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**Via email: [ossecomments.proposedregulations@dc.gov](mailto:ossecomments.proposedregulations@dc.gov)**

June 26, 2018

Tracey Langley  
Director of the Office of Dispute Resolution  
Office of the Assistant Superintendent of Operations (ASO)  
Office of the State Superintendent of Education (OSSE)  
Government of the District of Columbia  
1050 First Street, NE  
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Washington, D.C. 20002

**Re: Comments on proposed changes to the Office of Dispute Resolution  
Standard Operating Procedures Manual (SOP)**

Dear Ms. Langley,

Thank you for the opportunity to comment on proposed changes to the Office of Dispute Resolution's Standard Operating Procedures Manual (SOP). I am submitting these comments on behalf of Children's Law Center (CLC).<sup>1</sup> With more than 100 staff and hundreds of pro bono lawyers, Children's Law Center reaches 1 out of every 9 children in DC's poorest neighborhoods – more than 5,000 children and families each year. Many of the children we represent attend public schools in the District, and special education advocacy is a main area of practice for our attorneys.

We appreciate the time you have spent updating the SOP to help it align with current special education litigation practice, and the thought you have put into how to make the Office of Dispute Resolution a resource for mediation of disputes as well as litigation. Thank you for taking the time to meet with us to discuss our concerns and suggestions. We suggest the changes and clarifications below and have also attached a redline document. We begin with some general recommendations for clarification that recur in the manual. After these suggestions, we have organized our recommendations and suggested changes in order of the manual itself.

## **General Recommendations for Clarification and Changes**

### ***1. Add Language Regarding Children Suspected of Having a Disability***

Often in this manual, the rights of students with disabilities are discussed. While many experienced practitioners understand children with suspected disabilities or children challenging a decision of ineligibility under the IDEIA can utilize ODR's dispute resolution options, parents and new practitioners may not. This manual can helpfully clarify that concern, and we have provided suggested wordings throughout our redline of the SOP Manual.

### ***2. Clarifying the meaning of "days" and adding timelines and deadlines to support efficient motions practice***

As we discussed when we met, we strongly recommend this revision of the manual maintain the motions practice deadlines in the prior manual and add further timelines for when orders may be issued for all motions, so that motions submitted before the Impartial Hearing Officer can be addressed in a timely manner. This proposed manual only retains those deadlines for orders on continuances. However, parties may file time-sensitive motions at the same time the due process complaint is filed (e.g., a motion to "stay put") and throughout the course of due process proceedings. A robust motion practice supports efficient due process proceedings by allowing parties to address and resolve issues before the hearing and clarify the issues presented at hearing. We recommend oppositions to motions continue to be due three business days from the date a motion is filed, to allow the Hearing Officer to timely issue a ruling on this issues before the due process hearing.

We have also added "business" to the mention of days throughout the manual, except when it is clear that the manual intends school days or calendar days. As we discussed, we think a due process hearing timeline chart or other visual representation would also be a helpful addition to this manual defining days for purposes of due process deadlines.

### ***3. Include a definition and inclusive language around educational decision makers who may not be biological parents***

We would suggest, starting in the Introduction and Purpose Section and throughout the manual, adding language to "parents" to include educational decision makers who may not be biological parents or legal guardians of children. Youth in foster care or in the care of another D.C. Agency may not reside with their biological parents and we want to ensure the SOP is clear that they can still seek relief for a denial of FAPE through the Office of Dispute Resolution. We recommend the following changes:

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C. §1400 *et seq.*, requires each state and the District of Columbia to establish and maintain procedures to ensure that **parents or educational-decision makers for children with disabilities** and children with disabilities **and suspected disabilities** have an opportunity to seek mediation and/or an impartial due process hearing to resolve disagreements over the identification, evaluation, educational placement, or provision of a free appropriate public education for students with disabilities.<sup>2</sup>

Add a footnote (or other language) to further define educational decision maker:

**In the District of Columbia under IDEIA, “‘Parent’ means a natural or adoptive parent of a child, a legal guardian, a person acting in the place of a parent, such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child’s welfare, or a surrogate parent who has been appointed in accordance with 34 C.F.R. §300.519. The term “parent” may also include a foster parent when the natural parent’s authority to make educational decisions on the child’s behalf has been extinguished under applicable law and the foster parent has an ongoing, long-term parental relationship with the child, is willing to make educational decisions for the child as required under IDEA, and has no interest that conflicts with the interest of the child.” See D.C. Code § 38-2571.02 (8) (Definitions).**

## **Suggestions in Order of the Manual**

### **Section II**

#### ***§ 201 General Responsibilities***

It would be helpful if the Office of Dispute Resolution set clear guidelines in this manual for what constitutes the record of the due process hearing – which, in our experience of current ODR practice often includes notices, Pre-hearing and interim orders, and e-mails between the parties and the Impartial Hearing Officer. For clarity of what constitutes the record we would recommend the following addition:

10. Maintaining records of due process hearings, including without limitation, the complaint, response to the complaint, all motions and other documents **(notices, e-mails)** submitted by the parties;

#### ***§202 Hours of Operation; §203 Filings of Complaints and Other Papers***

We recommend that the manual provide clarity on days the Office of Dispute Resolution may be physically closed but not closed for docketing purposes, versus days

the Office of Dispute Resolution will be closed and anything filed will be docketed the following day. We would suggest the following changes:

ODR is open for business at 8:30 a.m. and will remain open until 5 p.m. Monday through Friday except for **federal and District of Columbia holidays, or other days when the District of Columbia Government is closed (e.g., inclement weather days)**. ODR may also be closed for ~~or~~ administrative leave days. **Pleadings or other documents filed on weekends, during federal or District of Columbia holidays, or filed on days the District of Columbia Government is closed will be docketed as being filed on the next business day. Pleadings or other documents filed on days when only the Office of Dispute Resolution is closed will be docketed as being filed that day.**

All documents received for filing by **11: 59** p.m. Eastern Standard Time will be accepted for filing as of that day. All documents filed after **11:59** p.m. Eastern Standard Time, and all documents filed on any designated holiday, Saturday, or Sunday **or day when the District of Columbia is closed** shall be deemed filed on the following business day. **Documents received for filing on administrative leave days (or days the office is closed but the District of Columbia Government is not closed) shall be deemed filed on that day.** Upon the filing of any paper, an attorney or unrepresented party is certifying that to the best of the his/her knowledge, information and belief, after an inquiry reasonable under the circumstances, that (a) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (b) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law; (c) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (d) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. Fed. R. Civ. P. 11(b).

### **Section III**

#### ***§302 Informal Meeting***

While Facilitated Resolution Session Meetings, Facilitated IEP/IFSP Meetings, Mediation and Due Process Hearings are all convened or facilitated by the Office of Dispute Resolution, informal meetings are not. We are concerned that this language could mislead *pro se* litigants or attorneys new to the forum about ODR's involvement. It

might be better included in the parent guide to make clear this is a suggestion (about which parents may want to seek legal advice) and not information on a service ODR offers. We hence suggest deleting § 302 – Informal Meeting:

~~When a parent/legal guardian/educational decision maker and LEA disagree with each other over an aspect of a child's educational programming, ODR encourages parents and LEAs to convene a meeting to discuss the specific concern as a first step. This may be all that is needed to resolve any disagreement to the satisfaction of both parties. The parties should, however, remain aware of the applicable timelines and for requesting a due process hearing or mediation during any period of early dispute resolution. ODR is not involved in scheduling or facilitating such meetings.~~

#### ***§304 Facilitated Resolution Session Meetings***

We would recommend clarifying the timelines for Facilitated Resolution Session Meetings within the due process hearing process. Pursuant to 34 CFR §300.510, the Resolution Session Meeting must be convened by the Local Education Agency within fifteen (15) days of the due process complaint being filed. We recommend the following language to clarify this provision:

The facilitator's primary task is to assist the participants in communicating with each other. The facilitator does not make any recommendations or decisions on the outcome of the meeting. The resolution meeting participants remain the sole decision-makers in the resolution meeting. The LEA and parent/legal guardian remain responsible for scheduling the resolution meeting for which a facilitator is requested, **and an FRM will be scheduled in accordance with the same timelines as non-facilitated Resolution Meetings.** After that meeting has been scheduled, ODR will assign a facilitator to attend the scheduled meeting. At the resolution meeting, the facilitator will ask the parties to sign a form indicating their agreement to the presence of the facilitator. These facilitation services are provided at no cost to the parent and are paid for by ODR in cases involving a student with or **suspected of having a disability**, or an eligible young child.

### **Section IV**

#### ***§402 Due Process Procedures – Children under Age of 3 (Part C)***

In the District of Columbia, Part C not only covers children under the age of three (3), but children who are receiving services under an extended Individualized Family Service Plan ("IFSP"). The extended IFSP is an option to continue Part C early intervention services for children with IDEA Part B-qualifying disabilities who are three or four years old but not yet old enough to attend District prekindergarten-four

programs. We recommend this section be revised to clarify Part C's coverage of children over the age of 3, who continue to be eligible for Part C services with the extended IFSP. We would recommend the following changes to clarify this section:

**§ 402 – Due Process Procedures – Children Under the Age of 3 (Part C) and Due Process Procedures regarding services from Strong Start/DC Early Intervention Program**

This part relates specifically to due process complaints filed with respect to ~~a child under the age of 3 with a disability~~ **children who are entitled to services under Part C of IDEIA, including a child children with a disability or suspected of having a disability under the age of 3, and a child over the age of 3 who is eligible for or receiving services under an extended Individualized Family Service Plan (“IFSP”) under Part C, or who is otherwise challenging the services provided to a child with a disability under Part C of IDEIA. See 34 C.F.R. § 303.21 (a), (c); 34 C.F.R. § 303.211.** Families of children serviced under part C have the same rights as families serviced under part B of the Individuals with Disabilities Education Act. Therefore, the hearing procedures are largely the same, with some notable differences.

**A. Lead Agency**

OSSE's Strong Start DC Early Intervention Program (DC EIP) is responsible for providing **and administering** ~~supervision and support~~ of early intervention programs for children under **Part C** ~~the age of 3~~ in the District of Columbia.<sup>1</sup>

**B. Role of ODR in Dispute Resolution**

1. Consistent with 34 CFR §303.430(b) mediation is available for all parties to disputes involving children under the age of 3 **or eligible for or receiving services under Part C.**
2. Upon receipt of a due process complaint, ODR will assign a hearing officer who meets the qualifications set forth in 34 CFR §303.435 and ODR will schedule a date for the hearing.

**C. Resolution Meeting**

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<sup>1</sup> Where “LEA” or “Lead Agency” are mentioned throughout this document, the corresponding agency for disputes under part C of the IDEA is the DC Early Intervention Program

Pursuant to 34 CFR §303.442, within 15 days of receiving notice of the parent's due process complaint, and prior to the commencement of a due process hearing for a child ~~receiving services under Part C~~ the age of 3 **or eligible for or receiving services under Part C**, OSSE's **Early Intervention Program** shall convene a meeting with the parent and the relevant members of the IFSP team who have specific knowledge of the facts identified in the due process complaint. The purpose of the resolution meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the complaint, so that the lead agency has an opportunity to resolve the dispute without going to due process hearing. Consistent with 34 CFR §303.442(a)(3), the parties may agree in writing to waive the meeting or agree to use the mediation process in lieu of the resolution process. Resolution meetings are discussed in more detail in §502 of this manual.

#### D. Due Process Complaint

1. **Who may file.** Pursuant to 34 CFR §303.440 and **5 D.C.M.R. § E-3029.1**, a parent/legal guardian/**educational decision maker**, Early Intervention Services (EIS) provider, or lead agency (i.e., OSSE) may file a due process complaint with respect to any matter relating to the **eligibility**, identification, evaluation, or placement of a child under the age of 3 **or eligible for or receiving services under Part C**, or **regarding** the provision of early intervention services to children **eligible for services under Part C**. ~~under the age of 3 with a disability.~~
2. **Content of Due Process Complaint.** There are six required components to a due process complaint. These components are discussed in more detail in §405 of this manual.

#### E. Hearing Timelines and Convenience

1. The due process hearing shall be carried out at a time and place that is reasonably convenient to the parent.
2. The due process hearing shall be conducted, and a written decision mailed to each party no more than **45 days** after the expiration of the 30 day period under 34 CFR §303.442(b) and 5A DCMR §3111.2 or the adjusted time periods under 34 CFR §300.442(c).

3. A hearing officer may grant specific extensions of time beyond the 45 days **by consent of the parties, or both if both parties do not consent, if good cause is shown by motion** ~~at the request of either party.~~

#### F. Required Disclosure of Evidence

At least five **business** days prior to the due process hearing **unless the parties and the Hearing Officer agree otherwise**, each party must disclose to the **other** party all evidence that the party intends to introduce at the hearing. The required disclosure of evidence is discussed in more detail in §504 of this manual.

#### *§ 403 Due Process Procedures - Students Age 3 to 22 (Part B)*

We recommend ODR also revise this section to reflect the language in the District of Columbia Municipal regulations that specify eligibility as a subject for due process. *See* 5 D.C.M.R. § E-3029.1. We would also recommend these procedures be revised to reflect the need for parties to consent or move for extensions of time beyond forty-five days, as well as to allow Hearing Officers and parties to agree to alternate deadlines for five day disclosures. We would propose the following changes:

#### C. Due Process Complaint

1. **Who may file.** Pursuant to 34 CFR §300.507 and **5 D.C.M.R. § E-3029.1**, a parent/legal guardian or a public agency may file a due process complaint with respect to any matter relating to the **eligibility**, identification, evaluation, or educational placement of a child with a disability, or the provision of a Free Appropriate Public Education or FAPE....
3. A hearing officer may grant specific extensions of time beyond the 45 days **by consent of the parties, or if both parties do not consent, if good cause is shown by motion** ~~at the request of either party. ...~~

#### E. Required Disclosure of Evidence

As further set forth in §504 below, at least five **business** days prior to the due process hearing **unless the parties and Hearing Officer agree otherwise**, each party must disclose to the party all evidence that the party intends to introduce at the hearing."



#### ***§405 Contents & Timeline for Filing a Complaint (Parts B and C)***

We recommend ODR clarify the requirements for filing a due process complaint when a child is a District of Columbia ward. Children in the District of Columbia who are wards may not live with their educational decision makers, and the parent or educational decision maker may wish to proceed to due process without identifying that the child is in foster care. Further, foster parents and foster homes themselves may not want to be identified in court proceedings or in complaints where they are not a party. In Abuse and Neglect proceedings, foster families are identified only by initials and their addresses are not disclosed. Given this context, we are concerned that ODR might require (and potentially limit the ability of the educational decision makers of these children to access due process) this private information.

We suggest that the language be changed as follows, to clarify what must be included in the due process complaint for homeless youth or District of Columbia wards.

C. Contents of a Due Process Complaint. The Due Process Complaint must contain the following information (34 CFR §300.508(b) and 34 CFR §303.441(b)):

1. The name of the child;
2. The address of the residence of the child, **unless the child's address of residence is not available or able to be disclosed because the child is a District of Columbia ward or homeless;**
3. The name of the school the child is attending; or the name of the EIS provider servicing the child;
4. In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. §11434a(2)), available contact information for the child, and the name of the school the child is attending;
5. A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and
6. A proposed resolution of the problem to the extent known and available to the party at the time.

We would also recommend the following be included at the beginning of this section to clarify that the Office of Dispute Resolution will not reject any filing.

**Please note that the Office of Dispute Resolution will not review or reject a filing for sufficiency or other reasons if a due process complaint does not comply with these requirements, but the Hearing Officer may dismiss or order**

**a party to amend a due process complaint that does not contain the required contents. For further guidance, see § 406.**

#### ***§ 409 Rights of All Parties; § 410 Special Rights of Parents***

We appreciate that revisions have been made to both sections to mirror the federal regulations more closely. However, this is a manual to assist people using ODR, so we would recommend clarifying language be added as is suggested below.

Additionally, while the right to an interpreter and the right to examine pupil records do not appear in the “rights” section of IDEIA, there is support for both rights elsewhere in IDEIA and in other relevant statutes. Under IDEIA, parents have the right to “inspect and review” all special education records related to their child upon request, and before any IEP meeting, due process hearing or resolution session meeting. *See* 34 CFR 300.501 (a); 34 CFR 300.613 (a). This procedural safeguard was recently expanded by the *Special Education Student Rights Act*, which now requires parents receive any documents to be reviewed at an IEP meeting at least five business days before that meeting. *See* D.C. Code § 38-2571.03 (3). Given the importance of a parent’s right to inspect and review records as a key component of parents’ rights to meaningful participation under IDEIA, we recommend this section be returned to the ODR manual in the parent’s right section.

With regards to the right to an interpreter, as the current draft of the manual notes, D.C. law and federal civil rights law does require interpretation of due process proceedings upon request, and while IDEIA does not specifically require interpretation of due process proceedings, IDEIA’s overarching emphasis on parental participation, as well as its codification of protection for English Language Learners in instruction, certainly supports it. Because of how important due process hearings are and the complexity of language used in IDEIA proceedings similar to court proceedings, we recommend in § 201 and §§ 505-509 that ODR provide court-certified or professionally qualified interpreters for IDEIA due process proceedings. While access to an interpreter appears elsewhere in the manual, we would recommend it also remain in the rights section as suggested below.

Finally, we recommend the language regarding transcript requests be changed to omit the language requiring the signature of a parent to obtain a transcript of the due process hearing. The federal regulations do not contain this language, and it risks limiting the ability of the parent to act through counsel.

#### § 409

Pursuant to 34 CFR §300.512(a) and 34 CFR §303.444(a), all parties have the following rights: ...

2. **Right to present evidence and argument.** All parties have the right to call witnesses and present written and other evidence that will help them prove their cases subject to the five-day disclosure requirement under 34 CFR §300.512(b) and 34 CFR §303.444(b). They will also be given the opportunity to argue the merits of their cases. **ODR and the Impartial Hearing Officer will ensure hearings have adequate time and space to be conducted in the time reasonably requested by the parties. [...]**
8. **Right to request the sequestration (exclusion) of witnesses.** A party may ask the Impartial Hearing Officer to order the prospective witnesses to remain outside the hearing room while other witnesses are testifying. The Impartial Hearing Officer shall have the discretion to rule on a motion by either party to allow expert witnesses who offer opinion testimony (based on their understanding of the facts) to remain in the hearing room while other witnesses are testifying. A party making such a motion shall support it with reference to legal authority and the facts of the particular case. **This right shall not prevent witnesses who are also a party to the case (or party representatives) to remain in the hearing room through the pendency of the due process proceeding.**
9. **Right to an Interpreter.** If the primary language of a party is a language other than English, an interpreter will be provided by the Office of Dispute Resolution for the hearing free of charge. For further guidance see § 505 below.

#### § 410

Both 34 CFR §300.512(c) and 34 CFR §303.444(c) confer certain special rights to parents/legal guardians in addition to the rights set out above:

- a. **Right to determine if the due process hearing will be a public or closed to the public<sup>3</sup>hearing.** The due process hearing will be closed to the public unless the parent chooses to have an open hearing.

- b. **Right to have the child present at the hearing.** Parents have the right to have the child involved in the dispute present at the hearing, but may wish to consider the impact of testimony on the child;
- c. **Right to Examine Pupil Records.** Parents have the right to examine all records maintained by the school that are related to their child. Parents should call or write their individual LEA or school(s) to request access to pupil records. Parents may authorize counsel, advocates, investigators or other individuals to review and obtain copies of their children's records; and
- d. **Right to a written verbatim transcript of the hearing.** If a parent wishes to have an electronic copy or written verbatim transcript of the hearing, the parent or parent's counsel should submit a request in writing to ODR ~~signed by the parent~~. There is no cost to the parent(s). Written transcripts of the hearing may take up to 30 days to process. A request for an audio transcript may take up to 7 days to process.

## **Section V**

### ***§ 501 Pre-hearing Matters***

We appreciate the revisions made in this section to clarify and standardize Pre-hearing conference practices. As we discussed, we do recommend further explaining in this section and throughout the manual under what circumstances Impartial Hearing Officers can make certain decisions that could otherwise impact the ability of the parties to make strategy decisions (e.g., potentially dictating witness number or order).

We would also recommend ODR make explicit that parties can request Pre-hearing Conferences be held in the record. Finally, we would recommend that some of the strong practices currently used by Impartial Hearing Officers in ensuring clarity of issues following a Pre-hearing conference, like requiring objections be made within a certain period of time to Pre-hearing Orders, become a part of the manual to further standardize Pre-hearing practice. Our recommended language follows:

- A. Pre-hearing Conferences [...]
  - e. To establish any **reasonable** limitations on the number of witnesses and the time to be allotted each party to present their case in chief **to support hearing efficiency and eliminate duplicative testimony;**
  - f. **Preliminary assignment of burden of proof; [...]**

**Parties may request a Pre-hearing Conference be held on the record, so that a written transcript or audio recording can be made available.**

During the pre-hearing conference, the Impartial Hearing Officer shall not offer advice to any of the parties and/or their representatives, however, an Impartial Hearing Officer shall advise unrepresented parties that they have a right to counsel and where free and low-cost legal services may be obtained. The pre-hearing conference must be held in the presence of all parties to the due process complaint (either by telephone or in-person). No delay in the hearing date should result from **a delay in scheduling the** prehearing conference absent the consent of both parties or an order of the Impartial Hearing Officer.

B. Pre-hearing Order [...]

3. **Parties must file any objections or requests for clarification in response to a Pre-hearing Order not more than three business days after the Pre-hearing Order has been issued.**

*§ 503 Case Assignments and Scheduling the Hearing*

We recommend the Office of Dispute Resolution consider changing the practice of issuing notices that schedule any due process hearing provisionally for one day to instead provisionally schedule due process hearings for the number of days or hours requested by the party filing the due process complaint. While the parties may agree to fewer days at a later time, protecting this time within the quick seventy-five-day window for due process complaints might assist in ensuring due process hearings are timely scheduled and sufficient time is allotted for due process hearings in accordance with § 201. We recommend the following change:

Not more than two **business** days after the due process complaint is filed, the ODR Scheduling Coordinator shall issue a Notice of Impartial Hearing Officer Appointment. The notice will include the name of the assigned Impartial Hearing Officer as well as a provisional date and time for the pre-hearing conference and due process hearing. ODR will provisionally schedule all hearings for **the time/number of days requested by the filing party on the due process complaint notice** ~~one day~~. The Impartial Hearing Officer, in consultation with the parties, shall determine how much time is needed for the hearing; and...

*§ 505 Interpretation Services*

As noted as well above in our comments on § 410 (Special Rights of Parents), interpretation and translation are required both under the DC Language Access Act and Title VI of the Civil Rights Act of 1964. While IDEIA does not specifically speak to translation and interpretation with respect to the due process hearing process, IDEIA does provide explicit protections for students with limited English proficiency to access FAPE. *See* 34 C.F.R. § 300.324 (a)(2)(ii); 34 C.F.R. § 300.304 (c)(1)(ii).

Not only is access to a translator for due process proceedings required by law, but access to meaningful translation and interpretation by a qualified translator is necessary to ensure IDEIA's goals of meaningful parent participation in the special education process. As such, we would recommend ODR make explicit criteria for whom may serve as a translator or interpreter at a due process hearing, and provide translators with copies of common IDEIA acronyms and translations given the complexity of special education due process hearings. We would propose this language be revised as follows:

Interpretation refers to the process of orally rendering communication from one language into another. While there is no express right to interpreter and translation services included in the IDEA statute or its implementing regulations for special education due process hearings, IDEA makes it clear that communicating with non-English speaking parents/legal guardians about special education demands very high standards in regards to interpretation and translation. Furthermore, **Title VI of the Civil Rights Act of 1964** and the DC Language Access Act obligates the DC Government to provide equal access and participation in public services, programs and activities for residents of the District of Columbia who cannot (or have limited capacity to) speak, read or write English. DC Official Code §2-1901, *et seq.* **As such, ODR shall provide a court-certified interpreter (or professionally qualified interpreter if court certification is not available for the language to be interpreted) for Due Process Hearings, Mediations, Facilitated RSMs and Facilitated IEP/IFSP meetings without cost. ODR shall also provide a list of common abbreviations and their meanings to assist interpreters who may be unfamiliar with the subject matter.** ODR shall provide oral or American Sign Language (ASL) interpretation services to a party, without cost and upon request, for persons seeking information regarding dispute resolution services or participating in a due process hearing, mediation or facilitated IEP or resolution meeting. The party whose primary language is other than English is free to have their own interpreter present for confidential communications with their counsel; ODR is not required to incur the cost for these interpretation services.

### ***§ 509 Document Translation***

Pursuant to IDEIA, parties aggrieved by a Hearing Officer's Decision only have ninety (90) days to appeal a due process complaint. *See* 34 C.F.R. § 300.516 (b). To ensure parents who may need translation are not prejudiced in their appeal rights, we recommend explicit language be added to ensure HOD translations are provided in accordance with the due process hearing timelines.

Translation refers to the process of rendering written communications from one language to another. ODR shall provide translation of documents issued by ODR or an Impartial Hearing Officer into languages other than English, upon request of a party. Document translation requests shall be directed to [hearing.office@dc.gov](mailto:hearing.office@dc.gov). Document translation requests may take up to 30 days to fulfill. Notwithstanding, ODR will ensure adherence to the prescribed timelines noted in this manual upon receipt of a request for document translation, **including ensuring Hearing Officer's Decisions will be provided within seventy five days of the filing of the due process complaint, even when they require translation.**

## **Section VI**

### ***§ 601 Authority and Responsibility of Hearing Officers***

In the current manual, there is a helpful piece that details qualifications for Hearing Officers. We suggest adding that back in. This section on hearing officers in the proposed manual also references that Impartial Hearing Officers may have individualized procedures for their hearings, but the manual is unclear as to how these procedures will be communicated to all parties, including those new to ODR. We propose that an individual Impartial Hearing Officer's procedures be memorialized, either in the initial order or in the Pre-hearing Order, to ensure parties are clear on Hearing Officer expectations outside of the manual as soon as possible.

**§ 601 Authority, and Responsibilities, and Qualifications of Hearing Officers**  
Impartial Hearing Officers are not employees of OSSE. Consistent with 34 CFR §300.511(c)(i)(A) and 34 CFR §303.443(c)(i)(A), at a minimum, a hearing officer must not be an employee of the SEA, LEA or DC EIP that is involved in the education or care of the child. Impartial Hearing Officers contract with OSSE to provide special education dispute resolution services. **Impartial Hearing Officers are attorneys selected based on their academic achievement, background in special education and special education law, professional experience, and writing ability. All Hearing Officers are members in good standing of the District of Columbia Bar, have at least five years of active legal experience as an attorney, and have received special training in conducting administrative hearings. Hearing Officers also receive training in special education laws, regulations, procedures and programs. The Office of Dispute Resolution shall maintain a statement of the qualifications of each person**

**who serves as a Hearing Officer, and will make it available to the public without charge or undue delay upon request.**

Pursuant to 34 CFR §303.511(2) and 34 CFR §303.443(2), Impartial Hearing Officers are independent and have discretion in managing a due process hearing. Impartial Hearing Officers may have individualized procedures or rules concerning the handling of documents, exhibits, and witnesses, **which shall be communicated to the parties in writing in the Pre-hearing Order at the latest and must be** consistent with this manual as well as all applicable federal and District laws, rules and regulations.

## **Section VII**

### ***§ 705 Conducting the Hearing***

Similar to our recommendations for § 501, we want to ensure that Hearing Officer's discretion to run the due process hearing as he or she sees fit does not impede the right of a party to develop and implement their own legal case and strategy to best advocate for their client. To this end, we recommend ODR eliminate the language potentially allowing the Hearing Officer to control witness order, and to determine whether or not parties can submit written closings. We recommend the following changes:

[...] The Impartial Hearing Officer will ask the parties whether they have discussed settlement of the case. The Impartial Hearing Officer may provide the parties an opportunity to discuss settlement off the record or to request a mediator, if desired by both parties. The Impartial Hearing Officer will ask whether there are preliminary issues to be decided before the hearing commences, and then will rule on accepting into evidence the documents that the parties have presented. ~~The Impartial Hearing Officer will determine the order in which the witnesses will be presented. ...~~

At the end of the hearing, each party is allowed to make a closing statement. The Impartial Hearing Officer may ask the parties to make oral closing statements, or if necessary because of the complexity of the issues, submit them in writing after the hearing. The Impartial Hearing Officer may also continue the hearing to request written briefs on particular legal issues and schedule additional oral argument, if necessary. **Parties may also request to submit written closings, however, n**~~No~~ **request for written closing statements or briefs shall be grounds for extending the timeline for issuing a hearing decision without the express consent of the parties/counsel. After closing statements are presented, the hearing**



record is closed. The Impartial Hearing Officer then must prepare a written decision, which will be provided to all parties.

### ***§ 706 Burden of Proof***

We appreciate that this section has been updated to implement the legislative changes to the burden of persuasion in cases concerning a child's IEP and placement. Given that this section now includes the burden of proof in manifestation determinations, we think it would be helpful to clarify that for these cases as well, the Local Education Agency bears the burden of persuasion. *See* 5-E DCMR §2510.16. We think it would also be helpful in this section to acknowledge that, while the burden of production is typically on the filing party, that is a presumption not a mandate – and a Hearing Officer can shift the burden of production by motion and good cause shown. In the context of Due Process Hearings, the fact that schools hold many of the records makes the topic of production relevant. We propose the following changes:

Pursuant to DC Code §38-2571.03(6)(A), in special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), **there is a presumption that the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion by a preponderance of the evidence;** except, that:

- (i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. ~~The burden of persuasion shall be met by a preponderance of the evidence.~~
- (ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

Further, in reviewing a decision with respect to a manifestation determination, **the LEA bears the burden of persuasion as to whether or not** ~~the Impartial~~

~~Hearing Officer must determine whether~~ the LEA has demonstrated that the child's behavior was not a manifestation of his or her disability. *See* 5-E DCMR §2510.16

**Finally, the Hearing Officer may elect to shift the burden of production, upon motion and good cause shown.**

### ***§ 708 Expedited Due Process Hearings (Part B)***

IDEIA mandates that due process hearings be expedited in discipline cases, where there is a dispute as to the outcome of a manifestation determination or where there is a dispute over a child's placement due to discipline. *See* 34 CFR §§300.532-533. This mandate is firmly rooted in case law that has interpreted IDEIA's goals to include ensuring children are not denied access to a free, appropriate public education as a result of the manifestations of their very disability. *See Honig v. Doe*, 484 U.S. 305 (1988).<sup>4</sup> We are concerned that, in this proposed version of the manual, it is not clear that expedited due process hearings are as of right in the context of discipline and strongly recommend the language be changed to clarify that they are.

We also would recommend the proposed manual be revised to return the current manual's language allowing the Hearing Officer to grant a motion for an expedited due process hearing where "the physical or emotional health or safety of the student or others would be endangered by a delay in the conduct of the hearing or there is other substantial justification for the hearing." *See* § 1008, Expedited Due Process Hearing, Special Education Student Hearing Office Standard Operating Procedures. There are circumstances outside of discipline where an expedited due process hearing is needed to address an egregious and urgent denial of FAPE – where a student is out of school because the placement process has been delayed or the student has been unenrolled from school, or where a school placement has become irrevocably unsafe. These students can barely wait the twenty school days until an expedited due process hearing, let alone the two months it would take for them to have their case heard along the standard due process timelines. Removing a parent's ability to seek an expedited hearing outside of discipline also risks denying parents access to the hearing process – as when a child is out of school, a parent may be forced to enroll their child in a different school system rather than waiting the months it would take for their case to be heard. We recommend the following changes:

#### **Special Rule for Expedited Due Process Hearings:**

1. A due process complaint involving a request for an expedited hearing shall be governed by the same rules as are applicable to due process hearings generally. Additionally, requirements for expedited due process hearings are found at 34 CFR §§300.532-533. Pursuant to 34 CFR §300.532, expedited

hearings **must be held** ~~are generally requested~~ when the dispute is related to a disagreement with regard to any change to the student's current placement under 34 CFR §§300.530 and 300.531, or the manifestation determination under 34 CFR §300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing;

2. **An expedited hearing may be granted for other reasons when good cause is shown as to harm that may result from the due process hearing proceeding along standard due process timelines.**

### **Miscellaneous**

We have also made changes throughout the attached redline to provide examples or clarification where it might be helpful and add to the utility of this manual. These changes include: adding further examples of evidence in § 401; clarifying that the rule on witness sequestration does not require the exclusion of the parent or other party representatives in § 409; adding "photographs" to types of evidence that may be disclosed and adding language clarifying that the Hearing Officer can set additional requirements for disclosures in § 504; adding language and a citation to § 702 to memorialize the practice of attorneys pending admission to the District of Columbia bar practicing under the supervision of a D.C. barred attorney as permissible before ODR like it is before the courts; clarifying that dismissal for petitioner's failure to appear will only occur after a reasonable period of time has passed in § 704; and adding language to permit Hearing Officers to set timelines for objections to disclosures before due process hearings and indicating a tabbed copy of disclosures be provided to the Hearing Officer in line with current ODR practice in § 707. Where it might be beneficial, we have also added examples (types of motion, evidence) to help make the manual more accessible for *pro se* litigants and practitioners newer to the forum and recommend ODR also consider including further examples of subjects due process complaints can be filed upon (similar to the prior manual) as well as types of motions.

Thank you for your attention to our comments. If you have questions or would like to speak further, you can contact me at [sflohre@childrenslawcenter.org](mailto:sflohre@childrenslawcenter.org), or (202) 467-4900, ext. 628.

Sincerely,

/s/ Sarah L. Flohre

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<sup>1</sup> Children's Law Center fights so every child in DC can grow up with a loving family, good health and a quality education. Judges, pediatricians and families turn to us to advocate for children who are abused or neglected, who aren't learning in school, or who have health problems that can't be solved by medicine alone. With more than 100 staff and hundreds of pro bono lawyers, we reach 1 out of every 9 children in DC's poorest neighborhoods – more than 5,000 children and families each year. And, we multiply this impact by advocating for city-wide solutions that benefit children.

<sup>2</sup> **Bold** means recommended additions, and ~~striketrough~~ recommended deletions.

<sup>3</sup> Where text already appears in bold in the proposed revisions, **bold underline** means recommended additions.

<sup>4</sup> "When the law [EHA, now IDEIA] was passed in 1975, Congress had before it ample evidence that such legislative assurances were sorely needed: 21 years after this Court declared education to be 'perhaps the most important function of state and local governments,' *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954), congressional studies revealed that better than half of the Nation's 8 million disabled children were not receiving appropriate educational services. § 1400(b)(3). Indeed, one out of every eight of these children was excluded from the public school system altogether, § 1400(b)(4); many others were simply 'warehoused' in special classes or were neglectfully shepherd through the system until they were old enough to drop out. See H.R.Rep. No. 94-332, p. 2 (1975). Among the most poorly served of disabled students were emotionally disturbed children: Congressional statistics revealed that for the school year immediately preceding passage of the Act, the educational needs of 82 percent of all children with emotional disabilities went unmet." See *Honig v. Doe*, 484 U.S. 305, 309-310 (1988).