

CHIEF ADJUDICATOR'S GUIDANCE PAPER
REGARDING LOSS OF OPPORTUNITY RE-OPENERS

A. BACKGROUND

A hearing may be re-opened to adjust a DR award rendered for loss of opportunity under the Independent Assessment Process (IAP). The requirements to have a hearing re-opened for loss of opportunity are referred to in **Appendix XIII 2(b) of The Agreement In Principle**. This Transition Section states that a hearing may be re-opened to reconsider the assignment of points under the Consequential Loss of Opportunity category in Schedule "B" and pursuant to the standards of the IAP in the following circumstances:

- i. A decision has to have been rendered by an adjudicator under the DR process;
- ii. A release must have been signed in relation to that decision after May 30, 2005; and
- iii. The adjudicator who heard the case had to have found in his or her decision that the claimant suffered a loss of opportunity at the highest level in the Consequential Loss of Opportunity scale in the DR Model (level three).

The Loss of Opportunity Instructions to Adjudicators in the IAP Model are also to be taken into account when hearing this kind of re-opener case. These **Instructions For Adjudicators** may be found in **Schedule "D", Appendix IX, Section II, 4 (page 36)**. In accordance with these instructions, the following shall be taken into account by adjudicators:

- i. The civil standard of proof is to be used;
- ii. Expert evidence is required to establish the harms leading to the losses at Levels 4 or 5 unless the parties have agreed to dispense with it; and
- iii. There must be a plausible link between the abuse proven to have occurred at the IRS, and the proven subsequent experience.

It should also be noted that, pursuant to the **Instructions For Adjudicators in Schedule “D”, Appendix IX, Section II, 5 (page 37)**, a loss of opportunity request to re-open cannot result in an award for actual income loss.

B. INITIAL PROCESS

All claimants who are eligible to have their case re-opened according to the above criteria have been identified and contacted by the Indian Residential Schools Secretariat. Those that wish to have their case re-opened have been asked to submit a request for same in writing. When those written requests are received, the file and the request are sent to the Chief Adjudicator’s office for assignment and completion.

The Chief Adjudicator has determined that these files will proceed on the following principles:

- i. If possible, the original adjudicator who made the DR decision on loss of opportunity will be assigned to re-open and hear the case. If this is not possible, another DR adjudicator will be assigned to hear the case.
- ii. All evidence from the previous DR hearing will be made available to the assigned adjudicator and it will form part of the record; and
- iii. In all cases, the adjudicator will bear in mind that the intention of the parties who agreed on this re-opener process is to have as expeditious a hearing as possible in a manner that is the least intrusive for the claimant who has already gone through the hearing process once. In many instances this may be achieved by conducting a paper review of the file only or by way of a negotiated settlement.

C. PROCEDURE TO BE USED BY THE ADJUDICATOR

1. Upon receipt of the file, the Adjudicator will review all of the documentation to identify the following:
 - i. Is the case eligible to be re-opened according to the criteria set out in the **Agreement In Principle** set out above;

- ii. Has all of the previous file documentation been provided and, if not, determine if it is necessary for the making of a decision and, if so, request same the necessary documentation;
 - iii. Is an assessment already on the file and, if not, is one required from the adjudicator's perspective; and
 - iv. Can a paper review be completed on the file without the necessity of a hearing?
2. Convene a pre-hearing telephone conference call with all of the parties and ensure that all of the parties have the right to comment on the following:
 - i. How the parties wish to proceed (either paper review, in person hearing or negotiated settlement). If the parties wish to proceed by way of a negotiated settlement, the role of the adjudicator will cease unless the parties request adjudicator assistance. The parties are free to vary the initial decision by consent although this may not always be appropriate where the claimant is self represented;
 - ii. Is more evidence required and how should that evidence be presented (either through documentation or viva voce evidence);
 - iii. Is an expert report required, what kind of expert is required and can the parties agree on a specific expert (either from the approved list of psychologists or psychiatrists or another kind of expert depending upon the circumstances); and
 - iv. Are there any other issues that the parties or the adjudicator wish to raise regarding procedure for the hearing?

The intention of the pre-hearing telephone conference call is that all parties will have the opportunity to canvass process issues at this initial stage but that the adjudicator will have the final say as to how the matter will proceed with the exception of where there has been or will be a negotiated settlement.

3. Proceed with one or more of the following depending on the outcome of the conference call:
 - i. Complete a paper review;

- ii. Ask the Adjudication Secretariat to set up a viva voce hearing to enable the adjudicator to obtain more evidence (bear in mind that the evidence from the first hearing need not necessarily be revisited); and
 - iii. Seek more evidence such as an expert report.
4. Prepare a written decision using a modified format of the existing decision template for IAP decisions.

D. GUIDING PRINCIPLES

1. The **Agreement In Principle** allows the claimant to have their hearing re-opened as stated in the relevant **Transition Provisions** set out above **and pursuant to the standards of the IAP**. No other information is provided in the **Settlement Agreement** or elsewhere as to any further requirements for a hearing to be re-opened. Accordingly, it is clear that once the initial requirements of the **Transition Provisions** are met, the criteria that guides the decision making process is to be found in the IAP model itself. All procedural rules and due process requirements, that would apply in an IAP hearing, apply equally to a re-opener hearing regardless of the form that it takes. This would include the following:
 - i. The right of the parties to make submissions;
 - ii. The right of the parties to examine an expert on their report; and
 - iii. The right of the parties to seek a review of the re-opener decision.
2. A successful re-opener request will usually result in an award at OL4 or OL5 due to the wording of those loss levels in the IAP model (as opposed to an award at OL3) but adjudicators should be prepared to hear arguments to the contrary.

E. REVIEW OF LEGAL FEES

The Chief Adjudicator's Office has determined that the provisions of the Court Orders with respect to adjudicator's responsibilities regarding legal fees, also apply to Opportunity Loss Re-openers. In other words, while adjudicators have no jurisdiction with respect to legal fees payable on the balance of the ADR award, those responsibilities do apply to any additional amount awarded as a result of a re-opener request. At a minimum, adjudicators are required to ensure

that the fees on such additional amount awarded do not exceed the 30% cap imposed by the courts. Further, claimants are entitled to be notified that they are entitled to ask the adjudicator to review those additional fees for fairness and reasonableness. A special notice to claimants is being developed for this purpose. Finally, adjudicators may review such fees for fairness and reasonableness on their own motion. The principles and schedules set out in Guidance Paper 1 (as revised from time to time) apply in such cases, with such modifications as may be necessary.

F. FINAL COMMENTS AND BILLING

1. Adjudicators are encouraged to conclude re-openers without the necessity of recalling the claimant. There will be cases where this is not possible and to some degree, the cooperation of the parties will be required. Please use your persuasive skills wherever possible to keep this process to its simplest.
2. You will notice the re-opener file has a new number. It is the old file number with a “9” in front. For example, file D-0123 would now be file D-90123.
3. Decisions should be short and concise. A decision should be written on one page or perhaps two in ordinary circumstances.
4. We expect billing of one half day for a re-opener case that involves review of the file, conference call and a decision. If the work requires more time because a hearing is needed, you should bill actual time.
5. If you require any assistance, please contact Kaye Dunlop or Rodger Linka.

(September 22, 2008)