform. The State Educational Agency could also engage in such efforts and accomplish the necessary reform.

However, the high number of Due Process Complaints in New York State and the requisite number of contractual Hearing Officers statewide would require the development of a sufficient infrastructure to provide the essential administrative support, such as the appointment of Hearing Officers; interpretation and transcription services; a docketing system; maintenance of administrative records; and continuous oversight over the implementation of the system. The oversight of the performance of the contractual Hearing Officers would need to be accomplished in a manner that is immune from influence, such as a contractual Chief Hearing Officer with adequate staff and resources commensurate with the number of Hearing Officers. In addition, the nature of the contractual system would require a high level of vigilance on the part of the State Educational Agency to avoid any actual or appearance of conflict of interest in the operation of the system.

Alternatively, the State Educational Agency could transfer responsibility for conducting the hearing to another agency/entity, and that is what is recommended. A statewide administrative model could be accomplished through an interagency agreement with another state agency in existence or created for that purpose or a contract with an organization or entity.[197] (If desired, other state alternative dispute resolution systems such as mediation could also be included in such interagency agreement or contract.)

It is further recommended that the statewide administrative model utilize full-time Hearing Officers with the capability of the entity to augment the cadre if the number of Due Process Complaints requires it. Converting to full-time Hearing Officers would provide stability to the system, enhance consistency, enable the reduced number of Hearing Officers to hone their expertise; and facilitate ongoing oversight and quality monitoring A full-time model would also eliminate the appearance of any conflict of interest discussed previously under the qualifications of the Hearing Officers.

To ensure maximum flexibility over time on the configuration of the state administrative model, it is recommended that the statutory authority cited above in California law be considered.[198] It is further recommended that the infrastructure not cause the State

[197] See the previously cited California Interagency agreement. Another less detailed example in Wisconsin at http://www.directionservice.org/cadre/exemplar/artifacts/WI-76%20Contract%20with%20Division%20of%20Hearings%20and%20Appeals.pdf

[198] Calif. Educ. Code §56504.5: http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=EDC&division=4.&title=2.&part=30.&chapter=5.&article

Educational Agency's relinquishment of control over the quality of the system, but rather retains its involvement, as appropriate, through the statutory authority and controlling documents. To maximize the ability of the State Educational Agency to exercise its general supervision responsibilities under the IDEA and ensure the hearing system is in accord with standard and best legal practices, it is recommended that the State Educational Agency include in the statute or implementing regulations and/or the controlling interagency agreement/contract, as appropriate, essential requirements such as the agency's/entity's responsibility for:

- The training of Hearing Officers, including the provision and/or coordination of continuing education and the State Educational Agency's role, if any, in such training;
- The supervision of, and provision of technical assistance to, Hearing Officers in a manner that protects and ensure the decisional independence of the Hearing Officers, including, observation, the review of Hearing Officers' decisions, and feedback;
- The evaluation of Hearing Officers and the investigation of complaints filed against individual Hearing Officers;
- The discipline of Hearing Officers who do not meet the established standards of conduct and competence;
- The development of guidance documents, including mandatory and model forms for Hearing Officers;
- Mandatory quality control mechanisms in the operation of the system and monitoring, including addressing any periodic need to engage additional Hearing Officers if the number of Due Process Complaints exceeds predictions;
- An electronic timeline tracking and docketing system;
- The development and maintenance of a website for the hearing system, to include guidance documents for participants on hearing procedures;
- Mandatory periodic reports to the State Educational Agency;
- If an office of administrative hearings is selected as the infrastructure, the exceptions to the rules of administrative procedure to comply with the IDEA; and
- The responsibility for the management of all disputes, including litigation, that arise out of the administration of the hearing system agreement.[199]

[199] In addition to the previously cited interagency agreement in California , see for example, the high level of specificity under California regulation in Article 7.5. Duties of Contractors or Agencies Related to Conducting Mediation or Due Process Hearings, Title 5 CCR §3090 et seq. https://govt.westlaw.com/calregs/Index?transitionType=Default&contextData=(sc.Default) Consider also the elements set forth in the American Bar Associations Model Act Creating a State Central Hearing Agency, 1997 and reaffirmed in 2011, particularly the role of a Chief Administrative Law Judge: http://digitalcommons.pepperdine.edu/naalj/vol17/iss2/8 Reaffirmed in 2011: http://www.americanbar.org/content/dam/aba/migrated/2011_build/house_of_delegates/112_2011_my.authcheckdam.pdf

As part of its general supervisory authority under the IDEA, the State Educational Agency would remain ultimately responsible for the hearing system. However, a number of the activities at the state level could be phased out with the transfer of the responsibility to another agency/entity. It is recognized that a change in New York State's special education hearing structure would require statutory and regulatory changes, including with regard to the role of the Commissioner, the State Educational Agency, and the local educational agencies.

3. Fiscal Implications

The operational costs of the other high activity states with a statewide hearing system provide a basis of comparison for the State Educational Agency's consideration. Based only on the operational costs of the statewide hearing systems in California and Pennsylvania and the number of Due Process Complaints filed in those states, the operational cost of a statewide system in New York State would be approximately 22 million dollars, assuming a continuing trend of Due Process Complaints in the 6000 range. Consistent with the reform of the system in the District of Columbia and given the potential enhancement of dispute resolution options in New York State, the number of Due Process Complaints may be reduced over time in this restructured system and, paired with the increased efficiency of the system, this cost estimation is considered high.

In the absence of data on the operational costs of the current hearing system at the State Educational Agency and local educational agency levels, it is unknown how the estimate above compares to the current cost of the system. However, since the system will be fundamentally restructured if this recommendation is accepted, the State Educational Agency should consider not only the operational costs of the current system, but less apparent costs, such as those related to the duration of the current system.

The data on the source and relative amounts of federal and state funds for the cost of the current hearing system and data on personnel costs of the Office of State Review were also not available during the course of the Study. This latter data along with operational costs would be relevant if New York State decides to transition to a one-tier system. If a two-tier system is retained with restructured hearing and review systems, the improvements at both tiers should ultimately result in cost savings.

The limited scope of the Study did not permit the examination and comparison of the operational details and costs of the other administrative hearing systems in New York State, such as the Department of State, Office of Administrative Hearings or the New York City Office of Administrative Trials and Hearing. This data may help to inform the State Educational Agency's ultimate decision on this recommendation and, if adopted, the appropriate infrastructure.

It should be noted that some statewide special education hearing systems in one-tier states are funded in their entirety with IDEA set-aside funds for state administrative costs.

However, a preferable model is one that ensures cost-sharing from the local educational agencies in a manner that adjusts for the proportionate use of the system. A cost-sharing model ensures that the local educational agencies continue to be invested in the early resolution of disputes and avoids a disproportionate impact on small local educational agencies. It is particularly appropriate in this system since the current operational costs at the local level are the responsibility of the local educational agency and a conversion to a statewide system will result in local cost savings.

One example of a cost sharing model is Michigan State's utilization of a system of reimbursement which was instituted upon the change from a two-tier to a one-tier statewide system.[200] It is recommended that if the hearing system is restructured as a statewide system, that the State Educational Agency conduct further study to ascertain the available funding sources for the operation of a statewide system and the optimal fiscal structure for the costs of the system, taking into consideration existing operational costs at the state and local levels.

In addition, there are opportunities for economic savings with regard to the fixed operational costs of a statewide system, such as facility, electric, and equipment. It is recommended that the State Educational Agency explore the possibility of the location of a statewide hearing entity in an existing publically funded structure with available suitable space, with or without cost sharing. For example, an existing facility for the conduct of administrative hearings or the location in a federally funded facility as was done in the State of Pennsylvania. If the system is transitioned to a one-tier system, the Office of State Review facility, if suitable, and/or equipment may be available as the operation of the second tier is phased out.

4. Transition implications

The Infrastructure

The scope of this Study also did not include an examination of prospective governmental or private entities with the capacity to administer a statewide hearing system. Since the NYSED is both the State Higher Education Agency and its State Educational Agency, eligible entities to administer the special education hearing system are more limited than other states that administer higher and elementary and secondary education as separate governmental agencies.

If the State Educational Agency determines the fundamental restructuring of the system to a statewide hearing system is desirable, it is recommended that the following options

[200] http://www7.dleg.state.mi.us/orr/Files/AdminCode/1113_2012-106ED_AdminCode.pdf Rule 24i. "This rule applies only to due process complaints filed on or after July 1, 2006. For purposes of MCL 380.1752, this rule replaces R 340.1882(4), which was rescinded. The district of residence or public school academy shall reimburse the State 75% of the costs related to providing the due process hearing."

be explored to ascertain the preferred administrator of the system and the comparative costs:

- Existing governmental agencies with an infrastructure in place for the conduct of administrative hearings and willing to assume the function;
- The establishment of an independent governmental agency for this purpose (or, if New York State transitions to a one-tier system, the possibility of converting the Office of State Review to a hearing agency independent of the State Educational Agency); and
- In a one-tier system, eligible private entities and agencies with the capacity and expertise to administer a statewide hearing system.[201]

While additional study is recommended, a few probable advantages and disadvantages of the comparative infrastructures are offered for the State Educational Agency's consideration. (All of the options would require legislative and regulatory change and the appropriation and/or re-appropriation of funds.)

In order to ensure an optimal structure for New York State, it is important to note that the perceived advantages and disadvantages listed below can be incorporated or eliminated, as appropriate, in the authorizing legislation that establishes the statewide system and the controlling document that sets forth the terms of the agreement/contract:

- The advantage of the utilization of an existing governmental office of administrative hearings would be a high level of expertise in the conduct of administrative hearings generally; long-term stability; an existing infrastructure of administration and support; and the potential of available facilities with appropriate equipment, including hearing rooms in a neutral location. However, unless a separate special education hearing office is established, a disadvantage would be a lack of expertise in substantive special education law and the distinctions in the conduct of special education hearings:
- The establishment of an independent governmental agency for this sole purpose, or conversion of the Office of State Review, if available, would offer long-term stability and specialization in substantive special education law and the conduct of special education hearings. The fundamental disadvantages of a standing agency would be those associated with start-up, such as the recruitment of qualified personnel; the development of the infrastructure of administration and support; and the acquisition of the necessary facility, or facilities if regional offices are established, and equipment. If the system is transitioned to a one-tier system, the conversion of the Office of State Review to an independent hearing agency offers the additional advantage of the prospect of utilizing required qualified personnel, as needed, and an existing facility in Albany and some equipment, as required.

[201] See also the exemplar items available on CADRE website on Critical System Function: System Design for additional considerations in system design: http://www.directionservice.org/cadre/exemplar/artifactlist.cfm?mdrsipeid=5

- The advantage of the utilization of a qualified private entity with the requisite capacity to administer a statewide system in a one-tier system, or potential capacity, would be a high level of expertise in substantive special education law and the conduct of special education hearings. The disadvantages would be the need for the procurement process to be sufficiently adaptable to ensure a qualified contractor; the establishment of a reliable system of regular funding for the contractor; and the prospect of a cyclical competitive procurement process. The latter would engender long-term instability since a subsequent transition may be required.

  The infrastructure of a qualified private entity is not recommended for the Tier I hearing in a two-tier system. This option would either be unavailable in a two-tier system, since this would not meet the requirement that the hearing be conducted by a public agency other than the State Educational Agency pursuant to the IDEA, 34 C.F.R. §300.514(b), or would require an overly complicated infrastructure involving the local educational agency as the responsible public agency that may be disallowed, notwithstanding the design. (In contrast, see the exemplar of North Carolina with the Office of Administrative Hearings as the administering governmental agency in a two-tier system.)

To seamlessly implement a restructured hearing system, the authorizing legislation must include a date certain when a filed Due Process Complaint would be processed through the statewide hearing system. It is recommended that trends in the filing of Due Process Complaints be examined to ascertain the optimal date to transition the system, ideally at a traditionally low filing period. While all new Due Process Complaints filed after the designated date would be processed through the new infrastructure, there will be an overlap in the operation of hearing systems at the state and local levels for a period of time until the Due Process Complaints filed and being processed through the local hearing system are resolved and closed.

Based on the parties' perception of the effectiveness and impartiality of the current local hearing system with part-time Hearing Officers, there may likely be a rise either prior to the effective date of a statewide system or immediately thereafter due to filings held in abeyance. This trend may be revealed in advance during the legislative process based on stakeholder's support/opposition and, if so, will be of assistance in transition planning. However, to avoid any missteps, the new entity must be prepared to absorb a higher than usual number of Due Process Complaint filings from the outset to avoid noncompliance.

5. Short-Term

Given that the recommended major restructuring set forth above, if adopted, will take time, the following are recommended on a short-term basis to immediately implement changes that have the potential to have the greatest impact on the timeliness of the system.

a. Accountability

Failure of a Hearing Officer to ensure the timely closure of a case in accordance with the IDEA and New York law and regulations is a fundamental breach of the duties of a Hearing Officer. Yet, as a general matter, timely and untimely Hearing Officers are treated the same in this system. As such, it is a tacit acceptance of a culture of untimeliness and lengthy duration.

Given the authority of the Commissioner, the immediate imposition of the sanctions of suspension and/or revocation on Hearing Officers who have a pattern of untimeliness is an obvious solution. However, any system change must take into consideration not only the intended consequence, but must avoid unintended consequences, such as impacting pending cases. Based on the high incidence of untimely Hearing Officers in this system, the system would be immediately stripped of a sufficient number of Hearing Officers.

Alternatively, the system of appointment could be restructured in a manner that still honors randomness consistent with the prescriptive rotational selection in Education Code §4404 and Title 8 NYCRR §200.2(e)(1)(ii), but ensures timely Hearing Officers are rewarded and untimely Hearing Officers are penalized. It is recommended that the Commissioner, on his initiative and based on verifiable data in the IHRS or other such data available to the State Educational Agency on timeliness, utilize his sanctioning authority under Title 8 NYCRR §200.21(b)(4) to take "other appropriate action" with respect to the certification of the Hearing Officer upon a finding that the Hearing Officer failed to issue a decision in a timely manner where such delay was not due to extensions granted at the request of either party as documented in the record. The following is one way to accomplish this purpose:

1. Revoke the certification of the Hearing Officers with the highest proportion of untimely closure of Due Process Complaints by decision or other order in 2012-2013 and 2013-2014, absent good cause such as a Hearing Officer's acceptance of an appointment to an already untimely case; and

2. Reconfigure the list of remaining certified Hearing Officers with a pattern of untimeliness to be appointed only after the list of Hearing Officers with a pattern of timeliness and who meet the standard of willingness and availability pursuant to Title 8 NYCRR §200.1(x)(6) is exhausted. That is, the Hearing Officers with a pattern of timeliness who have accepted appointments are unavailable to accept appointment. This latter category would include the new cadre of Hearing Officers trained on the mandatory timelines in this hearing system in 2014; informed of the system of accountability; and newly certified with no history of timeliness.

The rotational selection process within each of these subcategories of timely and untimely Hearing Officers would remain consistent with Education Law §4404 and Title 8 NYCRR §§200.2(e)(1)(ii) and 200.5(j).[202]

In addition to instilling immediate accountability into this hearing system, there are additional benefits in that compliant Hearing Officers who are available to work on a full-time basis may have that opportunity and, as a result, oversight of the system will become more manageable and the Hearing Officers will have an opportunity to hone their expertise. For those Hearing Officers with a pattern of untimeliness, if needed on reserve, appointments could be restricted to a small number of cases and the Hearing Officers would have to demonstrate the ability to correct this noncompliance in a designated amount of prospective cases prior to being considered compliant. If a Hearing Officer's untimeliness persists, it is recommended that the Commissioner impose escalated sanctions, including the suspension or revocation of certification.

If interested in a full-time position in a restructured system, current high performing Hearing Officers who have a record of timeliness and adherence to not only the law, but standard and best legal practices, would be a desirable pool of candidates for a statewide hearing system. These candidates already possess the requisite knowledge of, and the ability to understand, the IDEA and New York law and regulation as well as the knowledge and ability to conduct hearings and write decisions in accordance with appropriate, standard legal practice. The Hearing Officers' knowledge that prior performance as a Hearing Officer in the special education hearing system will be a consideration in prospective future employment may have a short-term impact of heightened performance and, in the long-term, will provide or augment the new system with knowledgeable high performing candidates.

b. Points of Delay

As discussed previously, the points of delay in this system impede the efficiency of the hearing system and unnecessarily prolong the duration of Due Process Complaints. The following several changes in the short-term, discussed in more detail below, would cause a fundamental improvement in the duration of the cases:

- A change in the appointment process to ensure Hearing Officers' availability prior to or at rotational selection and prior to appointment;
- The Hearing Officers' careful management of the time period for post-hearing submissions, the close of the record, and decision writing;
- The Hearing Officers' scheduling of sufficient hearings days early enough in the process to maximize the availability of the parties and their representatives and

[202] It is recognized that the Commissioner may determine that this accountability proposal is not in concert with New York law or otherwise choose not to accept this recommendation. However, in that case, it is hoped that this proposal will instigate alternative proposals to change the current paradigm where timely and untimely Hearing Officers are treated the same.

the prospect of the conduct of multiple day hearings on consecutive, or at least proximal, hearings days;
- The Hearing Officers' timely clarification of the issues in the Due Process Complaint, if needed;
- The reconsideration of compensation scales by local educational agencies;
- As needed, the clarification and/or reconciliation of local operational procedures and the Hearing Officer's responsibilities; and
- Enhanced oversight of the system, including evaluation of the Hearing Officers.

i. Appointment

Dependence on the recusal process after appointment to ascertain if a Hearing Officer is available is a significant impediment to timely adjudication of Due Process Complaints in, at least, New York City. The following recommendations are designed to ascertain a Hearing Officer's availability prior to appointment:

- Clarification be provided to the Hearing Officers that quantifies the period of time that is considered "temporarily unavailable" and the expectation that the notification of such unavailability will be prior to the appointment to a case; [203]
- In order to ensure the rotational selection list of certified Hearing Officers remains current, it is recommended the electronic system employed for Hearing Officers to update their status be reviewed to ascertain its efficacy, including consideration of stated work load capacity of individual Hearing Officers, and be augmented as needed. It is further recommended that the utilization of the system by Hearing Officers on an ongoing basis since July 2014 to update work load capacity and other reasons of unavailability be verified; and
- If a Hearing Officer has designated availability to serve on a local educational agency's rotational selection list; has not notified the local educational agency of the Hearing Officer's temporary unavailability or inactive status; and has a recurrent pattern of recusals for unavailability, the State Educational Agency take appropriate action, absent good cause.

As previously discussed, in at least one local educational agency, it appears that Hearing Officers have declined to serve as a Hearing Officer due to the local reimbursement policy. If this practice is confirmed, it is recommended that the State Educational Agency inform the Hearing Officers that, if a Hearing Officer has designated availability to serve on a local educational agency's rotational selection list, declination of an appointment for that reason does not constitute "good cause."

[203] See for example, Title 23 IAC §226.630(c)(2) in Illinois: A hearing officer whose other commitments will interfere with his or her ability to accept cases for more than 15 days shall so notify the State Board of Education in writing.

If the State Educational Agency has not already provided guidance to all local educational agencies regarding the transmittal of personally identifiable information in advance of a Hearing Officer's acceptance of an appointment to a case, it is recommended that guidance be provided. In addition, it is recommended that the State Educational Agency follow-up to ensure inconsistent practices have been changed to protect the confidentiality of any personally identifiable information pursuant to the IDEA, 34 C.F.R. §300.123.

ii. Interval From Last Day of Hearing to Decision

The duration of the time period from the last day of hearing to the issuance of the decision is excessive in this system. It is imperative that Hearing Officers carefully manage the time period for post-hearing submissions, the close of the record, and decision writing to ensure a timely decision and to avoid unnecessary delay. It is recommended that the State Educational Agency remind the Hearing Officers that written closing argument and briefs are not a right of the parties under the IDEA or New York law or regulation and that there is no requirement or right that the Hearing Officers have the transcript prior to writing the decision.

It is recommended the guidance include the State Educational Agency's expectation that the Hearing Officer will address this matter prior to the day of hearing and document in the record whether the parties will be prepared to present oral closing argument, and if not, except in exceptional circumstances, that the parties should be prepared to submit written closing arguments within a time period that will permit the issuance of the decision within the established timeline and without access to the transcript, if not already available. Due to the variability in prior guidance on the record close date, it is further recommended that the State Educational Agency also definitively describe this event in the guidance.

c. Pre-hearing Conference

The failure of Hearing Officers to conduct a pre-hearing conference is an obstacle to the timeliness and efficiency of the hearing system, including early resolution of the dispute. It is recommended that, in the long-term, the State Educational Agency amend Title 8 NYCRR §200.5(j)(3)(xi) to mandate the conduct of a pre-hearing conference.

In the short-term, a prehearing conference remains within the discretion of the individual Hearing Officer. However, it is recommended that the State Educational Agency provide guidance to the Hearing Officers that communicates its expectation that if the issues are not clearly and specifically stated in the Due Process Complaint and/or the Hearing Officer has not established the date(s) for the completion of the hearing with the parties within two weeks after the commencement of the applicable 45-day time period, or earlier in the case of an expedited hearing, that the Hearing Officers will do so through the conduct of a pre-hearing conference. The guidance should remind the Hearing

Officers of the model forms previously provided on the conduct of the pre-hearing conference.

d. Compensation Scales

Local compensation policies that may inhibit best legal practices, such as the conduct of pre-hearing conferences, are an obstacle to a high performing hearing system. In addition, lack of consistency among local compensation policies, such as the exclusion of per diem reimbursement, may impact the availability of Hearing Officers for a local educational agency and is an obstacle to an efficient appointment process.

Therefore, in accordance with the IDEA, 34 C.F.R. §300.150, it is recommended that the State Educational Agency provide additional guidance to local educational agencies recommending the reexamination of local compensation policies to ensure reimbursable activities and associated compensation are consistent with standard and best practices in the management of the hearing process, the conduct of a hearing, and decision writing. It is recommended the guidance specifically address the possible untended impact of currently imposed caps on standard and best legal practices and, possibly, the right to due process.

In the short-term, a local educational agency's modification of an activity cap or other limitation that influences the conduct of a pre-hearing conference(s) and decision writing could improve the efficiency and timeliness of the process. In addition, for those local educational agencies that have an insufficient number of Hearing Officers who have designated availability to be on the rotational list of Hearing Officers, a greater degree of uniformity in the compensation policy for those local educational agencies may increase the availability of Hearing Officers and engender a more efficient appointment process.

It is recognized that one of the purposes of the locally imposed compensation caps and other limitations may be the establishment of an objective and auditable amount of compensation. As such, another alternative is offered. It would not be appropriate for a party local educational agency to review the propriety of a Hearing Officer's invoice in a substantive manner. However, it is recommended that the State Educational Agency consider an independent system of recourse for a local educational agency to appeal Hearing Officers' invoices. If such process is warranted, it should include an opportunity for the Hearing Officer to explain the performance of questioned tasks.

As discussed previously, the maximum hourly rate for Hearing Officers established in 2001 is no longer consistent with prevailing rates in the community for comparable services. This latter fact should be a consideration in the long-term restructuring of the system and the compensation rates for full-time Hearing Officers. If New York State elects to raise the compensation level for Hearing Officers in the future, it is recommended that the compensation scale be associated with the implementation of the

accountability provisions discussed in this Study, including the conduct of evaluations and intervention when warranted.

e. Hearing Officers and Local Operational Procedures

While it is recognized that the training of Hearing Officers currently includes the responsibilities and authority of a Hearing Officer, there are some local operational procedures that are either inconsistent with that training or lack clarity. Therefore, it is recommended that the State Educational Agency remind the Hearing Officers of the following responsibilities as a Hearing Officer, notwithstanding the availability of assistance from the involved local educational agency:

- The timely scheduling of the hearing date(s) with the parties at the earliest opportunity after discussing the timeline for the issuance of the decision, the number of hearing days anticipated, and available dates within that time period;
- The availability of approved model forms issued by the State Educational Agency for final decisions after adjudication or closing orders, including, for all decisions, the model redaction style;
- The determination whether a resolution agreement is a complete or partial resolution of the issues in a Due Process Complaint and the issuance of all final closing orders or decisions after adjudication notwithstanding the availability of issuance services of a local educational agency;
- The prompt submission of the certified administrative record to the local educational agency pursuant to Title 5 NYCRR §200.5(j)(5) after a final decision has been rendered, consistent with the model form issued by the State Educational Agency and the inclusion of an index to the record to facilitate State review (Title 5 NYCRR §279.9); and
- The closure of cases with a final closing order, including, as applicable, consideration of the time period of three business days that a party may void a resolution agreement. (5 NYCRR §200.5(j)(2)(iv))

It is recommended that the New York City Department of Education and other local educational agencies be copied on the notification or otherwise informed of the guidance. Ideally, the local operational procedures will be clarified and/or reconciled, as needed.

f. Oversight of the system

Since the restructuring of the system will take time, it is recommended that the State Educational Agency consider how oversight of the system can be enhanced in the interim. At minimum, it is recommended that the overall performance of the Hearing Officers with regard to timeliness continue to be monitored and, additionally, the duration of cases be monitored by or on behalf of the State Educational Agency and the data be utilized consistent with the appointment recommendations.

As noted previously, the State Educational Agency recently initiated a process to establish a Hearing Officer evaluation system. It is recommended that the State

Educational Agency proceed with the establishment and implementation of a Hearing Officer evaluation system to include the review of work products for each Hearing Officer.

Even if the system is ultimately converted to a statewide hearing system, the data on the performance of individual Hearing Officers and systemic deficiencies among the Hearing Officers will allow for appropriate intervention in the interim to avoid the perpetuation of identified noncompliance or substandard legal practices. It is recommended that the system of evaluation include the availability of the results of an individual Hearing Officer's evaluation in a subsequent recruitment of high performing Hearing Officers. In accordance with the impartiality of the system, the evaluation of Hearing Officers must be conducted by an independent individual selected by the State Educational Agency with the requisite knowledge and experience.

B. AN ALTERNATIVE PATH TO REFORM OF THE HEARING SYSTEM

If the State Educational Agency does not adopt the recommendation for the restructuring of the hearing system to a statewide system and retains the local level system with part-time contractual Hearing Officers, fundamental changes must be made to the current system to increase the likelihood of attaining timeliness. It can be done, as evidenced in the reform of the District of Columbia's system referenced earlier, but it will be significantly more difficult than restructuring the system in its entirety and may be more expensive in the long run for New York State.

If that is the State Educational Agency's decision, it is recommended that the identified obstacles at all stages of the process described in this Report be considered and addressed. In addition, since this Study did not include the review of Hearing Officers' work products, it is recommended that a representative sample of administrative records for adjudicated and withdrawn/dismissed cases be reviewed by an individual(s) with expertise in standard and best legal practices in the conduct of a special education hearing to ascertain whether there are additional practices that affect the effectiveness and efficiency of this hearing system. Upon the implementation of the State Educational Agency's continued reform of the hearing system, it should be noted that additional less obvious or new obstacles may also become apparent and must be addressed as they arise.

It is recommended that the reform of the current local hearing system address the following areas. This is not an exhaustive list:

- Appointment of the Hearing Officer in an expeditious manner, including an adequate computerized docketing system with case management software that enables an electronic appointment system that includes work load capacities;

- The required number of Hearing Officers, including consideration of the engagement of a sufficient number of Hearing Officers available on a full-time basis;
- Local task oriented compensation schedules for Hearing Officers that may impede performance consistent with standard and best practices;
- Clarification of the responsibilities of the Hearing Officers relative to the tasks currently performed by the New York City Impartial Hearing Office;
- A regulatory revision to mandate the conduct of a pre-hearing conference soon after the commencement of the applicable 45-day time period, or earlier in the case of an expedited hearing, to include clear and specifically stated issues and the Hearing Officer's establishment of the date(s) for the required number of hearing days with the parties;
- Accountability of the Hearing Officers, including the discipline of Hearing Officers who do not meet the established standards of conduct and competence and, for the short-term, the establishment of policies/procedures that differentiate between the treatment of timely and untimely Hearing Officers;
- Desirability of the continued eligibility of Hearing Officers who represent parents or local educational agencies in IDEA hearings or the resultant administrative/judicial appeals in New York State and, possible, any other jurisdiction;
- Supervision, technical assistance, and evaluation of the Hearing Officers by an independent individual with the expertise and concomitant authority to serve as the equivalent of a Chief Hearing Officer;
- Continued State level monitoring of the timeliness of the system and enhanced oversight on the duration of hearings and the quality of the system. The system of oversight must enable the State Educational Agency to address emerging issues that will affect the reform of the system and modifications in operational practices, as needed, in a manner that eschews impartiality or the appearance of partiality;
- Consideration of the need for the State Educational Agency to have additional authority to ensure the effective implementation of the procedural safeguard of the right to a hearing administered at the local educational agency level; and
- The expansion of the availability and use of alternative dispute resolution options.

C. IF RESTRUCTURE FROM A TWO-TIER TO A ONE-TIER SYSTEM: THE OFFICE OF STATE REVIEW

This is an appeal system that has been untimely since 2012 with a persistent decline in timeliness that culminated in July 2014 with approximately only 20% of the 219 open cases still timely. As such, parties have been unable to avail themselves of the intended expeditious administrative review and resolution of a contested hearing decision. On the contrary, for the past several years, parties with the necessary resources have had to resort to litigation to obtain a decision.

Notwithstanding some of the recognized business practices in the Office of State Review and the acknowledgement that the needed intervention, such as an augmentation of resources, may not have been within its authority to avoid escalating untimeliness, without a timely resolution the delay of justice in this system denies the parties' rights under the IDEA. As the recent improvement in the issuance of decisions in pending untimely cases and current cases demonstrates, this system is capable of improvement. However, extensive restructuring of the Office of State Review will be necessary to ensure its maintenance of timeliness in the future, while preserving the integrity of an effective review system.

It is a significant concern that the untimeliness in this system since 2012 is a reoccurrence of the very problem the Office of State Review faced from 1999 through 2002. Yet, the system had not been redesigned sufficiently to prevent the current untimeliness and to provide the Office of State Review with the capacity/ability to intervene before the numbers of untimely cases rose to overwhelming proportions.

Therefore, it is recommended that New York State abandon the two-tier system and focus its resources on the restructuring of the hearing system to a statewide system that not only meets the requirements of the IDEA and New York law and regulation, including timeliness, but standard and best legal practices. In the interim, it is recommended that the short-term restructuring of the Office of State Review be continued to enable the Office to eliminate the backlog of untimely cases and maintain timeliness for current cases and appeals of Due Process Complaints that will be filed under the two-tier system, prior to the effective date of an exclusively one-tier system.

If it is the determination of the State Educational Agency to transition from a two-tier to a one-tier system, the programmatic, operational, fiscal and transition implications with regard to the restructuring of the current hearing system to a statewide hearing system discussed in Part Seven (A) of this Report apply in full. The following additional implications should be considered in the phase-out of Tier II of the system.

1. Programmatic/Operational Structure Implications

While the scope of this Study did not include input on the perspective of stakeholders, a 2011 position paper from the Council of New York Special Education Administrators on the elimination of the second tier provided a thoughtful analysis of the structure of a one-tier system:

> "The elimination of the second tier of NY's administrative due process system will only result in savings to school districts, if done with the state's commitment to create and replace it with a structure that provides for monitoring, oversight and accountability for the state hearing officers who must be appointed, in accordance with federal law, to replace the state review officer . . . . Without the creation of a statewide structure that enforces standards and consistency through monitoring,

> oversight and accountability of state hearing officers, the elimination of the state review officer, would leave for a losing party, only the court's review. Such review is not only far more costly and far more complex than the current second tier administrative review; it provides no timelines for the issuance of decision . . . With a genuine commitment to replace the State Review Office with an office of highly trained state hearing officers, we support an initiative to eliminate the second tier of review . . . .[204]

If the elimination of a two-tier system results in a significant increase in the utilization of the judicial appellate process in the absence of administrative review, that would negatively impact the costs of the system and likely exacerbate the current duration of disputes. However, the restructuring of the hearing system as set forth in this Report is designed to ensure the conduct of hearings and decisions rendered are in accordance with the IDEA and New York law and regulations, including consistently thorough and well-reasoned hearing decisions that will merit judicial deference. Consistent judicial deference is likely to influence the judicial appeal rate and confidence in the administrative hearing system.

As noted previously, when the State of Pennsylvania transitioned from a two-tier system to a one-tier system, the incidence of judicial appeals was reduced. Further, while the data were not available on the relative number of the current judicial appeals that were a result of the failure of the Office of State Review to issue a decision in a timely manner, the recommendations on the restructured statewide hearing system are designed to prevent untimeliness, and that will reduce such cases accordingly.

If the State Educational Agency determines to transition to a one-tier statewide hearing system, the pool of available knowledgeable candidates would not only include interested high performing Hearing Officers, but the attorney employees in the Office of State Review. Other non-attorney Office of State Review personnel may also be eligible for positions in a one-tier statewide hearing system. It is recommended that the design of the hearing system and its transition to a one-tier system include consideration of the availability of these qualified personnel and aspects of the Office of State Review that are proven best practices.

2. Transition Implications

The Office of State Review would have to remain in existence so long as appeals are pending that were filed prior to the effective date of the one-tier system and until the expiration of the appeal period for Due Process Complaints that will be filed under the two-tier system. However, during the time period of the transition, the number of possible appeals would be known and the agency could be gradually downsized. The inevitability

[204] Council of New York Special Education Administrators Mandate Relief 2011 Position Paper; http://www.lhcss.org/positionpapers/Council_of_NY_Sp_Ed_Admin_Appendix_G.pdf

of the phase-out of the agency needs to be a consideration in any civil service employment matters, and further study is recommended in this regard.

Based on the experience in other states recently transitioned, there will be a rise in the filing of Due Process Complaints in accord with the parties' perception of the current system either prior to the effective date or immediately thereafter to avoid a two-tier system. The date and incidence of filings of Due Process Complaints should be reviewed to ascertain possible appeals and that factor should be considered in the necessary appeal infrastructure in the transition to a one-tier system.

3. Fiscal Implications

If it is the determination of the State Educational Agency to transition from a two-tier to a one-tier system, the phase-out of the Office of State Review over time would cause the diminution of the attendant costs of the appeal system as the residual appeals are completed for Due Process Complaints filed prior to the effective date of the authorizing law. The operational funds in the budget for the Office of State Review would ultimately be available for reallocation, hopefully, for the administration of the one-tier system.

D. IF THE TWO-TIER SYSTEM IS MAINTAINED: THE OFFICE OF STATE REVIEW

Preface

The high incidence of untimeliness of these time sensitive cases at the State Review level and the duration of the appeal process can only be rectified with the immediate revision of the internal timelines set forth Title 8 NYCRR Part 279 regulations and enduring structural changes in the business practices of the Office. While the State Educational Agency is already engaged in a number of program improvements to the Office of State Review, including the development of proposed regulations to Part 279 and the business practices of the Office of State Review, time is of the essence. Therefore, some of the recommendations below relate more to the expeditious implementation of changes under consideration and/or proposed by the External Reviewer of the Office and accepted by the State Educational Agency.

It is unknown whether the recent increase of the issuance of decisions in October and November 2014 and attained timeliness in December 2014 for current cases resulted from new short-term or long-term strategies employed by the Office of State Review. It is also unknown whether the employed strategies involved a reallocation of staff or additional augmentation beyond the July 2014 organizational chart; and/or the modification of the operational procedures/practices of the Office, including a redefinition of staff functions; or other business practices.

In the absence of necessary operational information, no recommendations are made regarding the recently changed business practices of the Office of State Review in the review and decision writing processes. If the State Educational Agency retains the two-tier hearing system, additional study is recommended to ascertain the efficacy and desirability of the current approach in processing appeals. Given the exponential increase of the issuance of decisions in October and November 2014, assuming adherence to standard and best legal practices in decision writing, the allocation of personnel and/or practices employed may serve as a model for the Office.

Due to the current fluidity of the changes at the Office of State Review, this Report should be viewed in the context of the impact of any recent measures put in place by the Office of State Review to address the identified noncompliance and to streamline and modify the review process. In addition, the recommendations that follow assume the State Educational Agency's restructuring of the current hearing system to either a statewide hearing system or a comprehensively reformed local level hearing system. Accordingly, depending on the State Educational Agency's election, the programmatic, operational, fiscal and transition implications set forth in Part Seven (A) or (B) of this Report apply. As previously discussed, if the State Educational Agency elects to reform the local level hearing system to a statewide system in a two-tier system, consideration must be given to necessary variations in the recommendations in Part Seven (A) to ensure the statewide system meets the requirements of the IDEA, 34 C.F.R. §300.514(b).

1. Recommendations for Improving Efficiency, Timeliness, and Overall Operation

a. Internal Timelines

The extensive pleading procedures and expansive timelines in Part 279 are a major impediment to a timely review system in accordance with the IDEA, 34 C.F.R. §300.515(b). It is recommended that Part 279 be amended to ensure these internal timelines do not prevent the timely issuance of the decision. In addition, since the 30-day appeal timeline is calendar rather than business days, it is also recommended that concurrent filing with the Office of State Review be required rather than a lapse in service and that the State Educational Agency reconsider the allowances made when service timelines fall on a Saturday, Sunday, or legal holiday. (8 NYCRR §§279.4(b), 279.5, and 279.11) If the State Educational Agency elects to maintain the current computation of days that erodes the 30 calendar day timeline, it is recommended the Office of State Review discuss any anticipated diminution of time with the parties at a pre-review conference.

If the State Educational Agency's promulgation of revisions to Title 8 NYCRR Part 279 includes the repeal/revision of these internal pleading timelines, these changes should eliminate this impediment to timeliness for all appeals filed after the effective date of the regulations. However, if these proposed regulations are not within 30 days of adoption, it is recommended that the State Educational Agency commence the process for the

immediate revision of the Title 8 NYCRR Part 279 regulations through New York's emergency rule making process.

b. Capable of Monitoring Timeliness and Adjustment

Based on the findings of the External Reviewer of the Office of State Review with access to operational information, the current docket database is inadequate and has only limited report features, some of which are not reliable.[205]

Unless the current rudimentary paper and electronic tracking systems employed at the Office of State Review for tracking appeal timelines will be replaced with the State Educational Agency's envisioned electronic system with that function within 30 days, it is recommended that the current system be augmented immediately. The augmentation must ensure redundancies are built into the system with multiple individuals monitoring timeliness and ensure advance notifications to the State Review Officer, the Office of State Review supervisor, and other pertinent Office of State Review personnel on missed internal timelines and the impending decision date.

The system at the Office of State Review must be capable of prediction and adjustment to avoid history repeating itself and the prospect that students will be left without a timely resolution. With the number of Office of State Review personnel premised on 260 appeals a year as the upper limit, the Office of State Review remains vulnerable to unanticipated fluctuations on a monthly or annual basis. Therefore, it is recommended that the reporting capability of an enhanced docket data base be engineered to provide data capable of trend analysis at both the hearing and appeal levels.

The ongoing monitoring of the hearing trend data will avoid surprise in a relatively predictable system. Given the consistent appeal rate of adjudicated Due Process Complaints under 20% for the past several years, trend data on the number of Due Process Complaint filings and adjudicated hearings are an effective predictor of the number of appeals. In addition, data on the issue types at the hearing level are also a good predictor of both the number and the complexity of appeals that are likely to be filed at the Office of State Review. The ongoing monitoring of the trend data will enable supervisors of the system to discern emerging trends that might impact timeliness and will allow advance consideration of any necessary adjustment to the business practices of the Office of State Review, the augmentation of personnel, and/or resource reallocation.

c. Electronic Filing

If the State Educational Agency's promulgation of revisions to Title 8 NYCRR Part 279 authorizes electronic filing by the parties, the inherent delays in the system caused by paper filing and the absence of concurrent service will be eliminated. However, the

[205] Executive Summary: External Review, *supra* pg. 4

implementation of this reform is also dependent on the establishment and implementation of a reliable case management and electronic appellate case filing system. If the proposed regulations authorizing electronic filing and the selection of a vendor who will design and implement the system are not within 30 days of adoption/commencement, it is recommended that the State Educational Agency utilize an expedited procurement process and/or an emergency rule making process.

d. Staffing and the Team under the Guidance and Direction of State Review Officer

The recent doubling of the personnel in the Office of State Review, including an increase in the number of State Review Officers from one to three, may be sufficient to allow the Office to continue the Team approach in the review process, if desired. (It was noted that the External Reviewer of the Office of State Review with access to the internal operation of the Office of State Review did not recommend significant changes in the current staffing levels.)

In the absence of information on recent changes to the operational procedures of the Office of State Review, it is unknown whether the Team approach in the review and decision writing process was abandoned; the process and/or timeline was abbreviated; or the approach was held in abeyance until the backlog of untimely cases is eliminated. However, based on the findings and recommendations of the External Reviewer with access to operational information on the Team process, the writing process and the decisions themselves could be pared down if the approach is continued. The External Reviewer also provided recommendations with regard to enhancing the efficient operation of the Office of State Review in decision analysis and format and the redefinition of the functions of the educator to provide consultative services, as needed. These recommendations are adopted in this Report.

Without other changes in the internal processes, based on the timeline of the Team approach reflected by two representative current complex cases and three representative average cases, the review and decision writing process can still take as long as four weeks. If the Team approach will still be employed by the Office of State Review, this time period will need to be expedited further and procedures will need to be established to ensure the implementation of the approach does not cause the review process to be untimely again upon spikes or sustained increases in the number of appeals.

In addition, if the performance of the contractual Backlog Elimination Team results in the expeditious processing of the assigned appeal cases in a quality manner, it is recommended that the processing of these cases be considered as an exemplar that may also increase the efficiency of the Office of State Review. The quality of the draft decisions provided to the State Review Officer may also inform the Office of State Review further regarding the design and/or efficacy of the Team approach. In addition, the continued availability of reserve special education experts provides one model for the

Office of State Review to quickly augment personnel in the future if the number of appeals requires it.

e. System of Supervision, Evaluation and Training

Based on the assumed validity of the findings of the External Reviewer of the Office of State Review with access to operational information, the following recommendations are adopted with regard to the system of supervision, evaluation, and training:

- The conduct of performance evaluations to assess the performance of personnel on a periodic and consistent basis;
- The training of Office of State Review personnel responsible for the evaluation of personnel on the conduct of annual performance reviews as well as civil service procedures, including documentation of incidents;
- The impediments identified by the External Reviewer to the supervision and oversight of the Office of State Review be addressed and the structure of the Office of State Review be focused on the "core functions and needs" of the Office of State Review; and
- The conduct of management training and a "more structured and consistent training approach of Office of State Review attorneys."

2. Programmatic/Operational Structure Implications

a. Pre-review Conference

Given the duration of the cases at the review level and the impediment of lengthy pleading timelines, the absence of a pre-review conference authorized under Title 8 NYCRR §279.14 is considered an impediment to the timely disposition of the appeals. It is recommended that the Office of State Review reinstitute this practice as a general matter for case management.

b. Administrative Hearing Record

Pursuant to Title 8 NYCRR §279.9, it is the party board of education, whether it is the petitioner or the respondent, that is required to file the certified administrative record with the Office of State Review. The delayed filing of the certified record with Office of State Review by the party board of education is an obstacle to the timely review of an appeal.

The recent revision to Title 8 NYCRR §200.5(j)(5) requiring the appointed Hearing Officer to promptly transmit the certified record to the local educational agency may remove this impediment. If a review of the time period for the filing of the certified record for cases closed after the effective date of the revised regulations reveals a persistent problem, it is recommended that the State Educational Agency ascertain whether the delay is caused by the Hearing Officers' late submission of the certified

record to the local educational agency and/or the local educational agency's delayed transmittal.

If the delay is due to the failure of Hearing Officers to comply with the prompt transmission of certified records for closed cases, it is recommended that the State Educational Agency remind the Hearing Officers of that responsibility. If individual Hearing Officers are identified as failing to comply with the prompt transmission of the certified record to the local educational agency and causing a delay at the appeal level, it is recommended that the State Educational Agency initiate progressive discipline pursuant to Title 8 NYCRR §200.21.

If the delay is caused by local educational agencies' untimely filing of records, it is recommended that the State Educational Agency take action to remind the local educational agencies of this responsibility to ensure the effective implementation of the procedural safeguard of the review process. (34 C.F.R. §300.150) If a pattern of delay by local educational agencies is discerned, then it is further recommended that Title 8 NYCRR §279.9 be revised to include a recourse for a petitioner if the respondent board of education fails to timely file the administrative record.

3. Fiscal Implications

Insufficient information was provided in the course of this Study to enable conclusions regarding the fiscal implications of the extensive restructuring of the Office of State Review. However, ensuring the timeliness of the review process in the long term will either require significant reallocation of current resources and redefined roles or will have fiscal implications.

Due to the implementation of some reforms in the Office of State Review during the course of this Study, some fiscal data are available to the State Educational Agency with regard to the augmentation of personnel in the Office of State Review and processes such as the engagement of the vendor for the expeditious establishment and implementation of a case management and electronic appellate case filing system. In addition, the fiscal implications of the recommendations of the External Reviewer previously provided to the State Educational Agency and adopted in this Report may already be known by the State Educational Agency.

PART EIGHT - ADDITIONAL STUDY NEEDED

Since this Study was designed only to focus on the identification of relevant implications rather than an in-depth analysis of the existing systems and multiple available configurations are available for the New York State hearing and review systems, additional study will be required. In the absence of some important data on the current operation of Tier I and, particularly, Tier II and the substantive review of work products in the course of this Study, the areas identified below should be viewed as preliminary and will require further refinement based on the determination of the State Educational Agency regarding the optimal structure for New York State.

A. TIER I – STATEWIDE SYSTEM IN A TWO-TIER SYSTEM

If the State Educational Agency determines the fundamental restructuring of the system to a statewide hearing system is desirable, additional study is recommended:

- On the necessary features of a statewide hearing system to meet the requirements of the IDEA, 34 C.F.R. §300.514(b);
- Methods to ensure the orderly transition of the system from a local level system; including maintaining parallel systems for a period of time;
- To inform the State Educational Agency on the optimal organizational structure that will ensure the efficiency, effectiveness, and timeliness of the system, including the comparative costs of the options;
- On the essential details of the authorizing statute or implementing regulations and/or the controlling interagency agreement/contract to maintain the degree of general supervision determined to be appropriate;
- If additional detail is desired on the amount and proportion of state and federal funding in other statewide hearing systems, the collection of such data;
- The optimal funding structure for a statewide system, including consideration of a proportionate contribution by local educational agencies; and
- The state activities that could be phased out if responsibility for the statewide hearing system is to another agency/entity.

B. STATEWIDE SYSTEM IN A ONE-TIER SYSTEM

If the State Educational Agency determines the fundamental restructuring of the system to a one-tier statewide hearing system is desirable, in addition to the applicable areas recommended in Section A, additional study is recommended in the following areas:

- Methods to ensure the orderly transition of the system, including maintaining parallel systems for a period of time until all pending cases are resolved through the current local level hearing system and the appeal level, if desired;

- The supervision of the parallel systems in a manner that is immune from actual, or even the appearance of, improper influence and control to ensure the timely processing of all pending cases;
- The impact of civil service protections for employees of the Office of State Review on the transition;
- If the State Educational Agency elects to utilize the model of statewide contractual Hearing Officers, the necessary infrastructure at the state level and the method for continuous oversight in a manner immune from influence, including the supervision and evaluation of Hearing Officers;
- Any variance in the optimal source of funding in a one-tier system, including consideration of a proportionate contribution by local educational agencies; and
- In the absence of data on the cost of the operation of the current two-tier system at the state and local levels, an analysis of the financial impact of a shift to a one-tier statewide system.

C. TIER ONE - MAINTAIN A LOCAL LEVEL HEARING SYSTEM

If the current local level hearing system is retained by New York State, it is recommended that additional study be conducted in the following areas:

- The hearing practices among the local educational agencies, including the identification of practices that are inconsistent with standard and best legal practices and impediments to timeliness and efficiency, and the extent to which the practices of the agencies are consistent with their written operational procedures;
- The review of work products of Hearing Officers to ascertain whether the conduct of pre-hearing and/or status conferences, hearings, the consideration and documentation of extensions, the organization and certification of administrative records, and the writing of decisions are in accordance with standard legal practice;
- The review of hearing and review decisions on individual Due Process Complaints to ascertain if there is a pattern with regard to the reversals on appeal in whole or in part;
- The identification of perceived and actual obstacles which affect the efficiency, effectiveness, and timeliness of the system, including common non-standard practices, from the perspective of the State Educational Agency, the Hearing Officers, parties, party representatives, and other participants in the system;
- The causes(s) for the escalating trends of Due Process Complaints filed and adjudicated;
- The cause(s) for the pattern of non-consecutive hearing days;
- If the previously identified trend of multiple requests does not diminish in the next several years, the cause(s) for this practice;

- Impediments to performance consistent with standard and best practices caused by the local task oriented compensation schedules for Hearing Officers not yet identified, including the conduct of pre-hearing conferences; hearing days; and decision writing;
- Impediments to the appointment of the Hearing Officer in an expeditious manner not yet identified;
- Customizable computerized docketing/appointment systems with case management software, including systems employed in other high volume administrative hearing systems;
- Impediments to the timely issuance of a decision after the conduct of a hearing not yet identified, including the review of extensions after the submission of closing briefs;
- The optimal structure for the supervision, technical assistance, and evaluation of the Hearing Officers in an impartial manner; and
- The optimal structure for expanded State level oversight and ongoing monitoring of the timeliness, duration, and quality of the system in a manner that eschews impartiality or the appearance of partiality.

D. TIER II IN A TWO-TIER SYSTEM

If the State Educational Agency retains a two-tier hearing system, additional study is recommended in the following areas in the operation of the Office of State Review:

- The efficacy and desirability of the recent expedited approach in processing appeals, including the ability to adhere to standard and best legal practices in decision writing;
- The optimal long term structure, business practices, and staffing to attain and maintain timeliness and expeditiously resolve appeals, including the ability to quickly augment the personnel in the Office of State Review in the future if the numbers of appeals require it;
- The necessary business rules in an electronic data base for appeals; the necessary and desirable data to be collected; the query, reporting, and tracking capabilities; and the necessary protections to ensure the confidentiality of personally identifiable information;
- The necessary data and tracking capabilities in an electronic data base to allow the Office of State Review to discern trends at the hearing and appeal levels that might impact timeliness and to adjust accordingly to prevent any prospect of untimeliness;
- The desirability of a change in the qualifications of a State Review Officer to require the Review Officer to be an attorney; and
- Any pattern associated with withdrawals at the State Review level that may inform the restructuring of the process.