

**TO:** P-12 Education Committee

**FROM:** Kimberly Young Wilkins *Kimberly Young Wilkins*

**SUBJECT:** Expanding the Pool of Applicants to Serve as Impartial Hearing Officers to Hear Special Education Due Process Complaints Filed in New York City

**DATE:** January 7, 2020

**AUTHORIZATION(S):** *Sharam L. Tahaee*

### SUMMARY

#### **Issue for Discussion**

Should the Board of Regents expand the pool of applicants to serve as impartial hearing officers (IHOs) to hear special education due process complaints filed in New York City?

#### **Reason(s) for Consideration**

Review of policy.

#### **Proposed Handling**

This issue will come before the Regents P-12 Education Committee for discussion at the January 2020 meeting.

#### **Background Information**

The New York City Department of Education (NYCDOE) is experiencing an unprecedented number of special education due process complaints that has overwhelmed its due process hearing system. On January 6, 2020, New York State Department of Education (NYSED) records indicated that there were approximately 10,000 open special education due process complaints in New York City (NYC), as compared to 209 in the rest of New York State. Currently, there are 68 IHOs certified by NYSED to hear cases in NYC. However, recently, there have not been any, or only a handful of, IHOs in rotation each day willing to be appointed to cases. IHOs, while recruited, trained, and certified by NYSED, are independent contractors; they are not employees of NYSED or NYCDOE. This fall, NYSED significantly expanded its

recruitment efforts to find qualified candidates to train and certify IHOs to help address the volume of due process complaints in NYC. NYSED is preparing to have a new IHO training session in March 2020. However, due to the multiplicity of due process system issues in NYC, as of early January 2020, more than 1,300 complaints were awaiting initial appointment of an IHO.

NYCDOE has been placed under a Compliance Assurance Plan (CAP) and is required to implement a comprehensive series of corrective action steps to improve the provision of a free appropriate public education to preschool and school-age students with disabilities — actions that are expected to eventually lead to a reduction in due process complaint filings. Moreover, as part of the CAP, responding to deficiencies identified in the February 2019 external review of New York City’s Impartial Hearing Office, NYCDOE is required to implement several action steps to ensure that parents and students have access to timely and meaningful due process<sup>1</sup>. The following actions are specifically designed to address the current strains on NYCDOE’s due process complaint hearing process and foster a more timely and responsive system for parents and students:

- Eliminate the role of the IHO in uncontested pendency, or stay-put, cases. NYCDOE’s current requirement that IHOs issue a pendency, or stay-put, order when there is no dispute as to the student’s placement burdens the availability of IHOs to conduct required and needed hearings, further worsening delays for families seeking resolution. Moreover, requiring an IHO order in uncontested pendency cases is inconsistent with the Individuals with Disabilities Education Act (IDEA).
- Implement a revised IHO Compensation Policy that ensures fair and equitable compensation for IHOs working in NYC, incentivizes the use of appropriate, standard legal practice, and provides a rate that will ensure that a sufficient number of IHOs are willing to accept appointment. The majority of IHOs serving in NYC have indicated to Department staff that they will not accept appointment to special education due process complaints until their compensation is increased.
- Ensure timely settlement of due process hearings. While a high number of due process hearing cases settle, NYCDOE experiences significant delays in finalizing settlements, with the process sometimes lasting two years. While parties await this long-delayed settlement resolution, the due process case is kept on the docket and the IHO remains assigned to the case, resulting in limited resources being absorbed into case management regarding these cases.
- Increase the use of mediation and other less adversarial dispute resolution options, including Individualized Education Program (IEP) facilitation.

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<sup>1</sup> Deuseddi Merced, Special Education Solutions, LLC, “External Review of The New York City Impartial Hearing Office,” February 22, 2019. In January 2019, NYSED implemented a review of NYCDOE’s due process system, to be conducted by Merced, so as to understand possible systemic factors contributing to sharply rising numbers of due process complaints.

### Applicable Federal Law and State Regulations

IDEA does not require IHOs be attorneys and, instead, requires IHOs have the following:

- Knowledge of, and the ability to understand, the provisions of the Act, federal and State regulations pertaining to the Act, and legal interpretations of the Act by federal and State courts;
- Knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
- Knowledge of and ability to render and write decisions in accordance with appropriate, standard legal practice.

See Attachment A for a complete description of the federal statutory requirements for an IHO.

Section 200.1 of the Commissioner's Regulations requires that an IHO have the following qualifications:

- Be an individual admitted to 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; or be an individual certified by the State of New York as an impartial hearing officer on September 1, 2001;
- Have access to the support and equipment necessary to perform the duties of an impartial hearing officer;
- Be certified by the Commissioner as an impartial hearing officer eligible to conduct hearings pursuant to Education Law;
- Successfully complete a training program, conducted by the Department, which program provides information regarding State and federal laws and regulations relating to the education of students with disabilities, the needs of such students, and the procedures involved in conducting a hearing, and in reaching and writing a decision;
- Possess knowledge of, and the ability to understand, the provisions of federal and State law and regulations pertaining to the Individuals with Disabilities Education Act and legal interpretations of such law and regulations by federal and State courts; and
- Possess knowledge of, and the ability to conduct hearings in accordance with appropriate, standard legal practice and to render and write decisions in accordance with appropriate standard legal practice.

For the complete list of IHO requirements set forth in section 200.1(x) of the Commissioner's Regulations, see Attachment B.

Since September 1, 2001, the Commissioner's Regulations have required that an IHO presiding over a special education due process hearing be an attorney admitted in New York with two years of practice and/or experience in the areas of education, special education, disability rights or civil rights. Prior to 2001, non-attorneys could serve as IHOs in this State. Already certified IHOs who were not attorneys were grandfathered in and could continue to serve as IHOs. Currently, there remain eight IHOs who are not attorneys, one of whom serves in New York City.

The 2001 regulations changes were adopted as part of a package of amendments designed to increase the timeliness and quality of impartial hearings and decisions and, additionally, to improve the "integrity of the impartial hearing process." Public comment indicated that the move toward having attorney IHOs would enhance the quality of determinations and ensure that hearings were expeditiously, fairly, and competently conducted.

Of significance, three years after New York amended its regulations, in 2004, the federal IDEA was reauthorized and amended, in relevant part, to require that IHOs preside over IDEA complaints and render and write decisions "in accordance with appropriate, *standard legal practice*" (emphasis added). While federal law and regulations do not specifically require that an IHO be an attorney, the vast majority of states now require IHOs to be attorneys<sup>2</sup>.

### National Trends

Nationwide, 43 states require IHOs to be attorneys. Special education experts indicate that there is a nationwide gradual shift toward hearing officers who are attorneys. According to a recent study, "[State Due Process Hearing Systems Under the IDEA: An Update](#),"<sup>3</sup> published in March 2019, 42 states require IHOs to be attorneys, with the remaining eight states using a varying percentage of non-attorney IHOs, and in a variety of ways. Of note is that since the study's publication, one of the states cited for using non-attorneys, Indiana<sup>4</sup>, has moved to require that all new IHOs be attorneys (see Attachment C). All of the states in the 7-PAK consortium<sup>5</sup> require that IHOs be attorneys; however, New York and Pennsylvania both still utilize a handful of non-attorney IHOs who were grandfathered in as part of regulatory amendments.

Currently, most of the few states that allow for non-attorney IHOs have IHO qualification regulations that mimic the federal law. Oklahoma, however, requires that all non-attorney hearing and appeal officers possess "a minimum of a Master's degree in education, special education, psychology, or any related field" (Okla. Admin. Code 210:15-13-5).

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<sup>2</sup> Jennifer F. Connolly, PhD, Perry A. Zirkel, PhD, and Thomas A. Mayes, JD, "[State Due Process Hearing Systems Under the IDEA: An Update](#)," Journal of Disability Policy Studies, March 2019, available at <https://journals.sagepub.com/doi/abs/10.1177/1044207319836660>.

<sup>3</sup> [Id.](#)

<sup>4</sup> "[Independent Hearing Officer \(IHO\) and Mediator Application-Indiana](#)" available at <https://www.doe.in.gov/specialed/iho-mediator-application>.

<sup>5</sup> California, Florida, Illinois, New York, New Jersey, Pennsylvania, Texas

However, because of the unprecedented crisis in New York City, there are thousands of students and families waiting for decisions on their due process complaints. Therefore, Department staff are presenting several options, including the use of non-attorney IHOs in New York City, for the Board of Regents to consider in an effort to expand the pool of qualified applicants to serve as IHOs. NYSED has arranged for Deusedi Merced, the consultant who conducted the 2019 external review of the NYCDOE impartial hearing office to make a presentation at the January Board of Regents meeting to respond to questions by the Board of Regents. Merced is a national expert on special education due process issues, having served as an IDEA hearing officer, mediator, and facilitator in hundreds of matters; including serving as the chief hearing officer for the District of Columbia, where heh played a key role in assisting the District in being released from court supervision.

See Attachments D and E for the external review report and the May 2019 New York City Department of Education Compliance Assurance Plan.

#### Proposed Regulatory Changes Regarding Qualifications of IHOs

The Board of Regents has the following options to expand the pool of qualified IHOs in New York City:

- Allow non-attorneys to serve as IHOs.
  - Require non-attorneys to have experience in special education and IDEA;
  - Provide them with training on writing decisions and the due process system;
  - If expand to non-attorneys, make this change time-limited to only address the backlog (amendments could grandfather in non-attorney IHOs certified to address the New York City backlog);
- Open applications to attorneys admitted to practice in states other than New York;
- Amend the practice and experience requirements for attorney IHOs in the following ways:
  - Expand the areas of practice to include administrative law and employment law;
  - Reduce the years of experience required from two to one;
  - Render these specified qualifications preferred but not required;

#### Other Regulatory Changes Regarding Qualifications of IHOs

In response to issues identified in the NYCDOE CAP, NYSED's Office of Special Education has been preparing for the Board of Regents' review of other possible amendments to the Commissioner's Regulations to also address deficiencies in the hearing process that might help alleviate some of the pressure on the NYCDOE special education due process system. Proposed regulatory amendments would bring the State regulations into better conformity with the federal requirements in the following areas:

- Require a prehearing conference, so as to prevent delays in complaint resolution by identifying in a timely manner the relevant issues, exhibits, and party availability;
- Eliminate the restriction that IHOs only grant an extension of a maximum of 30 days in complaints, to eliminate the burden of unnecessary status conferences in New York City, where settlement approvals may take a year or longer;
- Require IHOs to render a decision in a format consistent with NYSED guidelines and in accordance with the Family Education Rights and Privacy Act (FERPA);
- Provide for the use of alternative technology, specifically telephonic testimony and the use of video-conferencing, in due process hearings to provide parties greater access to hearings and to alleviate scheduling problems impacting due process hearings;
- Specify justifiable grounds for recusals, or voluntary withdrawals from cases by IHOs, to conform with standard legal practice allowing for recusals when a hearing officer has a good faith belief that he or she has a conflict of interest;
- Require local education agencies to have a compensation policy for IHOs that provides a rate to ensure that a sufficient number of IHOs are available to serve in the district; and
- Require New York City IHOs to accept a minimum number of cases annually and set a maximum number of cases that a New York City IHO may accept.

### **Related Regents Items**

January 2014: [Proposed Amendment to Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education Relating Special Education Impartial Hearings](#)

([https://www.regents.nysed.gov/common/regents/files/114p12a2%5B1%5D\\_0.pdf](https://www.regents.nysed.gov/common/regents/files/114p12a2%5B1%5D_0.pdf))

October 2013: [Proposed Amendment of Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings](#)

(<https://www.regents.nysed.gov/common/regents/files/1013p12d3%5B1%5D.pdf>)

November 2012: [Proposed Amendment of Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings](#)

(<https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/November2012/1112p12a4.pdf>)

January 2012: [Proposed Amendment of Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings](#)

(<https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/January2012/112p12d3.pdf>)

June 2012: [Proposed Amendment of Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings](https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/June2012/612p12d1.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/June2012/612p12d1.pdf>)

January 2009: [Dispute Resolution in Special Education – A Review and Analysis of New York State Due Process System](https://www.regents.nysed.gov/meetings/2009/2009-01-90)  
(<https://www.regents.nysed.gov/meetings/2009/2009-01-90>)

February 2004: [Impartial Hearings for Students with Disabilities](https://www.regents.nysed.gov/common/regents/files/documents/meetings/2004Meetings/February2004/0204aemscvesida1.htm)  
(<https://www.regents.nysed.gov/common/regents/files/documents/meetings/2004Meetings/February2004/0204aemscvesida1.htm>)

### **Recommendation**

With approval of the Board of Regents, NYSED will continue to engage stakeholders in discussions on expanding the pool of qualified IHOs in New York City and other issues relating to the special education due process system and will come back to you in the next couple of months with proposed regulatory changes.

**Federal Requirements for Impartial Hearing Officers:**

34 C.F.R. § 300.511 (c)

(c) Impartial hearing officer.

(1) At a minimum, a hearing officer—

(i) Must not be—

(A) An employee of the SEA or the LEA that is involved in the education or care of the child; or

(B) A person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) Must possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;

(iii) Must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) Must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(2) A person who otherwise qualifies to conduct a hearing under paragraph (c)(1) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(3) Each public agency must keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(Authority: 20 U.S.C. 1415(f)(1)(A), 1415(f)(3)(A)-(D))

AUTHORITY: 20 U.S.C. 1221e-3, 1406, 1411-1419, and 3474; Pub.L. 111-256, 124 Stat. 2643; unless otherwise noted.



**State Regulations Regarding IHO Qualifications:**

8 NYCRR 200.1(x)

- (x) *Impartial hearing officer* means an individual assigned by a board of education pursuant to Education Law, section 4404(1), or by the commissioner in accordance with section 200.7(d)(1)(i) of this Part, to conduct a hearing and render a decision. No individual employed by a school district, school or program serving students with disabilities placed there by a school district committee on special education may serve as an impartial hearing officer and no individual employed by such schools or programs may serve as an impartial hearing officer for two years following the termination of such employment, provided that a person who otherwise qualifies to conduct a hearing under this section shall not be deemed an employee of the school district, school or program serving students with disabilities solely because he or she is paid by such schools or programs to serve as an impartial hearing officer. An impartial hearing officer shall:
- (1) be an individual admitted to 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; or be an individual certified by the State of New York as an impartial hearing officer on September 1, 2001;
  - (2) have access to the support and equipment necessary to perform the duties of an impartial hearing officer;
  - (3) be independent, shall not be 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, shall not have a personal or professional interest which would conflict with his or her objectivity in the hearing, and shall not have participated in any manner in the formulation of the recommendation sought to be reviewed; and
  - (4) be certified by the commissioner as an impartial hearing officer eligible to conduct hearings pursuant to Education Law, section 4404(1) and subject to suspension or revocation of such certification by the commissioner for good cause in accordance with the provisions of section 200.21 of this Part. In order to obtain and retain such a certificate, an individual shall:
    - (i) successfully complete a training program, conducted by the department, which program provides information regarding State and Federal laws and regulations relating to the education of students with disabilities, the needs of such students, and the procedures involved in conducting a hearing, and in reaching and writing a decision;

- (ii) attend such periodic update programs as may be scheduled by the commissioner;
- (iii) annually submit, in a format and by a date prescribed by the commissioner, a certification that the impartial hearing officer meets the requirements of paragraphs (1), (2) and (3) of this subdivision;
- (iv) possess knowledge of, and the ability to understand, the provisions of Federal and State law and regulations pertaining to the Individuals with Disabilities Education Act and legal interpretations of such law and regulations by Federal and State courts;
- (v) possess knowledge of, and the ability to conduct hearings in accordance with appropriate, standard legal practice and to render and write decisions in accordance with appropriate standard legal practice;
- (vi) be willing and available to accept appointment to conduct impartial hearings. Notwithstanding the provisions of section 200.21 of this Part, unless good cause has been provided to the commissioner including, but not limited to, cause resulting from poor health as certified by a physician, active military services or other similar extenuating circumstances, the certification of an impartial hearing officer shall be rescinded upon a finding that the impartial hearing officer was not willing or available to conduct an impartial hearing within a two-year period of time.

**Percentage-Range Distribution of Impartial Hearing Officers Who Are Attorneys for Each State System.**

Range (number) States<sup>a</sup>

100% (n = 42) AL, AK, AZ, **CA**, CO, CT, **DC**, FL, GA, HI, ID, IL, IA, KS, KY, LA, ME, MD, **MA**, MI, MN, MO, MT, NE, NV, NH, **NJ**, NC, ND, OH, OR, RI, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY

76%–99% (n = 5) MS, NM, **NY**, **PA**, SC

51%–75% (n = 3) AR, IN\*, OK

26%–50% (n = 1) DE<sup>b</sup>

0% (n = 0)

<sup>a</sup> The six most active states for adjudicated hearings are designated in bold text.

<sup>b</sup> Delaware has a tripartite panel in which the neutral is an attorney.

\* Since this survey, Indiana has moved to require that all new IHOs be attorneys.

Adapted from: Jennifer F. Connolly, PhD, Perry A. Zirkel, and Thomas A. Mayes, JD, "[State Due Process State Due Process Hearing Systems Under the IDEA: An Update](https://journals.sagepub.com/doi/abs/10.1177/1044207319836660)," Journal of Disability Policy Studies, March 2019, available at <https://journals.sagepub.com/doi/abs/10.1177/1044207319836660>.

REPORT  
EXTERNAL REVIEW OF  
THE NEW YORK CITY IMPARTIAL HEARING OFFICE

Submitted by:

Deusdedi Merced  
External Reviewer

Special Education Solutions, LLC

Filed

February 22, 2019

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## I. INTRODUCTION

Under the Individuals with Disabilities Education Act (IDEA)<sup>1</sup> and its implementing regulations<sup>2</sup>, a free and appropriate public education (FAPE) must be available to all students residing in the State between the ages of 3 and 21.<sup>3</sup> In New York State, children with disabilities between the ages of 3 and 5, as well as 18 through 21, are entitled to FAPE.<sup>4</sup> Whenever a dispute arises between the student's parent(s) and the school district on any of the matters relating to the identification, evaluation or educational placement of a student with a disability or the provision of a FAPE to the student, the parent(s) or the school district must have an opportunity for an impartial due process hearing.<sup>5</sup> The hearing must be conducted by the New York State Education Department (SED),<sup>6</sup> and an impartial hearing officer (IHO) must be appointed to hear and decide the dispute between the parent(s) and the school district.<sup>7</sup>

The IDEA sets forth minimum qualifications for hearing officers who preside over IDEA hearings.<sup>8</sup> Consistent with the IDEA, New York State sets forth specific qualifications for hearing officers. Specifically, the hearing officer must be admitted to the practice of law in New York; have a minimum of two years practice/experience in education/special education/disability rights/civil rights; have access to support/equipment necessary to perform duties; and be certified by the New York State Commissioner of Education as an impartial hearing officer, which requires, among other things, successful completion of training/update programs and annual submission of a certification that these requirements have been met.<sup>9</sup>

In New York State, each school district must adopt a written policy that establishes administrative practices and procedures for the selection and appointment of an impartial hearing officer consistent with procedures set forth in the Regulations of

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<sup>1</sup> In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. *See* Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) (“This chapter may be cited as the ‘Individuals with Disabilities Education Act.’”).

<sup>2</sup> Implementing regulations followed the reauthorized IDEA in August 2006. *See* 34 C.F.R. Part 300 (August 14, 2006). In December 2008, the regulations were clarified and strengthened in the areas of parental consent for continued special education and related services and non-attorney representation in due process hearings. *See* 34 C.F.R. Part 300 (December 1, 2008). In June 2017, the regulations were further amended to conform to changes made to the IDEA by the Every Student Succeeds Act (ESSA).

<sup>3</sup> 34 C.F.R. § 300.101(a).

<sup>4</sup> N.Y. EDUC. LAW Art. 89 § 4402.

<sup>5</sup> 20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. §§ 300.507(a), 300.511(a).

<sup>6</sup> 34 C.F.R. § 300.511(b).

<sup>7</sup> 8 NYCRR §§ 200.2(b)(9), 200.2(e)(1), 200.5(j)(3).

<sup>8</sup> *See, generally*, 20 U.S.C. § 1415(f)(3)(A).

<sup>9</sup> 8 NYCRR § 200.1(x)(1) – (4).

the Commissioner of Education.<sup>10</sup> Accordingly, the New York City Department of Education (NYCDOE) has done so and created the New York City Impartial Hearing Office (NYCIHO) to oversee the “administrative and clerical aspects of [IDEA] impartial [due process] hearings” for the NYCDOE.<sup>11</sup> Specifically, the NYCIHO –

is responsible for processing requests for impartial hearings, appointing [IHOs], calendaring hearing dates, communicating with parties, providing transcription, interpretation, translation, other hearing-related services, processing evidence, and issuing reports analyzing these processes.<sup>12</sup>

## II. INITIATION OF EXTERNAL REVIEW AND SCOPE

On January 24, 2018,<sup>13</sup> Assistant Commissioner Christopher Suriano notified the NYCIHO and the NYCDOE in writing of SED’s plan to implement an independent review of the NYCIHO (Suriano Letter).<sup>14</sup> The purpose of the review was broad – to better understand the functioning of the NYCIHO and its policies, procedures and practices specific to special education impartial hearings.<sup>15</sup> In scope, however, the review focused on, though not limited to, the assignment of hearings to IHOs, the payment structure for IHOs, the specific assistance provided to IHOs by the NYCIHO, and the observation, availability and suitability of hearing room space.<sup>16</sup>

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<sup>10</sup> 8 NYCRR §§ 200.2(b)(9).

<sup>11</sup> See New York City Department of Education, *Standard Operating Procedures Manual: Impartial Hearing Office* (SOPM), p. 6. (March 2018) (on file with the NYIHO).

<sup>12</sup> *Id.*

<sup>13</sup> Delays to the prompt completion of this independent review are directly attributable to actions taken by the NYCIHO and/or NYCDOE, including, for example, requiring that SED share the independent reviewer’s contract with the SED to verify his access to personally identifiable information despite the notice given to the NYCIHO and NYCDOE clearly specifying that the reviewer was authorized to access personally identifiable information; scheduling meetings for weeks later than requested (e.g., notice given on February 6, 2018 with proposed meeting dates – five in total – in late February but meeting not taking place until March 19, 2018 despite reviewer offering additional dates in early March 2018); and, the NYCIHO releasing requested documents and information in piecemeal fashion after “management’s approval.” In a number of occasions, the SED was called up to assist the reviewer in securing the full and prompt cooperation of the NYCIHO and NYCDOE despite the NYCIHO and NYCDOE being informed that the reviewer had SED’s “full authority.”

<sup>14</sup> See Letter from Christopher Suriano, Assistant Commissioner, Office of Special Education, New York State Department of Education, to Chief Administrator, Impartial Hearing Office, New York City Department of Education (January 24, 2018) (on file with the New York State Education Department) (Suriano Letter).

<sup>15</sup> *Id.*

<sup>16</sup> See *id.*

This written report is intended to help the SED better understand the functioning of the NYCIHO and to determine whether its policies, procedures, and practices specific to special education impartial hearings in the areas identified in the Suriano Letter are consistent with basic elements of due process hearings and the rights of the parties set out in the IDEA and New York State law. The time period for this review<sup>17</sup> and limited resources available to the reviewer<sup>18</sup> did not permit for a more comprehensive and forensic review of the NYCIHO. Nonetheless, it is felt that sufficient, appropriate information and evidence was obtained to provide a reasonable basis for the findings and conclusions included in this report and that the objectives of the review have been met.

A. Foundation for the Findings in this Report

Various information sources were relied upon in reaching the findings, conclusions and recommendations contained in this report. These sources include key interviews of NYCIHO staff and stakeholders, the review of documents and information provided by the NYCIHO and stakeholders, and informal observations of the reviewer. Specifically, the primary activities that were undertaken include:

1. Interview of Chief Administrator, NYCIHO.
2. Interview of Deputy Chief Administrator, NYCIHO.
3. Interview of Operations Manager, NYCIHO.
4. Interviews of various NYCIHO personnel: I.H.S. System Administrator; Recusal Processor; Case Manager; Accounting Clerk; Hearing Room

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<sup>17</sup> Though SED did not set a specific timeline by when the review was to be completed and this report submitted, SED's on-going monitoring activities and the reviewer's preliminary findings suggests that a crisis is imminent that may compromise access to due process for students residing in the New York City school district requiring immediate, written feedback to SED from the reviewer.

<sup>18</sup> In scope, this review, as proposed by the reviewer as an alternative to developing a formal, IHO evaluation protocol as required under the contract between Special Education Solutions, LLC and SED, was simply intended to *identify* "any practices that are inconsistent with standard and best legal practices and/or may impede the timelines and efficiency of the hearing system." It had not been intended to be a formal audit of the NYCIHO. See Draft Letter from Deusdedi Merced, Managing Member, Special Education Solutions, LLC, to Cathryn Tisenchek, Supervisor, Due Process Unit, Office of Special Education, New York State Education Department (May 26, 2017) (on file with the New York State Education Department). As such, this report does not provide an in-depth analysis of identified practice failures.

Coordinator; Decision Processor; Claims Processor<sup>19</sup>; Appeals Processor<sup>20</sup>; and Case Non-Compliance Support<sup>21</sup>.

5. Interview of Managing Attorney 1, Managing Attorney 2, and Attorney, Special Education Unit, Office of General Counsel, NYCDOE.
6. Interview of Senior Director of Representation and Deputy Director, Impartial Hearing Representation Office (IHRO), Special Education Office, Division of Specialized Instruction and Student Support, NYCDOE.
7. Interview of Executive Director and Senior Policy Advisor, Committees on Special Education, NYCDOE.
8. Discussion with General Counsel and Director of Settlements and Adjudications, Office of the Comptroller of the City of New York.
9. Discussions with numerous IHOs, both individually and in an open meeting of IHOs who wished to attend held on Tuesday, November 13, 2018.
10. Discussions with numerous attorneys of prominent legal services agencies and private law firms who appear before the NYCISO.
11. Review of numerous documents and information provided by the NYCISO.
12. Review of various Audit Reports authored by the Office of the Comptroller of the City of New York.
13. Review of various documents and information provided by attorneys of prominent legal services agencies and private law firms who appear before

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<sup>19</sup> In the initial organizational chart dated March 12, 2018, provided by the NYCISO to the reviewer, Claims Processor had been identified under the branch titled “Attorneys.” A corresponding Job Description titled “Attorneys” was provided to the reviewer. The Job Description document does not include the role of “Claims Processor.” On November 30, 2018, the NYCISO provided a revised organizational chart dated November 29, 2018, identifying Claim Processor as the “Claims Processor.”

<sup>20</sup> Appeals Processor, like Claims Processor, had initially been identified under the branch titled “Attorneys.” Subsequently, as of November 29, 2018, Appeals Processor was identified as the “Appeals Processor.”

<sup>21</sup> In the March 12, 2018, organizational chart, Case Non-Compliance Support had been identified under the branch titled “System Administrators.” He presented himself during the interview as the “CFUS Processor.” The November 29, 2018, organizational chart identifies him under the branch titled “Case Non-Compliance Support.”

the NYCIHO in support of concerns brought to the reviewer's attention.

14. Discussion with SED personnel from the Office of Special Education and Office of Counsel.
15. Review of data provided by SED.
16. Informal observations of available hearing rooms and day-to-day functioning of the NYCIHO (i.e., three full-day site visits).

Discussions with IHOs and attorneys of prominent legal services agencies and private law firms were held in confidence to increase level of participation and information sharing.<sup>22</sup> As such, this report does not attribute to the IHOs or the attorneys of prominent legal services agencies and private law firms their individual comments.

The documents and informal observations were used to inform the interview process, corroborate the interview content, and to help generate the findings, conclusions and recommendations included in this report.

## B. Structure of the Report

This report provides a general overview of the New York State hearing system and, in particular, how New York City compares to the rest of the State. The overview is then followed by various findings related to the operation of the NYCIHO. The purpose of the overview and findings is to provide context to the recommendations included within this report.

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<sup>22</sup> Initially, few IHOs shared information with the reviewer. However, in time, with additional outreach by the reviewer and his visibility during the three onsite visits to the NYCIHO, and assurances that information shared would not identify the source, more IHOs contacted the reviewer to informally share their experiences and thoughts regarding the various matters within the scope of the review. The same was true of the attorneys of prominent legal services agencies and private law firms. Though the level of participation improved over time, greater participation would have been preferable but, as explained by those who guardedly participated, participation was stifled by fear of retaliation or other adverse consequences and a sense of futility fed by cynicism about whether anything would change.

### III. OVERVIEW

#### A. In General<sup>23</sup>

Like most States, and consistent with the IDEA, New York State offers three dispute resolution options: mediation,<sup>24</sup> a written state complaint process,<sup>25</sup> and due process hearings.<sup>26</sup> Between September 1, 2015 and August 31, 2018, SED also offered – on a pilot program basis – IEP facilitation<sup>27</sup> to all Long Island school districts and a limited number of New York City community school districts and committees on special education. In September 2018, there was a limited expansion of IEP facilitation statewide, and SED anticipates a permanent SED-sponsored statewide IEP facilitation program in January 2020.

#### B. By the Numbers

##### 1. *Comparison to States with Similar Demographics and Issues*

The number of due process complaints filed in New York State is considerable. The most recent data available, i.e., school year (SY) 2016-17, illustrates New York State's dominance over the other six States that comprise the 7-PAK States (i.e., New York, California, Florida, Illinois, New Jersey, Pennsylvania, and Texas),<sup>28</sup> with New York State having 35%<sup>29</sup> more than California, 3106% more than Florida, 1850% more than Illinois, 366% more than New Jersey, 658% more than Pennsylvania, and 1870% more than Texas. (See Figure 1.) In fact, New York State, in SY 2016-17, almost matched the total number of due process complaints filed in the other six States,

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<sup>23</sup> The reviewer acknowledges with appreciation source material provided by SED.

<sup>24</sup> 8 NYCRR § 200.5(h).

<sup>25</sup> 8 NYCRR § 200.5(l).

<sup>26</sup> 8 NYCRR § 200.5(i). An ancillary dispute resolution process associated with due process hearings is the resolution meeting process required by IDEA and, accordingly, offered in New York State. 8 NYCRR § 200.5(j)(2).

<sup>27</sup> Facilitated IEP team meetings is a rapidly growing alternative process available to school districts and parents who may be experiencing difficulty in reaching agreement during the IEP development process. A neutral third party, known as a facilitator, who is not a member of the IEP team and does not have a relationship with either the school district or the parent(s), works with the IEP team when there is impasse or a strained relationship between the school district and the parent(s) to help guide the process.

<sup>28</sup> The 7-PAK States is a consortium of the seven largest States that the National Association of State Directors of Special Education, Inc. (NASDSE) determined to have both similar demographics (e.g., general population, diversity, significant rural and inter-city populations) and issues in the delivery of special education programs to its students with disabilities. (NASDSE Representative, personal communication, January 11, 2019).

<sup>29</sup> Percentages are rounded up to the next whole number at .5 or above.

missing the mark by approximately 1300 due process complaints. The trend points higher. (See Figure 2.)

**Figure 1<sup>30</sup>**  
**2016-17 Comparisons with Similar Size States**

	<b>NY</b>	<b>CA</b>	<b>FL</b>	<b>IL</b>	<b>NJ</b>	<b>PA</b>	<b>TX</b>
<b>DPCs FILED</b>	6027	4467	188	309	1292	795	306
<b>RESOLUTION MEETINGS HELD</b>	5785	1434	54	40	42	534	87
<b>RESOLUTION MEETING AGREEMENTS</b>	164	448	16	17	30	172	31
<b>FULLY ADJUDICATED HEARINGS</b>	683	134	9	10	75	45	14
<b>DECISIONS WITHIN 45-DAY TIMELINE</b>	96	31	3	2	52	13	1
<b>DECISIONS WITHIN EXTENDED TIMELINES</b>	482	102	6	8	22	32	13
<b>DPCs PENDING</b>	2363	1031	25	36	169	173	66
<b>DPCs CLOSED OTHER THAN BY DECISION<sup>31</sup></b>	2981	3302	154	263	1048	577	226

<sup>30</sup> The data represented here is compiled from a review of The Center for Appropriate Dispute Resolution in Special Education (CADRE) State (Part B) Dispute Resolution Data Summaries. CADRE is funded by the Office of Special Education Program (OSEP) at the U.S. Department of Education to serve as the National Center on Dispute Resolution in Special Education. OSEP administers the IDEA. The information in the Data Summaries is provided by each State to OSEP on an annual basis.

<sup>31</sup> This number represents due process complaints that were withdrawn, dismissed, or resolved without a hearing.

**Figure 2<sup>32</sup>**  
**NYC Trend**

	<b>SY 2014-15</b>	<b>SY 2015-16</b>	<b>SY 2016-17</b>	<b>SY 2017-18</b>	<b>SY 2018-19</b>
<b>STATEWIDE</b>	5200	5464	6282	7635	6972 (as of 01/11/19)
<b>NYC</b>	4734 (91%)	5026 (92%)	5779 (92%)	7144 (94%)	6723 (96%)
<b>ROS</b>	466 (9%)	438 (8%)	503 (8%)	491 (6%)	249 (4%)

LEGEND: STATEWIDE - ALL LOCAL EDUCATIONAL AGENCIES IN NYS  
 NYC - NEW YORK CITY  
 ROS - REST OF STATE

## 2. Number of Due Process Complaints Filed

The overwhelming number of due process filings are in New York City, with the school district consistently commanding over 90% of the total number of due process complaints filed statewide since the 2014-15 school year.<sup>33</sup> (See Figure 2, above.) Further, within a four-school year span (i.e., 2014-15 through 2017-18), New York City had a 51% increase in the number of due process complaints filed (*see id.*), with the average number of due process complaints filed per day steadily increasing (*see Figure*

<sup>32</sup> The data points in Figure 2 were provided by SED. The numbers in Figure 2 do not correspond with the numbers reported to OSEP on an annual basis because there are a number of DPCs Filed prior to July 1 each year that are entered after the federal reporting date of July 1. Compare Figure 1, DPCs Filed for SY 2016-17 (i.e., 6027), with Figure 2, DPCs Filed for SY 2016-17 (i.e., 6282).

<sup>33</sup> Noteworthy, the number of due process complaints filed in New York City does not include thousands of other requests for tuition reimbursement sought through a 10-Day Notice (TDN) alone. (Interview of Managing Attorney 1, Managing Attorney 2, and Attorney, Special Education Unit, Office of General Counsel, NYCDOE.) Under IDEA, a parent may file a due process complaint seeking tuition reimbursement from the school district for alleged denials of a free appropriate public education. IDEA requires that the parent provide the school district with timely notice of the claim. The failure to provide timely notice is a consideration in whether to award reimbursement. In 2014, New York City “fast-tracked” reimbursement claims by permitting families to file a TDN alone without a corresponding due process complaint. See Press Release, Office of the Major, Mayor de Blasio and Speaker Silver Announce New Steps to Help Families of Students with Disabilities, June 24, 2014, <https://www1.nyc.gov/office-of-the-mayor/news/306-14/mayor-de-blasio-speaker-silver-new-steps-help-families-students-disabilities#/o>. Accessed Jan. 18, 2019. It is estimated that between 13,000 and 15,000 TDNs and due process complaints were filed in New York City in 2017 and 2018. (Interview of Managing Attorney 1, Managing Attorney 2, and Attorney, Special Education Unit, Office of General Counsel, NYCDOE.)



3). The reasons for this are beyond the scope of this review, though some attribute it to administrative changes made by Mayor Bill de Blasio in 2014 that made it easier and less litigious for families with students with disabilities in private schools to seek reimbursement of tuition and related expenses.<sup>34</sup>

**Figure 3<sup>35</sup>**  
**Average NYC Filings Per Day**

SCHOOL YEAR	AVG. PER DAY
2014-15	19
2015-16	20
2016-17	23
2017-18	29
2018-19	51 (as of 01/14/19)

The transactional costs of these claims to the New York City school district is substantial. For example, in fiscal year (FY) 2017,<sup>36</sup> New York City processed 4184 special education claims resulting in approximately a \$280 million payout, which represents 82% of all claims paid out by New York City in FY 2017.<sup>37</sup> In FY 2015, after Mayor de Blasio’s administrative changes, the number of special education claims increased by 73% (with 4479 in FY 2015 as compared to 2582 claims in FY 2014) but have since leveled off in the 4000 range since the initial uptick.<sup>38</sup>

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<sup>34</sup> See, e.g., Zimmerman, Alex. “New York City Now Spends \$325 Million A Year to Send Student with Disabilities to Private Schools.” *Chalkbeat*, Jan. 7, 2019, <https://www.chalkbeat.org/posts/ny/2019/01/07/private-school-tuition-reimbursement/>. Accessed Jan. 12, 2019.

<sup>35</sup> The data points in Figure 3 were provided by SED.

<sup>36</sup> July 1, 2016 through June 30, 2017.

<sup>37</sup> Stringer, Scott M. (2018). *Claims Report: Fiscal Year 2017*. Retrieved from the Office of the Comptroller of the City of New York website: <https://comptroller.nyc.gov/wp-content/uploads/documents/Claims-Report-FY-2017.pdf>. Accessed 12 Jan. 2019. Special education claims include both “claims on behalf of parents for the reimbursement of special education services costs and tuition, and claims for statutory attorneys’ fees where an underlying claim for special education reimbursement has been successful.” *Id.*

<sup>38</sup> *Id.*

### 3. *Number of Hearings and Conferences Scheduled in NYC Per Day*

Given the total number of due process complaints filed in New York City, the number of matters listed on the hearing calendar in New York City on a per day basis (i.e., days in which the NYCIHO is open for business) is not particularly surprising. And, given all else, this number is also rising. (See Figure 4.)

**Figure 4<sup>39</sup>**  
**Calendared Matters**

<b>SCHOOL YEAR</b>	<b>AVG. PER DAY</b>
2014-15	55
2015-16	69
2016-17	89
2017-18	106
2018-19	122 (as of 01/14/19)

### 4. *Number of Hearings Adjudicated*

Few hearings are actually fully adjudicated. For example, in SY 2016-17, only 11% of the total number of due process complaints filed resulted in written decisions.<sup>40</sup> (See Figure 1, above.) Of the 11%, the majority (482 or 71%) were decided within extended timelines,<sup>41</sup> 96 (or 14%) were decided within the 45-day timeline, 105 (or 15%) were untimely.<sup>42</sup> Forty-nine percent (49%) of the due process complaints filed were

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<sup>39</sup> The data points in Figure 4 were provided by SED. The per day average represents both scheduled hearings and conferences whether or not held.

<sup>40</sup> It is noted that 39% (or 2363) of the due process complaints filed were pending at the time the data was submitted to OSEP. The number of fully adjudicated hearings may have been higher than 11% in SY 2016-17.

<sup>41</sup> For purposes here, the validity of the extended timelines is assumed. Allegations of IHOs unilaterally extending the timelines were raised with the reviewer.

<sup>42</sup> IDEA and its implementing regulations require that a final decision, in non-disciplinary cases, be reached and mailed to each of the parties not later than 45 calendar days after the expiration of the 30-day resolution period, or the adjusted time periods described in 34 C.F.R. § 300.510(c). 34 C.F.R. § 300.515(a). A hearing officer

withdrawn, dismissed, or resolved without a hearing, with only 6% (or 164 of the 2981) resulting in resolution meeting agreements.

5. *Number of Pendency Hearings*

An anomaly in the numbers is the number of pendency hearings relative to the number of fully adjudicated hearings. This discrepancy is explained, in part, by the NYCDOE’s ongoing practice of not maintaining a student’s *uncontested* current educational placement absent a written order from an IHO.<sup>43</sup>

**Figure 5<sup>44</sup>**  
**Comparison of Fully Adjudicated Hearings with Pendency Hearings**

	<b>SY 2014-15</b>	<b>SY 2015-16</b>	<b>SY 2016-17</b>	<b>SY 2017-18</b>	<b>SY 2018-19</b>
<b>STATEWIDE FULLY ADJ. HEARINGS</b>	459	453	683	877	847 (as of 1/15/19)
<b>PENDENCY HEARINGS HELD – NYC</b>	584	714	902	1425	1482 (as of 1/15/19)
<b>PENDENCY HEARINGS HELD – ROS</b>	1	12	9	6	2

6. *Number of Extensions and Recusals*

The number of extensions granted in New York State is exceptionally high. (See Figure 6.) In SY 2017-18, for example, there were 36,369 requests granted statewide.<sup>45</sup> New York City alone accounts for 97% of all extensions granted in SY 2017-18. In fact, since SY 2014-15, New York City has decisively taken the lead in the number of requests

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may grant specific extensions of time beyond the 45-day period at the request of either party. 34 C.F.R. § 300.515(c); 8 NYCRR § 200.5(j)(5)(i).

<sup>43</sup> See *Letter to Goldstein*, 60 IDELR 200 (OSEP 2012). See also SOPM at 18 (“The NYCDOE requests a written Order of Pendency in each case in which pendency is sought by the Parent, regardless of whether pendency is disputed by the school district.”). This practice continues, as confirmed by discussions with IHOs serving in New York City.

<sup>44</sup> The data represented here is from the CADRE Dispute Resolution Data Summaries and data points provided by SED.

<sup>45</sup> In fact, there were 36370 requests for extensions filed. All but one was granted.

granted statewide, owning between 94 to 97% of the total number. To put this in perspective, the other 732 school districts in New York State,<sup>46</sup> account for 3 to 6% of the total requests granted during the same period.

**Figure 6<sup>47</sup>**  
**Number of Granted Extensions**

	<b>SY 2014-15</b>	<b>SY 2015-16</b>	<b>SY 2016-17</b>	<b>SY 2017-18</b>	<b>SY 2018-19</b>
<b>STATEWIDE</b>	15067	17447	24778	36369	20810 (as of 01/15/19)
<b>NYC</b>	14111 (94%)	16599 (95%)	23768 (96%)	35157 (97%)	20173 (97%)
<b>ROS</b>	956 (6%)	848 (5%)	1010 (4%)	1212 (3%)	637 (3%)

LEGEND: STATEWIDE – ALL LOCAL EDUCATIONAL AGENCIES IN NYS  
 NYC – NEW YORK CITY  
 ROS – REST OF STATE

Just as startling are the number of recusals in New York City, with 5634 in the school year that just ended (2017-18). The current school year (2018-19) has already surpassed last school year’s number and there are approximately six more months remaining to the school year.<sup>48</sup> (See Figure 7.)

And, here again, the New York City school district has the highest incidents of recusals as compared to rest of State (see Figure 7), with the number of recusals per IHO (serving New York City) varying widely (see Figure 8).

These disproportionate number of recusals are an impediment to the timely completion of due process hearings.<sup>49</sup>

<sup>46</sup> SED. (2018). *New York State Education At A Glance* (web page). Retrieved from <https://data.nysed.gov/>. Accessed Jan. 14, 2019.

<sup>47</sup> The data points in Figure 6 were provided by SED.

<sup>48</sup> The use of the term “recusal” as applied to the New York City school district is a misnomer. Recusal is the process by which an IHO is disqualified on objection of either party or disqualifies him/herself from presiding over a hearing because of self-interest, bias or prejudice. See Black’s Law Dictionary (10th ed. 2014). In practice, however, the IHOs in New York City are assigned due process complaints on an automatic rotational appointment basis. An IHO who is appointed but simply unavailable, or is available but for some reason chooses not to accept the appointment, is deemed to have recused him/herself.

<sup>49</sup> For an explanation on how the high number of recusals impede timely completion of due process hearings, see discussion on *Timely Appointment of IHOs and Subsequent Recusals* on page 41.

**Figure 7<sup>50</sup>**  
**Number of Granted Recusals**

	<b>SY 2014-15</b>	<b>SY 2015-16</b>	<b>SY 2016-17</b>	<b>SY 2017-18</b>	<b>SY 2018-19</b>
<b>STATEWIDE</b>	3333	1704	3959	5664	6979 (as of 01/15/19)
<b>NYC</b>	3309 (99%)	1697 (100%)	3942 (100%)	5634 (99%)	6968 (100%)
<b>ROS</b>	24 (1%)	7 (0%)	17 (0%)	30 (1%)	11 (0%)

LEGEND: STATEWIDE – ALL LOCAL EDUCATIONAL AGENCIES IN NYS  
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**Figure 8<sup>51</sup>**  
**Recusal Per IHO in NYC**

<b>Number of Recusals</b>	<b>IHOs Within Range in 2017</b>	<b>IHOs Within Range in 2018</b>
0 to 25	25	23
26 to 50	12	7
51 to 75	15	6
76 to 100	9	11
101 to 125	8	2
126 to 150	4	5
151 to 175	1	3
176 to 200	1	3
201 +	0	11
301 +	0	4

7. *Average Case Length (in days)*

The average number of days a case is open in New York State far exceeds the abbreviated timeline established in the IDEA and what is reasonable under an extended timeline. (See Figure 9.) The failure to promptly resolve due process complaints keeps

<sup>50</sup> The data points in Figure 7 were provided by SED.

<sup>51</sup> The data points in Figure 8 were provided by SED and are current as of November 8, 2018.

children in “administrative limbo”<sup>52</sup> and, for some, delays access to free appropriate public education to which they are entitled.

**Figure 9**<sup>53</sup>  
**Average Case Length (in days)**

	<b>SY 2014-15</b>	<b>SY 2015-16</b>	<b>SY 2016-17</b>	<b>SY 2017-18</b>	<b>SY 2018-19</b>
<b>STATEWIDE</b>	146	155	175	196	219 (as of 01/15/19)
<b>NYC</b>	149	159	181	202	225
<b>ROS</b>	115	114	114	120	140

LEGEND: STATEWIDE – ALL LOCAL EDUCATIONAL AGENCIES IN NYS  
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 ROS – REST OF STATE

8. *Number of IHOs*

The number of IHOs in New York State has remained constant for the past five (5) years (2014-18), with an average of 110 IHOs per year.<sup>54</sup> IHOs are part-time, independent contractors,<sup>55</sup> and many hold other part and full-time jobs.<sup>56</sup>

9. *In Sum*

The high number of due process complaints filed in New York City – the majority of which are resolved in favor of parents, as indicated by, for example, New York City’s \$280 million payout – raises valid questions of the school district’s ability to offer free appropriate public education to its students with disabilities. This apparent failure is longstanding as indicated by the exponential growth in the number of due process complaints since, at the least, SY 2014-15. Further study, followed by immediate, decisive action, is indicated.

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<sup>52</sup> *Engwiller v. Pine Plains Cent. Sch. Dist.*, 110 F. Supp. 2d 236, 33 IDELR 90 (S.D.N.Y. 2000) (“[T]he brevity of the 45-day requirement indicates Congress’s intent that children not be left indefinitely in an administrative limbo while adults maneuver over the aspect of their lives that would, in large measure, dictate their ability to function in a complex world.”).

<sup>53</sup> The data points in Figure 9 were provided by SED.

<sup>54</sup> Within these five (5) years, New York reached a high in 2015 with 125 IHOs and a low in 2018 with 98 IHOs. In the current calendar year (2019), there are 108 IHOs. (Data points provided by SED.)

<sup>55</sup> See 8 NYCRR § 200.1(x).

<sup>56</sup> Discussions with IHOs.

Conflating an already precarious situation is the high number of extensions and recusals in New York City, as well as the prolonged delays in resolving due process complaints, either by decision or otherwise. These systemic deficiencies are symptomatic of an unhealthy hearing system that requires immediate intervention.

Root causes of these systemic deficiencies are discussed below.

C. Key Observations

1. *Two Masters*

Throughout the review, NYCIHO interviewees guardedly engaged with the reviewer. Though this phenomenon was not widespread, it was most pronounced during discussions with the senior staff and attorneys, who sidestepped with greater frequency pointed questions probing potential process failures. The participation of the NYCDOE's Office of the Auditor General only served to complicate the situation.

This protectionist mindset is understandable, in part.

The NYCIHO functions to “oversee[] the administrative and clerical aspects of impartial hearings *for the [NYC]DOE.*”<sup>57</sup> Its primary purpose, however, is to support the work of the IHOs. This dichotomy in functions has the NYCIHO balancing the needs of two masters, the first of which controls its purse strings while the second is not constrained by the financial limitations of the first. Yet, any complicitness in concealing the shortfalls that plagues it to protect the first master, diminishes the value of the second whose need is the reason for the NYCIHO's very existence.

2. *SED's Commitment to Change*

In September 2016, OSEP determined that New York State had a high rate of fully adjudicated hearings with extended timelines and that it did not have procedures in place to ensure that IHOs are granting extensions consistent with 34 C.F.R. § 300.515(c). OSEP further determined that New York State “is not exercising its general supervisory responsibility to ensure that [IHOs] adhere to the 45-day timeline for issuing final decisions in due process hearings.”<sup>58</sup>

SED shares OSEP's commitment to improving New York States' due process system's efficiency, timeliness, and overall operation. To this end, SED has taken, and

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<sup>57</sup> SOPM at 6 (emphasis added). Specifically, the NYCIHO calendars hearing dates, communicates with parties, provides recording equipment and the individuals to operate it, secures translation/interpretation and transcription services, and provides clerical support inclusive of decision/order formatting and the processing of evidence. *Id.* at 6, 8.

<sup>58</sup> See New York Monitoring and Support Visit Summary and Next Steps, OSEP (September 28-30, 2016) (on file with the New York State Education Department).

continues to take, corrective action to address the overuse of extended timelines, including:

- Initiating a compliance assurance plan requiring the NYCISO to revise the IHO appointment process to ensure the availability of an IHO prior to his/her appointment to a case and to limit recusals;
- Releasing in September 2017 a memorandum to the field advising and reminding all parties of important procedural requirements relating to special education due process hearings;
- Releasing in January 2018 a Q & A to the field on impartial hearings procedures;
- Increasing monitoring of hearing timelines by SED Office of Special Education staff;
- Providing in September 2017, with a follow-up review in May 2018, focused training to all certified IHOs on impartial hearing timelines and extensions, and providing on an as needed basis additional training to IHOs identified by SED as requiring technical assistance;
- Collaborating and discussing with the National Center for System Improvement (NCSI) on New York State's due process system, including determination of root cause and the identification of strategies to address timeliness of due process hearings;
- Increasing the number of certified IHOs by recruiting and training 10 new IHOs who were added to the IHO roster in November 2018;
- Establishing an internal work group to review New York State's two-tier system and discuss how it might be improved; and,
- Initiating the independent review of the NYCISO, which is the subject of this report

This review uncovered sincere disagreements on how process failures of the NYCISO might be improved. Yet, it revealed wide consensus on the need to make changes to how the NYCISO operates, as well as a shared commitment to its improvement. To this end, despite the possibility that this review may also unveil SED's own shortcomings, SED's steadfast commitment to an utterly objective and candid review of the NYCISO by a reviewer granted SED's "full authority," is commended. Indeed, though laudable, it is simply a start. More needs to be done and will be done. For SED will be measured not by what it learned in this report but rather by what decisive actions it takes moving forward and the resulting outcomes.



### 3. *Interconnectedness*

This review identified substantial deficiencies in the policies, procedures and practices specific to special education impartial hearings in New York City, including the high rate of extensions granted, the considerable number of recusals, the inadequate payment structure for IHOs, and the insufficient number of hearing rooms available to accommodate the day-to-day hearing schedule. Each presents a threat to due process. Collectively, however, they render an already fragile hearing system vulnerable to imminent failure and, ultimately, collapse.

That it has not yet collapsed is remarkable given the staggering numbers of due process complaints filed in New York City. (See Figure 2, above.) A plausible explanation for this may be the mutually beneficial relationships that have formed to allow IHOs, parties (inclusive of the NYCDOE), and the NYCISO to coexist by “turning a Nelson’s eye.” Though the NYCISO finds itself between the proverbial rock and a hard place, serving two masters, such does not excuse any failure to comply with basic tenets of due process, including, for example, having an adequate number of hearing rooms available to accommodate the elevated number of hearings on a day-to-day basis and fairly compensating IHOs commensurate with their responsibilities.

## **IV. ADDITIONAL FINDINGS SPECIFIC TO TARGETED AREAS**

The following additional findings help inform the recommendations included in this report.

### A. NYCISO – Generally

#### 1. *Impartiality*

The NYCISO maintains some degree of autonomy and independence, though it reports to the Deputy Chancellor of School Planning and Development. The Office of School Planning and Development oversees for the NYCDOE space planning and management, school design and charter partnerships, nonpublic schools, and the Education Construction Fund.<sup>59</sup>

With respect to impartiality, the NYCISO’s stated objective is to “remain impartial at all times,” communicating with parties and IHOs in a professional and free of bias manner.<sup>60</sup> This rings true, with one notable exception – the degree of access

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<sup>59</sup> See Chancellor Carranza Announces Streamlined Support and Leadership Structure for New York City Schools, (2018), <https://www.schools.nyc.gov/about-us/news/announcements/contentdetails/2018/06/27/chancellor-carranza-announces-streamlined-support-and-leadership-structure-for-new-york-city-schools> (last visited Jan. 15, 2019).

<sup>60</sup> SOPM at 6.

NYCDOE personnel have to the NYCIHO's Impartial Hearing System (IHS).<sup>61</sup> Limited access to IHS is granted to district representatives of the committees on special education, the Office of the General Counsel, including the attorneys assigned to cases before the NYCIHO, and representatives of the Impartial Hearing Representation Office, whose staff represents the interest of the NYCDOE in claims filed with the NYCIHO.<sup>62</sup> Read-only access is granted to other NYCDOE employees and IHOs.<sup>63</sup> Parents or their representatives are not granted access whatever.<sup>64</sup> Such operational practice can be perceived as providing preferential treatment to one party to the disadvantage of the other.

Such perception is not without substance. For example, in the New York City school district, when the parent files the due process complaint, the commencement of the 45-day timeline is triggered when a school-district level representative enters information relating to the resolution process into IHS, or the 30-day resolution period has elapsed, whichever comes first.<sup>65</sup> Only then is the assigned IHO notified of the need to schedule the prehearing conference or hearing within 14 days.<sup>66</sup> A lapse in entering

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<sup>61</sup> IHS is a web-based case management system for collecting and maintaining information related to due process complaints filed in New York City. SOPM at 8.

<sup>62</sup> Interview of System Administrator, NYCIHO. *See also* Memorandum from Appeals Processor to Unknown (undated) (on file with the NYCIHO) (addressing outage to IHS and how it would affect user, including "Impartial Hearing Office, Hearing Officers, District Representatives, the Office of General Counsel, and the Implementation Office").

<sup>63</sup> *Id.*

<sup>64</sup> Interview of System Administrator, NYCIHO.

<sup>65</sup> Interview of Case Coordinator, NYCIHO. The 30-day resolution period must be adjusted in three circumstances: (1) both parties agree in writing to waive the resolution meeting; (2) the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; and, (3) both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or the LEA withdraws from the mediation process. 34 C.F.R. § 300.510(c).

<sup>66</sup> New York, unlike the IDEA, sets a timeline by when the hearing officer must initiate either the prehearing conference or the hearing. Specifically, the hearing officer must commence the prehearing conference or the hearing within the first 14 days after the hearing officer is appointed, if the school district filed the complaint. 8 NYCRR § 200.5(j)(5), § 200.5(j)(3)(iii)(a). Similarly, if the parent filed the complaint, the prehearing conference or the hearing must commence within the first 14 days of *receipt* by the hearing officer of the parties' written waiver of the resolution meeting, written confirmation that a mediation or resolution meeting was held but no agreement could be reached, or written notification that either party withdrew from mediation (after having agreed to continue mediation beyond the 30-day resolution period). 8 NYCRR § 200.5(j)(5), § 200.5(j)(3)(iii)(b). The prehearing conference or hearing must also commence within 14 days of the expiration of the 30-day resolution period, unless the parties agree in writing to continue mediation at the end of the 30-day resolution period. *Id.*

the information only serves to delay the commencement of the hearing process for the parent.

## 2. *Physical Space*

The NYCIHO is located in downtown Brooklyn, at 131 Livingston Street. It is easily accessible by nine (9) subway lines, making it a desirable, central location for those traveling from surrounding neighborhoods, boroughs, and other counties. The building housing the NYCIHO has six (6) floors, with the NYCIHO occupying space on the second floor. The IHRO also occupies space on the second floor. The second floor is L shaped.

The NYCIHO has 17 rooms on the second floor and the IHRO has four (4). There are also two sizable computer rooms, a sizable lunch room, and two bathrooms. Access to the second floor is either through two sets of stairs or two elevators, one of each on either end of the L-shaped floor.

Seven (7) of the 17 rooms available to the NYCIHO are designated administrative offices/space. The remaining 10 rooms are designated hearing rooms, with one of these rooms (Room 202C) also substituting as work space for IHOs.<sup>67</sup> An additional conference room on the third floor belonging to another office is available to the NYCIHO for use as a hearing room between the hours of 9 a.m. and 5 p.m.<sup>68</sup>

All hearing rooms have access to corded, table-mounted office telephones with built-in speakers and microphones. There are no Polycom Sound Stations (or similar telephone conference system) in any of the hearing rooms. Call/voice-quality control of existing telephones was not assessed.

Some hearing rooms are smaller than others, restricting the number of people who can sit comfortably in each. Nonetheless, seating is adequate, and tables are appropriately proportional to individual room sizes. Rooms were observed to be unkempt, cluttered, and having bare walls.

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<sup>67</sup> Room 202C is used for “overflow,” hearing matters. (Interview of Hearing Room Coordinator, NYCIHO.) Typically, only prehearing conferences are scheduled for this room. In-person participation in prehearing conferences held in Room 202C by school district personnel is not atypical. (Interview of Operations Manager, NYCDOE.) Evidence of pending hearings is stored in unlocked cabinets on shelves in boxes in this room and IHO mailboxes are also situated in the room. (Interviews of Hearing Room Coordinator and Operations Manager.) The appropriateness of using Room 202C for any hearing matters with one or both parties present in person is highly questionable given IDEA and Family Educational Rights and Privacy Act (FERPA) confidentiality requirements. See 20 U.S.C. §§ 1412(a)(8), 1417(c); 20 U.S.C. § 1232g.

<sup>68</sup> Interview of Hearing Room Coordinator.

Technical specification as to whether hearing rooms are soundproofed is unavailable.<sup>69</sup> Sound bleeding was observed in Room 204H with conversations in the adjacent rooms (204I and 208) discernible.<sup>70</sup> Similar leakage is also present in other hearing rooms.<sup>71</sup>

Posted signs near hearing rooms remind others of the need to keep noise to a minimum. The Hearing Room Coordinator “monitors” the hallway during hearing hours to ensure compliance.<sup>72</sup>

Access to computer terminals and printers by IHOs and parties is restricted. Only two (2) of the 11 rooms were observed to have computers but no printers,<sup>73</sup> one of which was Room 202C, which is used predominantly by IHOs. In the second, the computer was not connected to an electrical outlet or ethernet/USB lines. Access to a copier is restricted to NYCISO personnel and IHOs. The inability of parties, particularly school district personnel with access to student records, to have use of computer terminals and a copier has resulted in delays in the past and continues to hinder the timely completion of hearing proceedings.<sup>74</sup>

All hearing rooms are WiFi accessible.<sup>75</sup> Access to it is granted to IHOs but not parents or their representatives or school district personnel other than NYCISO staff.<sup>76</sup>

An adequate number of electrical outlets were observed in most hearing rooms, with at least three of the four walls each having an outlet.

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<sup>69</sup> Written Response to Reviewer Question Provided by Chief Administrator, NYCISO (November 30, 2018) (on file with the NYCISO).

<sup>70</sup> The Operations Manager has received complaints about the sound bleeds. Interview of Operations Manager, NYCISO.

<sup>71</sup> Interview of Hearing Room Coordinator.

<sup>72</sup> Interview of Deputy Chief Administrator, NYCISO.

<sup>73</sup> It is noted that the use of a network printer might be an option.

<sup>74</sup> Discussions with IHOs; Interview of Senior Policy Advisor, Committees on Special Education, NYCDOE. Conflicting information was provided to the reviewer regarding the ability of school personnel to have access to computers and a copier while present in the NYCISO. Senior Policy Advisor acknowledged that the NYCISO does not provide access to its computers and copier to school district personnel but indicated that Committee on Special Education 8, which is also housed in 131 Livingston Street, now provides school personnel with access to its computers and copier. (Interview of Senior Policy Advisor.) IHOs interviewed related that access continues to be limited and can disrupt hearing proceedings when prolonged breaks must be taken to allow school personnel to acquire or copy necessary documents. (Discussions with IHOs.)

<sup>75</sup> The NYCISO installed the WiFi in late 2017. Interview of Hearing Room Coordinator.

<sup>76</sup> *Id.*

Appropriate room ventilation and temperature regulation is an ongoing problem with the hearing rooms. Hearing rooms are either “very hot” or “notoriously cold.”<sup>77</sup> Cooling is achieved through the use of air conditioning and/or fans: one (1) hearing room has central air conditioning; five (5) hearing rooms have either window or portable air conditioning units; and, five (5) hearing rooms do not have air conditioning whatever. The window and portable air conditioning units are loud and affect the quality of the electronic recording of the proceedings.<sup>78</sup>

Poor ventilation has resulted in hearing cancellations.<sup>79</sup>

All hearing rooms have fans. Radiators heat the rooms.

Inadequate ventilation and temperature control in the hearing rooms has resulted in hearings being conducted with doors open.<sup>80</sup> This is a long-standing issue that the NYCIHO had been directed to correct.<sup>81</sup> It has not done so.<sup>82</sup>

The lunch room serves multiple purposes. It is managed by the NYCDOE’s Field Support Center – Brooklyn North.<sup>83</sup> Personnel from all offices residing at 131 Livingston Street have access to it.<sup>84</sup> It has typical furnishings of a lunch room, including round tables, chairs, cabinets, and a working sink. Two vending machines are also present.

In addition to its obvious purpose, the lunch room is also used as the NYCIHO’s waiting room and as one of the Field Support Center’s holding rooms for reassigned teachers.<sup>85</sup> In the four days the reviewer completed a site visit of the NYCIHO, there were as many as 20 reassigned teachers by early morning.<sup>86</sup> Coveted spaces – tables

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<sup>77</sup> Interviews of Senior Director of Representation and Deputy Director, Impartial Hearing Representation Office (IHRO), Special Education Office, Division of Specialized Instruction and Student Support, NYCDOE; Discussions with IHOs. Corroborated by Hearing Room Coordinator and Deputy Chief Administrator.

<sup>78</sup> Discussions with IHOs; Interview of Hearing Room Coordinator.

<sup>79</sup> IHO written feedback.

<sup>80</sup> Interview of Hearing Room Coordinator; Discussions with IHOs.

<sup>81</sup> Letter from Patricia J. Geary, Coordinator, Office of Special Education, SED, to Executive Director, Division of Financial Operations, NYCIHO (November 10, 2014) (on file with SED) (Letter to Executive Director).

<sup>82</sup> The reviewer observed multiple hearings being conducted with doors open on all four days that he was onsite. Conversations with participants in these hearing rooms confirmed that ventilation / temperature control were the reasons for keeping the doors open.

<sup>83</sup> Interview of Hearing Room Coordinator.

<sup>84</sup> *Id.*

<sup>85</sup> Reassigned teachers are NYCDOE employees who are the subject to an investigation dealing with potential misconduct.

<sup>86</sup> Identification of the reassigned teachers was aided by the Hearing Room Coordinator and by the reviewer’s own observations.

and chairs near electrical outlets – were mostly taken by eight in the morning.<sup>87</sup> By nine in the morning most tables were occupied by either reassigned teachers, IHOs, parents and/or their representatives, and school district personnel.

On days that there are considerable number of hearing matters on the NYC IHO calendar, there is an insufficient number of tables and chairs to accommodate everyone in the lunch room, in part, because of the space taken up by the reassigned teachers.<sup>88</sup> Overflow spills into the hallway.<sup>89</sup> Milling around in the hallways and near hearing rooms was observed.

Security concerns regarding the reassigned teachers were brought to the reviewer’s attention, with women feeling most vulnerable. No specific incidents were reported but all who spoke with the reviewer were judged to be sincere in their concerns.

School safety officers patrol the second floor.<sup>90</sup> This was observed by the reviewer. Near the main entrance to the second floor sits a security desk. However, in the four days that the reviewer was onsite, the desk was unmanned on three of the four days and for a limited time on the fourth.

There is no designated area on the second floor for parent attorneys/advocates to have confidential discussion with their clients.<sup>91</sup> Attorneys were observed having discussions with their clients in the lunch room, hallway, and stairwells within earshot of others. The need for privacy to have confidential discussions with clients has been brought to the attention of the Hearing Room Coordinator.<sup>92</sup> IHOs have requested of the Deputy Chief Administrator confidential space for themselves and for parent attorneys.<sup>93</sup>

### 3. *Budget and Availability of Funds*

The cost of operating the NYC IHO is considerable. IHO compensation accounts for two-thirds of hearing related expenses. Transcription services account for 30% of hearing related expenses. (See Figure 10.)

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<sup>87</sup> Interestingly, by day two of the site visit, it was apparent to the reviewer that preferred tables were “claimed.”

<sup>88</sup> Discussion with IHOs; Interview of Hearing Room Coordinator; Reviewer Observation.

<sup>89</sup> *Id.* It was also reported that that there is no cell service in the lunchroom, which may explain why some individuals find their way into the hallway. (Discussion with IHO.)

<sup>90</sup> Interview of Deputy Chief Administrator.

<sup>91</sup> Interviews of Hearing Room Coordinator and Deputy Chief Administrator; Discussions with IHOs.

<sup>92</sup> Interview of Hearing Room Coordinator.

<sup>93</sup> Interview of Deputy Chief Administrator; Discussions with IHOs.

**Figure 10<sup>94</sup>**  
**Hearing Related Expenses – FY 17, 18, and 19**

<b>FISCAL YEAR</b>	<b>2017</b>	<b>2018</b>	<b>2019</b> (as of 11/30/18)
PRINT SHOP	\$10,993	\$39,000	\$23,163
HEARING OFFICERS	\$3,873,780	\$4,204,635	\$3,429,716
TRANSCRIPTS	\$1,873,481	\$1,647,816	\$1,525,651
TRANSLATION SERVICES	\$153,626	\$168,506	\$171,771
<b>TOTAL</b>	<b>\$5,911,880</b>	<b>\$6,059,957</b>	<b>\$5,150,301</b>

Payment amounts to IHOs vary, with most IHOs billing \$100k or less and few exceeding \$150k. (See Figure 11.)

**Figure 11<sup>95</sup>**  
**IHO Payments**

<b>PAYMENT RANGE</b> (in thousands)	<b>FY 18</b>	<b>FY 17</b>	<b>FY 16</b>
<b>0-50</b>	32	39	54
<b>51-100</b>	26	24	16
<b>101-150</b>	10	8	7
<b>151-200</b>	3	3	0

“Funds do run out” during the fiscal year, and the NYCIHO seeks additional allocations of money.<sup>96</sup> In FY 2018 alone, there were two reported lapses in payments exceeding a few months.<sup>97</sup> These lapses have resulted in IHOs taking themselves off rotation or declining appointments of cases.<sup>98</sup>

<sup>94</sup> The data points in Figure 10 were provided by NYCIHO.

<sup>95</sup> These data points were provided by the NYCDOE and were current as of November 29, 2018. Payments are not apportioned to the fiscal year in which the work is completed but, rather, to when invoices were presented and paid. Interview of Accounting Clerk, NYCDOE.

<sup>96</sup> Interview of Accounting Clerk. *See also* Email Correspondence from Chief Administrator, NYCIHO, to Cathryn Tisenchek, Supervisor, Office of Special Education, NYSED (July 11, 2018) (on file with NYSED).

<sup>97</sup> Discussions with IHOs. Interview of Chief Administrator, NYCIHO (“Typical wait 90 days.”).

<sup>98</sup> Discussions with IHOs.

## B. IHO Compensation Policy

In 2001, New York State approved a *maximum* compensation rate for IHOs of \$100 per hour for prehearing, hearing, and post-hearing activities.<sup>99</sup> The IHO compensation rate has not been revised in 17 years. The compensation rate is significantly lower than the attorneys who appear before the IHOs.<sup>100</sup> An IHO with “impressive credentials” and “very experienced ... in IDEA matters” can see a bump of 350% to their hourly rate (assuming the maximum rate of \$100 is paid) simply by litigating IDEA cases rather than deciding them.<sup>101</sup>

SED’s compensation rate policy does not prescribe with specificity a payment schedule. Each school district is tasked with adopting a written policy for the selection and appointment of an IHO.<sup>102</sup> There is no requirement for a detailed written policy.<sup>103</sup>

IHOs serving in New York City are not compensated on an hourly basis. The NYCDOE has adopted a detailed compensation policy, last updated in FY 2014.<sup>104</sup> The rates have remained unchanged since 1998. The Compensation Policy sets forth a fee schedule of various IHO tasks that are compensable. Fees are capped for each task.<sup>105</sup> Actual time invested relative to the undertaking is of no significance.<sup>106</sup> The maximum number an IHO can bill per task per case is also capped.<sup>107</sup> Travel and other expenses (e.g., postage) are not reimbursable.<sup>108</sup>

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<sup>99</sup> Memorandum from Lawrence C. Gloeckler, to District Superintendents, et. al (August 2001), <http://www.p12.nysed.gov/specialed/publications/policy/ihocompmemo.html>, Accessed Jan. 17, 2019. In New York State, pursuant to Education Law 4404, the Commissioner of Education establishes the maximum rates for IHO compensation *subject to* the approval of the Director of the Division of the Budget. N.Y. EDUC. LAW Art. 89 § 4404(1)(c).

<sup>100</sup> *See, e.g., M.K. v. Arlington Central Sch. Dist.*, 119 LRP 347 (S.D.N.Y. 2019) (finding that an hourly rate of \$450 is reasonable for an attorney with “impressive credentials” and “very experienced ... in IDEA matters”).

<sup>101</sup> In *M.K., supra*, IHO Barbara Ebenstein was awarded \$450 per hour for work associated with the prosecution of an impartial hearing under IDEA. The court noted IHO Ebenstein’s experience as a hearing officer to determine what a reasonable rate would be for someone with her experience. *See id.*, n.5.

<sup>102</sup> 8 NYCRR § 200.2(b)(9).

<sup>103</sup> *Id.*

<sup>104</sup> *See* NYCDOE, Impartial Hearing Officer Compensation Policy (FY 2014) (on file with the NYCIHO) (Compensation Policy).

<sup>105</sup> *Id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See, e.g., id.* at 4 (entitlement to “an administrative fee”; cannot bill for “more than one ... [prehearing conference] per case”).

<sup>108</sup> *See* Compensation Policy at 6.



Other school districts in New York State compensate IHOs at an hourly rate of \$100 and reimburse travel and other expenses.<sup>109</sup> It is reported that IHOs are paid significantly more outside of New York City for comparable work performed in New York City.<sup>110</sup> (See Figure 12.)

**Figure 12**<sup>111</sup>  
**Invoice Comparisons**

	<b>TOTAL HOURS BILLED</b>	<b>TRAVEL &amp; EXPENSES, IF ANY</b>	<b>TOTAL AMOUNT BILLED</b>	<b>AMOUNT, IF BILLED TO NYC</b>	<b>PERCENT DECREASE</b>
<b>SAMPLE 1</b>	175.5	\$370.21	\$17,920.21	\$3460	81%
<b>SAMPLE 2</b>	73.5	0	\$7350	\$1900	74%
<b>SAMPLE 3</b>	30.7	\$511.89	\$3581.89	\$1190	67%
<b>SAMPLE 4</b>	216.88	525	\$22,483	\$5300	76%

The NYC IHO has held internal meetings to review the Compensation Policy and has submitted proposed revisions to “upper management.”<sup>112</sup> Management has “denied” these requests.<sup>113</sup>

The NYC IHO does not compensate IHOs for performing functions essential to the efficient and timely administration of due process complaints, including:

- Conducting more than one prehearing conference per case, unless the due process complaint has been amended.<sup>114</sup>
- Drafting a written summary of the prehearing conference.<sup>115</sup>
- Conducting status conferences.<sup>116</sup>

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<sup>109</sup> Discussions with IHOs; review of various invoices for services rendered by an IHO (on file with reviewer).

<sup>110</sup> Discussions with IHOs; review of a sampling of invoices submitted by IHOs for work performed *outside* of New York City delineating what the payment would have been if the work had been performed in New York City.

<sup>111</sup> The data points were provided by IHOs who voluntarily submitted their invoices to the reviewer for review. For purposes of this illustration, the accuracy of the invoices is assumed. It is not known whether the amounts billed were actually paid. The hourly rate billed in all three sample invoices for the work performed was \$100 per hour.

<sup>112</sup> Interviews of Claims Processor, Appeals Processor, Accounting Clerk, and Operations Manager.

<sup>113</sup> Interview of Operations Manager.

<sup>114</sup> See Compensation Policy at 4.

<sup>115</sup> See *id.* at 6.

<sup>116</sup> See *id.* at 5.

- Drafting interim orders on any other matter other than pendency, sufficiency, and consolidation.<sup>117</sup>
- Reviewing transcripts and legal memoranda submitted by the parties.<sup>118</sup>
- Certifying the record<sup>119</sup>

“Soft policies” have resulted in the NYC IHO not following the Compensation Policy as written.<sup>120</sup> These “soft policies” are not published, resulting in varying billing practices amongst IHOs.<sup>121</sup>

Inadequate compensation has resulted in IHOs engaging in widespread practices that are inconsistent with appropriate, standard legal practice and best practices,<sup>122</sup> including:

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<sup>117</sup> *See id.* at 6. There are many other matters handled by IHOs that may necessitate, or even require, the issuance of an interim, written order, including: requests for extensions of the timeline; appointment of a guardian *ad litem*; requests for independent educational evaluations; and, resolving disputes relating to evidentiary matters, subpoenas, and the statute of limitations.

<sup>118</sup> *See id.* at 5. The review of transcripts is only compensated upon appointment to a case that was already in progress and previously assigned to another IHO or remanded to the same IHO after an appeal. *Id.*

<sup>119</sup> *See, generally*, Compensation Policy. The NYC IHO takes the position that the Administrative Fee of \$100 covers the cost of certifying the record. (Interview of Accounting Clerk.) The Administrative Fee, however, simply covers the cost of transmitting the record. *See* Compensation Policy at 4. Transmittal of the record is not the same as certifying the record. *See* 8 NYCRR § 200.5(j)(5) (“After a final decision has been rendered, the [IHO] shall promptly transmit the record to the school district *together with a certification* of the materials included in the record”) (emphasis added).

<sup>120</sup> Interview of Accounting Clerk; Discussions with IHOs. In a written statement dated December 12, 2018, the NYC IHO informed the reviewer that it “follows the pay policy as it is written....” (New York City Response to SED (December 12, 2018) (on file with reviewer).) The accuracy of this statement is not substantiated. Accounting Clerk credibly acknowledged that the NYC IHO has adopted “soft policies” allowing for additional compensation beyond what is written in the Compensation Policy. Accounting Clerk offered three examples. An IHO is compensated for more than three (3) hearings per day at an additional fee of \$100 per case even though the Compensation Policy limits compensation to no more than three (3) cases per day at a maximum total fee of \$300. IHOs are also compensated for an unlimited number of adjournments per case. The Compensation Policy limits the number of adjournments to one (1) per case. Finally, an IHO is paid an administrative fee of \$100 per case even if the IHO declines the case after appointment for a reason other than a conflict of interest. The Compensation Policy indicates that an administrative fee would not be paid “for any reason other than a conflict of interest” or where the IHO is “appointed in error (i.e., invalid case, keystroke/data entry error).” Accounting Clerk’s representation is credited as confirmed in discussions with IHOs.

<sup>121</sup> Discussions with IHOs.

<sup>122</sup> Discussions with IHOs and party representatives.

- low incidence of prehearing conferences;
- premising their acceptance of an appointment on the nature of the due process complaint and/or the parent representative;
- scheduling non-consecutive hearing days over multiple months;
- scheduling multiple matters on the same day to increase the amount that can be billed on a per day basis;<sup>123</sup>
- writing decisions differently than outside of New York City;<sup>124</sup>
- not issuing interim orders for which there is no compensation, including interim orders on requests for extensions of the timeline;
- deciding prehearing matters during the actual hearing (e.g., whether the statute of limitations applies)

### C. Insufficient Number of Hearing Rooms

The number of available hearing rooms (11, including Room 202C) is insufficient to accommodate the number of hearing matters scheduled daily on the calendar. (See Figure 4.) The NYC IHO has engaged in a practice of either capping the number of hearing matters that can be scheduled on particular dates or asking IHOs to reschedule hearing matters that are already scheduled on the calendar to other days.<sup>125</sup>

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<sup>123</sup> For example, the maximum fee for one full-day of hearing for the same case is \$300 billed as an “H1.” See Compensation Policy at 5. Multiple cases, however, can be heard in one day. An IHO, therefore, can schedule eight (8) cases for one day and bill each as an “H3,” per “soft policy,” which commands \$100 per case fee for a total of \$800. See *id.* Alternatively, an IHO can schedule a combination of pendency hearings and hearings and increase the total amount s/he can bill for the day. For example, on one of the days this reviewer was onsite at the NYC IHO, one IHO held seven (7) pendency hearings and two (2) hearings, allowing the IHO to bill a *minimum* of \$2100. (An additional fee of \$150 is paid for each pendency order issued by an IHO.) There is an apparent financial incentive to schedule multiple matters in one day over one full-day of hearing.

<sup>124</sup> An IHO candidly shared, “I write New York City decisions differently than cases upstate ... beautiful job upstate, good job in New York City.” Discussion with IHO.

<sup>125</sup> See, e.g., Email Correspondence from System Administrator, NYC IHO, to Unknown (August 8, 2017) (on file with NYC IHO) (advising that, due to the number of hearings scheduled for Wednesday, August 9, 2017, the NYC IHO is “unable to add-on any additional hearings” to the calendar); Email Correspondence from System Administrator, NYC IHO, to Unknown (October 9, 2018) (on file with NYC IHO) (advising that, due to the number of hearing scheduled for Thursday, October 11, 2018, the NYC IHO is “unable to add-on any additional hearings” to the calendar); Email Correspondence from System Administrator, NYC IHO, to Unknown (October 9, 2018) (on file with NYC IHO) (asking that, due to the number of hearings scheduled for October 18, 2018, if it is “all possible ... to move a few ... hearing[s] from Thursday to Friday).

The lack of an adequate number of rooms has resulted in prolonged delays (e.g., two-plus hours) in commencing hearings on time.<sup>126</sup> Hearing room assignments are on a first come, first served basis when there are more hearing matters scheduled for an appointed time than there are available hearing rooms.<sup>127</sup> As hearing rooms become available, cases are called and assigned hearing rooms.<sup>128</sup>

These prolonged delays have resulted in parties losing witnesses, feeling rushed to complete the presentation of their case, and having to reschedule cases to another day because of IHO time constraints.<sup>129</sup> At least one IHO reported that, in the absence of a “special situation,” the school district is given no “more than 30 minutes beyond the scheduled time to provide ... a room or else [the IHO] default[s]” the school district.”<sup>130</sup>

#### D. Insufficient Number of School District Representatives

Three separate offices represent the interests of the NYCDOE before the NYCIHO. They are the Special Education Unit of the Office of the General Counsel (SEU), the Impartial Hearing Representation Office (IHRO), and the Committees on Special Education (CSE).<sup>131</sup> Each has responsibility for due process complaints filed in assigned community school districts and/or committees on special education.<sup>132</sup>

The IHRO and the CSE each has approximately 20 school district representatives available to appear at impartial hearings. The SEU has 62 attorneys of which approximately 35 of them oversee free appropriate public education matters, including representing the NYCDOE in due process hearings.<sup>133</sup> Availability of an adequate number of school district representatives to cover calendared cases has resulted in hearing delays.<sup>134</sup> School district representatives are scheduled to appear in multiple cases at the same time, making their availability difficult.<sup>135</sup>

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<sup>126</sup> Discussions with IHOs and party representatives.

<sup>127</sup> Interview of Hearing Room Coordinator.

<sup>128</sup> *Id.*

<sup>129</sup> Discussions with party representatives.

<sup>130</sup> Written correspondence from IHO.

<sup>131</sup> Interviews of representatives from each of these NYCDOE offices.

<sup>132</sup> *Id.* The SEU has responsibility for due process complaints filed from committee on special education 9. The IHRO has responsibility for due process complaints filed from community school districts 1 through 32, District 75, and committee on special education 1. The CSE has responsibility for due process complaints filed from committees on special education 2 through 8 and 10. *Id.*

<sup>133</sup> Interviews of representatives from each of these NYCDOE offices.

<sup>134</sup> Discussions with IHOs, parent representatives; Interview of Hearing Room Coordinator.

<sup>135</sup> *Id.* For example, committee on special education 7 processes between 1200 and 1400 due process complaints per year. (Interview of Executive Director and Senior Policy Advisor.) Only 4 individuals, however, represent committee on special education 7 in impartial hearings. (*Id.*) In three of the four days this reviewer was onsite at the NYCIHO, committee on special education 7 had 24, 31, and 32 hearing matters

#### E. Appointment and Recusal

In FY 2018, there were 71 IHOs listed on New York City's rotational appointment list.<sup>136</sup> The high volume of due process complaints, however, has resulted in many going off list as temporarily unavailable for new appointments, resulting in an inadequate number of available hearing officers to absorb any new complaint filings and to be reassigned cases in which the appointed IHO declined appointment.<sup>137</sup> The failure to have an adequate number of available IHOs impedes the timely administration of due process complaints.<sup>138</sup>

The number of recusals in New York City is a significant impairment to the timely adjudication of due process complaints. Each instance of recusal reviewed by the reviewer resulted in several months of delays. (See Figure 13.)

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scheduled, respectively. (Review of Scheduled Hearings calendars provided by the NYCIHO.)

<sup>136</sup> See NYCDOE, FY18 – FY14 [sic] Hearing Officer Payments document (November 29, 2018) (on file with the NYCDOE). This number has remained fairly constant. In FY 2017 and FY 2016, there were 74 and 77 IHOs listed, respectively. *Id.*

<sup>137</sup> See, e.g., Email Correspondence from Operations Manager, NYCIHO, to Chief Administrator, NYCIHO (January 4, 2019) (on file with SED) (explaining that 20 IHOs in rotation with 435 recusal requests to process and approximately 30 new complaints filed); Email Correspondence from Cathryn Tisenchek, Supervisor, SED, to Joanne LaCrosse, Coordinator, Office of Special Education, SED (January 18, 2019) (on file with SED) (explaining that 13 IHOs in rotation with 300 recusal requests to process and approximately 59 new complaints filed).

<sup>138</sup> Email Correspondence from Cathryn Tisenchek, Supervisor, SED, to Joanne LaCrosse, Coordinator, Office of Special Education, SED (January 18, 2019) (advising that, as of January 18, 2019, there were 1670 late cases in New York State; 1645 of those cases were in New York City).

**Figure 13**<sup>139</sup>  
**Delays Caused by Recusals**

<b>CASE STUDY 1</b>	An expedited due process complaint is filed in March. Student was suspended from school. Multiple IHOs recuse. An IHO finally accepts appointment in June. Expedited hearing scheduled for July after required statutory timelines for an expedited hearing had lapsed. By the time due process complaint was heard, student had served entirety of suspension, depriving student of right to challenge exclusion from school.
<b>CASE STUDY 2</b>	A due process complaint is filed in mid-August. 30-day resolution period expired in mid-September and parties informed by NYCIHO that IHO will schedule hearing. However, IHO never communicates directly with parties and in mid-November, after unilaterally extending timeline, scheduled hearing for February.
<b>CASE STUDY 3</b>	A due process complaint is filed in June. Resolution period expired in July. As of August, seven IHOs had recused and IHO had not been appointed.

In New York City, IHOs are appointed automatically without first confirming their availability.<sup>140</sup> New York City does not impose any time limitation by when an IHO must recuse him/herself for lack of availability.<sup>141</sup> The primary reason for recusals in New York City is the “unavailability” of the IHO.<sup>142</sup>

F. Extensions

The validity of reported timeliness in New York City cannot be assumed.

Prevalent practice in New York City is to extend the timeline without a written order meeting the requirements of 8 NYCRR § 200.5(j)(5).<sup>143</sup> This is so, in part, because in New York City, IHOs are not compensated for interim orders on case extensions.<sup>144</sup>

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<sup>139</sup> Information, including supporting documentation, provided by parent representatives. Descriptions purposely kept vague to protect against specific cases being identified.

<sup>140</sup> Interview of Claims Processor. *See also* Letter from Cathryn Tisenshek, Supervisor, Office of Special Education, SED, to Chief Administrator, NYCIHO (July 28, 2017) (on file with SED) (requiring the NYCIHO to discontinue the practice of appointing an IHO to a due process complaint without first confirming availability).

<sup>141</sup> *Id.*

<sup>142</sup> Discussions with IHOs; review of data provided by SED listing recusal reasons by IHO in calendar years 2017 and 2018 (on file with SED).

<sup>143</sup> Interview of Appeals Processor; Discussion with IHOs.

<sup>144</sup> Interview of Operations Manager. *See also* Compensation Policy.

Consequently, case extensions are primarily documented through the use of the Case Follow-Up Sheet (CFUS).<sup>145</sup> The CFUS is not intended to be an extension order.<sup>146</sup>

Incidences of IHOs unilaterally extending timelines (or extending presumably at the request of one party but without consulting the other party) or soliciting extensions from the parties were reported during the review.<sup>147</sup>

#### G. Decision Processing

The ability of an IHO to issue a hearing decision or order directly to the parties is “frowned” upon by the NYCISO.<sup>148</sup> The NYCISO directs IHOs not to directly issue their own hearing decisions and orders.<sup>149</sup>

There are three (3) Decision Processors in the NYCISO, one of which splits her time with evidence processing.<sup>150</sup> Decision Processors process hearing decisions and orders.<sup>151</sup> There is no written guidance by when IHOs are expected to submit their hearing decisions and orders to the Decision Processors to allow processing prior to the compliance date.<sup>152</sup> Decision Processors “have been told” they have seven (7) days to process hearing decisions and five (5) days to process pendency and other interim orders.<sup>153</sup> IHOs regularly submit their hearing decisions and orders in fewer than seven

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<sup>145</sup> Interviews of Operations Manager, Appeals Processor, and Case Non-Compliance Support; Discussions with IHOs. The CFUS is a “data processing sheet” that all IHOs are required to submit in a variety of circumstances, including each time an extension is requested. (Interview of Appeals Processor.) (A CFUS is also required when a prehearing conference, pendency hearing, and hearing is scheduled, as well as when a case is withdrawn or dismissed. See NYCISO Case Follow-Up Sheet (Revised December 4, 2014) (on file with the NYCISO)).

<sup>146</sup> Interview of Appeals Processor. It is noted that a number of IHOs have modified the CFUS form to list the cumulative impact factors found in 8 NYCRR § 200.5(j)(5)(ii). Simply listing the factors on the CFUS form does not meet the regulatory requirements of 8 NYCRR § 200.5(j)(5). See 8 NYCRR § 200.5(j)(5)(iv).

<sup>147</sup> Discussions with parent representatives; Interviews of SEU and IHRO representatives.

<sup>148</sup> Discussion with IHO. See also Email from Chief Administrator, NYCDOE, to Cathryn Tisenchek, Supervisor, Office of Special Education, SED (December 8, 2018) (on file with SED) (“[A]re they instructed to inform the parties that only orders by my office should be deemed official?”).

<sup>149</sup> NYCISO New Hire Training, Attended November 20, 2018; Interview of Decision Processor, NYCDOE. See also SOPM at 18 (“The [NYCISO] formats and distributes decisions on behalf of Hearing Officers.”).

<sup>150</sup> Interview of Decision Processor.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

(7) and five (5) days, respectively, and, “often,” hearing decisions are received for processing on the actual compliance date.<sup>154</sup>

Staffing allowance, volume of cases, and lack of written guidance by when hearing decisions and orders are to be submitted prior to the compliance date impedes the ability of the NYCIHO to meet statutory and regulatory timeline requirements.

## V. DUE PROCESS IMPLICATIONS

The primacy of a special education due process hearing system is to ensure that the substantive rights of the parties are protected. Any shortcomings of the system can lead to denials of due process. This review identified process failures that impinge upon the ability of the parties to adequately exercise their due process rights.

### A. Physical Space

#### 1. *Inadequate Number of Hearing Rooms*

The number of available hearing rooms is inadequate to meet the demands of the hearing calendar – 11 hearing rooms is simply not enough, when on average in the past two school years, there have been over 100 matters on the calendar per day. Both IHOs and parties should reasonably expect that proceedings will begin promptly at their appointed time. Keeping IHOs and parties waiting until hearing rooms become available has real implications to the administration of due process: witnesses are lost, parties are made to rush through the presentation of their cases, and cases are adjourned delaying their timely completion.

Assignment of hearing rooms should not be based on who is able to out-sprint the others and arrive first to the NYCIHO.

#### 2. *Poor Ventilation / Temperature Control*

Ventilation and heating/cooling concerns have largely gone unaddressed. In 2014, SED requested of the NYCDOE that it take timely action to ensure appropriate ventilation and temperature control in the hearing rooms. It did not, and parties continue to choose between exercising their due process rights and being uncomfortable (because it’s too cold or too hot), their health,<sup>155</sup> or confidentiality (by keeping doors open during hearing proceedings).

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<sup>154</sup> *Id.*

<sup>155</sup> An IHO, for example, reported that a hearing had to be canceled after an attorney showed up with a stomach virus that everyone else in the “small, unventilated room was afraid to catch.” (Written feedback from IHO.)



### 3. *Unkempt Hearing Rooms*

Poor cleanliness of the hearing rooms erodes respect for and public confidence in the hearing system and demeans the importance of the proceedings. As one IHO put it, the “abject lack of dignity in the environment ... impacts ... the parties’ perception of the integrity of the proceedings.”<sup>156</sup> And, this assessment may hold true. Parties describe the hearing rooms as “not a great space” and “dark, dingy, and unpleasant.”<sup>157</sup>

### 4. *Confidentiality Breaches*

#### a. *Open Doors*

The poor ventilation/temperature control in the hearing rooms has resulted in a growing but long-standing practice of hearing proceedings moving forward with doors open.<sup>158</sup> This is a clear violation of IDEA and FERPA’s confidentiality requirements.<sup>159</sup> While IHOs have ultimate responsibility to ensure the confidentiality of hearing proceedings by keeping doors closed during the proceedings, the NYCDOE/NYCIHO’s continued failure to address the poor ventilation/temperature control concerns has legitimized the wrongdoing. The presence of individuals milling around in the hallway because of an overfilled lunch room makes matters worse.

#### b. *Poor/Non-Existent Insulation*

An equally concerning matter is the absence of adequate insulation to prevent the sound bleeds between rooms. In some respects, the sound bleeds are worse than the open doors. When the doors are open, the parties are aware of the absence of confidentiality. On the other hand, when doors are closed, there is an expectation of privacy. In reality, however, depending on the hearing room, discussions can be overheard in the adjacent room.

#### c. *Storing Evidence in Room 202C*

The willingness of the NYCIHO to allow IHOs to store evidence of pending hearings in the hearing office is commendable. It is a “perk” that avoids the schlepping of hearing files back and forth from an IHO’s office or home in cases with multiple hearing days. Nonetheless, keeping these files in unlocked cabinets that are accessible to other litigants, IHOs, and individuals not associated with the particular cases, is inconsistent with the confidentiality requirements in IDEA and FERPA and can lead to impermissible disclosure of personally identifiable information of students.

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<sup>156</sup> Written feedback from IHO.

<sup>157</sup> Discussions with party representatives.

<sup>158</sup> In 2014, SED informed the NYCDOE of its concerns regarding the open doors. See Letter to Executive Director at 2.

<sup>159</sup> See 34 C.F.R. 300.623; 34 C.F.R. 99.30.

## 5. *Lack of Amenities*

Though hearing rooms have the basic essentials for the conduct of hearings (i.e., conference tables, chairs, and telephones), the rooms do not include other important amenities, like computers and access to printers. Use of a copier is restricted to NYCIHO personnel and IHOs. The lack of access to computers, printers, and a copier (that parties can also use) has resulted in delays to hearing proceedings and inhibits the ability of IHOs and the parties to gain quick access without prolonged delays to information that is digitally stored and readily accessible online.

## 6. *Inadequate Waiting Area*

The lunch room presents as an uncomfortable and unprofessional setting. Hearing participants should not need to vie for coveted seats, much less fear for their safety, while waiting for their hearings to start. The lack of visible security is concerning.

The absence of a designated area for parent attorneys/advocates to have confidential discussions with their clients hinders the right of parents to be “accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.”<sup>160</sup> IDEA hearings are legal proceedings. The ability of parents to be able to privately confer with their chosen representatives during the course of hearings is important.

## B. Payments and Compensation

### 1. *Payment Delays*

Payment delays of IHO invoices is a frequent occurrence and happen without notice to the IHOs.<sup>161</sup> In 2018 alone, for example, there were two reported lapses, each lasting several months.<sup>162</sup> In July 2018, the NYCIHO had over \$2 million dollars of unpaid IHO invoices.<sup>163</sup> These payment delays have resulted in IHOs taking themselves off rotation, declining appointments of cases, or seeking other work, leaving an

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<sup>160</sup> 34 C.F.R. § 300.512. The same is true for school district personnel that is being represented by an attorney from the SEU. However, unlike parents who are without any options, school district personnel and SEU attorneys can access other NYCDOE offices in the building, including the IHRO and the Committee on Special Education 8.

<sup>161</sup> Email Correspondence from Cathryn Tisenchek, Supervisor, Office of Special Education, NYSED, to Chief Administrator, NYCIHO (July 11, 2018) (on file with NYSED).

<sup>162</sup> Discussions with IHOs.

<sup>163</sup> Email Correspondence from Chief Administrator, NYCIHO, to Cathryn Tisenchek, Supervisor, Office of Special Education, NYSED (July 11, 2018) (on file with NYSED).

insufficient number of IHOs to adequately and timely manage any new due process complaint filings.

## 2. *IHO Compensation*

New York State's maximum \$100 rate for IHO services is not in keeping with prevailing community rates for legal services rendered by attorneys who appear before IHOs.<sup>164</sup> Worse, New York City does not compensate on an hourly basis whatever, opting for a fee schedule that compensates IHOs per task at rates that are not commensurate with the awesome responsibilities that they have undertaken. The rates have remained unchanged for 20+ years. For example, the hearing rate of \$300 per day in New York City effectively pays IHOs \$40 per hour.<sup>165</sup> The same hearing officers, however, would be paid \$100 per hour in surrounding counties for the same work. The \$40 per hour effective rate is not an appropriate compensation rate for individuals required to be licensed attorneys and highly trained.<sup>166</sup> IDEA hearings have grown in complexity in the past 20+ years. What had been a brief administrative hearing is now more litigious with increased legal complexity.

IHOs do, and must, wisely exercise broad authority in their handling of the hearing process. The IDEA and its implementing regulations delineate the specific rights accorded to any party to a due process hearing.<sup>167</sup> The IHO is charged with the specific responsibility "to accord each party a meaningful opportunity to exercise these rights during the course of the hearing."<sup>168</sup> It is further expected that the IHO "ensure that the due process hearing serves as an effective mechanism for resolving disputes between parents" and the school district.<sup>169</sup> In this regard, apart from the hearing rights set forth in IDEA and the regulations, "decisions regarding the conduct of [IDEA] due process hearings are left to the discretion of the [IHO]," subject to appellate review.<sup>170</sup>

The use of interim orders is an effective tool to managing the process. Yet, in New York City, IHOs are not compensated for writing interim orders (other than pendency, sufficiency, and consolidation) or for performing functions essential to the efficient and timely administration of due process complaints.<sup>171</sup> This is simply

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<sup>164</sup> See Footnotes 100 and 101 and accompanying text, *supra*.

<sup>165</sup> Prior to October 1, 2001, New York State had a maximum compensation rate of \$40 per hour, not to exceed \$300 per day for a 7.5-hour day. Memorandum from Lawrence C. Gloeckler, to District Superintendents, et. al (August 2001), <http://www.p12.nysed.gov/specialed/publications/policy/ihocompmemo.html>, Accessed Jan. 17, 2019.

<sup>166</sup> In addition to an initial 40-hour training program, IHOs must participate in one (1) full-day onsite training program and three (3) two-hour webinar programs on an annual basis. See 8 NYCRR §§ 200.1(x)(4)(i) and (ii).

<sup>167</sup> See 34 C.F.R. § 300.512.

<sup>168</sup> *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See Footnotes 114 through 119 and accompanying text, *supra*.

inconsistent with appropriate, standard legal practice, which the IDEA mandates. Anything less than what IDEA mandates, denies the parties due process.

Similarly, the lack of adequate compensation for prehearing conferences is the primary reason given by most IHOs for why they do not conduct prehearing conferences in New York City.<sup>172</sup> An IHO in New York City is compensated a one-time fee per case of \$40 for conducting a prehearing conference. There is no compensation for writing the follow-up summary and order. Best practice, however, is for IHOs to hold prehearing conferences in every case to discuss the important matters listed at 8 NYCRR § 200.5(j)(3)(xi), including “simplifying or clarifying the issues” for hearing. Yet, the Compensation Policy financially discourages IHOs from conducting prehearing conferences and issuing prehearing orders, depriving the parties of effectively engaging with IHOs in addressing essential matters in advance of the hearing.<sup>173</sup>

Inadequate compensation is also to blame for decisions that do not reflect appropriate, standard legal practice.<sup>174</sup> The Compensation Policy allows for one \$300 payment for decision writing per case,<sup>175</sup> with additional decision-writing-day-payments of \$300 per day but only for subsequent hearing days lasting longer than four (4) hours.<sup>176</sup> Compensating for decision writing based on a flat rate of \$300 and the

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<sup>172</sup> A prehearing conference is not required in New York State. It is discretionary with the hearing officer. *See* 8 NYCRR § 200.5(j)(3)(xi) (“A prehearing conference with the parties *may* be scheduled.”) (Emphasis added.).

<sup>173</sup> For the unrepresented parent (i.e., the *pro se*), the lack of a prehearing conference can have devastating consequences to the parent’s ability to exercise the right to due process. It cannot be over emphasized that for many reasons the prehearing conference is usually the most important strategy an IHO can use to help the unrepresented parent understand and navigate the hearing process.

<sup>174</sup> Pursuant to the IDEA, IHOs must “possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.” 34 C.F.R. § 300.511(c)(1)(iv). More specifically, and consistent with appropriate, standard legal practice, a well-written decision would include the following basic components: (i) the specific issues to be decided; (ii) the facts determined to be relevant and relied upon to decide the identified issue(s) (i.e., findings of fact); (iii) the applicable legal standard for each disputed issue and a discussion that applies the law to the facts (i.e., conclusions of law); and, (iv) a simple, concise and comprehensible order that precisely defines for the parties the next steps, if any, to be taken, by whom, and by when. Early on, in consultation with SED, the training entity responsible for providing professional development programs to IHOs on a yearly basis, identified decision writing as an area in need of improvement. (This was determined, in part, by an independent review by the training entity of various sample decisions written by New York State IHOs.) Accordingly, in the past seven (7) years, SED has invested considerable time in training IHOs in writing thorough and well-reasoned decisions, with particular emphasis on the care that should be given to the preparation and presentation of the written decisions consistent with appropriate, standard legal practice.

<sup>175</sup> *See* Compensation Policy at 6.

<sup>176</sup> *Id.*

length of the hearing rather than on the actual time needed to write a thorough, careful, and well-reasoned decision is inadequate and fails to take into consideration that some cases are more complex than others and require a greater investment of time. Also, a substandard decision can result in the hearing process being viewed by the losing party as unfair and the outcome suspect, increasing the likelihood of an appeal,<sup>177</sup> not to mention the potential continuing deprivation of appropriate education to the student. And, the State review officer and courts, on appeal, will deem them worthy of little, if any deference.<sup>178</sup>

In all, the Compensation Policy does not reflect the reality of the work that IHOs are required to do, “resulting in IHOs having to figure out ways to do their work in order to end up being compensated fairly.”<sup>179</sup> This includes vetting cases to refuse appointment of cases with perceived difficult attorneys, complex due process complaints, and *pro se* litigants, who command significantly more of the IHO’s time than a represented parent.

### C. School District Representatives

#### 1. *Limited Number of School District Representatives*

Though New York City is not expected to have as many school district representatives as there are due process complaints filed, the current configuration is wholly inadequate to credibly respond to the school district’s daily hearing obligations. IHOs and parents alike have been required to wait for school district representatives that are tied up in other hearing matters, resulting in unnecessary delays.

### D. Hearing Process

#### 1. *Timely Appointment of IHOs and Subsequent Recusals*

In New York State, upon receipt of the due process complaint, an IHO must be immediately appointed to the case but, in no event, later than two business days of the school district receiving the complaint.<sup>180</sup> Appointment of an IHO is essential, and the

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<sup>177</sup> C. Thibaut and L. Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale, NJ: Lawrence Erlbaum, 1975).

<sup>178</sup> See *Walczak v. Florida U.F.S.D.*, 142 F. 3d 119, 27 IDELR 1135 (2d Cir. 1998) (“Deference is particularly appropriate when ... the state hearing officers’ review has been thorough and careful.”). See also *P.C. v. Rye City Sch. Dist.*, 232 F. Supp. 3d 394, 66 IDELR 122 (2017) (declining to defer to the IHO decision because it was “rambling, incomplete ..., [and] frankly an embarrassment,” and directing the school district to send a copy of the judge’s decision and the IHO decision “to the NYSED official responsible for certification of IHOs).

<sup>179</sup> Discussions with IHOs.

<sup>180</sup> 8 NYCRR § 200.5(j)(3)(i)(a).

State must maintain a list of individuals who are qualified to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice.<sup>181</sup>

The IDEA does not regulate the manner by which an IHO is selected and appointed to a due process hearing. This function is left to the State to decide. New York State has elected a rotation selection process:

Appointment of [IHOs] ... shall be made only from such list and in accordance with the rotation selection process .... Such names will be listed in alphabetical order. Selection from such list shall be made on a rotational basis beginning with the first name 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.<sup>182</sup>

An IHO may not be appointed to hearing unless s/he is available to make a determination of sufficiency within five (5) days of receiving the notice of insufficiency and to initiate the hearing within 14 calendar days of the applicable time period.<sup>183</sup>

New York City's practice of automatically appointing an IHO to a due process complaint without first confirming his/her availability is inconsistent with the regulatory requirement in 8 NYCRR § 200.2(e)(1)(ii). Further, the failure of New York City to set a time limitation by when an IHO must inform the NYC IHO of his/her unavailability, risks that the hearing decision in the case is not issued within the 45-day timeline. Moreover, because an IHO is appointed without first confirming his/her availability, the IHO is unnecessarily provided with personally identifiable information of the student and is impermissibly allowed to vet the due process complaint before deciding whether to accept the appointment.

Unavailability of IHOs is the primary reason for the high number of recusals in New York City. Each instance of recusal results in delays to the hearing timeline, with a growing number of cases having multiple recusals and extending out by several months.

## 2. *Questionable Extensions*

The prevalent practice in New York City of extending hearing timelines without written orders that meet the requirement of 8 NYCRR § 200.5(j)(5) thwarts SED's ability to effectively monitor the timelines. It is more likely than not that New York City

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<sup>181</sup> See 34 C.F.R. § 300.511(c)(3).

<sup>182</sup> 8 NYCRR § 200.2(e)(1)(ii).

<sup>183</sup> 8 NYCRR § 200.5(j)(3)(i)(b).

has a greater number of untimely cases than reported and that the incidence of IHOs unilaterally extending timelines or soliciting extensions from parties is considerable.

### 3. *Decision Processing*

Requiring that IHOs submit their hearing decisions and orders for processing and distribution to the parties is resulting in numerous hearing decisions and orders being issued after the compliance date. Processing includes making minor adjustments to the fonts and margins of each document and, for decisions, adding the caption, list of appearances per hearing day, and typing the list of evidence submitted by each party during the course of the hearing. (IHOs can ask that their hearing decisions or orders be issued without formatting, but few do.) The NYC IHO simply does not have the man power to timely process the many hearing decisions and orders that are generated in New York City.

## VI. SED'S AUTHORITY TO ENSURE COMPLIANCE

SED has general supervisory responsibility to *ensure* that each school district is meeting IDEA requirements.<sup>184</sup> This extends to ensuring that each school district is, not only meeting State educational standards, *but also* other IDEA requirements, like due process.<sup>185</sup> The authority to monitor and enforce systematic compliance with IDEA and State requirements requires follow through.

[T]he state's role amounts to more than creating and publishing some procedures and then waiting for the phone to ring. The IDEA imposes on the state an overarching responsibility ....<sup>186</sup>

It's authority to follow through, is not limited.<sup>187</sup>

## VII. RECOMMENDATIONS – FOR IMMEDIATE ACTION

Indeed, the process failures confirmed in this report are long-standing and allowed to fester with impunity. Notwithstanding SED's efforts to "right the ship," New York City's hearing system is in rapid, continuing decline. The problems are many. And, though this report finds that the NYC IHO shares culpability, it is not entirely to blame – the NYCDOE's macro-level problems feed the NYC IHO's micro-level challenges. Yet, though this helps to explain the process failures, it does not excuse them.

Change is needed. Immediately. And, though the larger NYCDOE is not the subject of this review, its cooperation is essential to SED's efforts to reform the hearing

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<sup>184</sup> 20 U.S.C. § 1412(a)(11)(A).

<sup>185</sup> See 34 C.F.R. § 300.149(a)(2)(ii).

<sup>186</sup> *Cordero v. Commonwealth of Pennsylvania Dept. of Educ.*, 795 F. Supp. 1352, 18 IDELR 1099 (M.D. Pa. 1992).

<sup>187</sup> See 20 U.S.C. § 1412(a)(11); 34 C.F.R. § 300.608(b).

system in New York City. Corrective action, therefore, should be directed to both the NYCDOE and the NYCIHO.

Recommendations follow.

A. Physical Space

1. *Expansion of the NYCIHO to Accommodate Additional Hearing Rooms*

The NYCDOE and NYCIHO should be required to expand the number of hearing rooms available.

Expansion will not be easy, given the space constraints on the second floor of 131 Livingston Street. Nonetheless, the location of the NYCIHO should remain at 131 Livingston Street. Its proximity to nine (9) subway lines makes it quite accessible for those traveling from surrounding areas. Consideration, therefore, should be given to moving the IHRO and the two computer rooms to other locations and reconfiguring the floor plan to accommodate additional hearing rooms. Administrative offices of the NYCIHO that are not essential to the administration of the actual hearings themselves on a day-to-day basis (e.g., file rooms, back-office personnel) should be relocated to other floors within the building.

2. *Ventilation / Temperature Control*

The NYCDOE and NYCIHO should be required to conduct a comprehensive building condition and HVAC assessment of the second floor of 131 Livingston Street to determine how to improve ventilation in the hearing rooms and regulate temperature. Mini-split systems should be considered for windowless hearing rooms. The existing window and portable air conditioning units should be replaced with quieter units that emit lower ambient white noise.

3. *Cleanliness and Upkeep*

The NYCDOE and NYCIHO should be required to maintain the cleanliness and upkeep of the hearing office. Hearing rooms should be decluttered of any unnecessary furniture. Consideration of a fresh coat of paint is suggested.

4. *Sound Proofing*

The NYCDOE and NYCIHO should be required to sound proof hearing rooms to eliminate sound bleeds between hearing rooms.



5. *Access to Amenities*

The NYCDOE and NYCIHO should be required to equip all hearing rooms with computers attached to the internet and with network printing capabilities. Public access should be restricted, with IHOs being given individual login credentials. Parties should have limited access to a copier, as needed and as directed by IHOs.

6. *Waiting Area and Access to Privacy*

The NYCDOE and NYCIHO should be required to relocate reassigned teachers to another site. A designated area to allow parents to speak privately with their attorneys/advocates, as needed, should be required and identified.

B. Payments and Compensation

1. *Prompt Payments*

The NYCDOE and NYCIHO should be required to allocate sufficient funds based on projected expenses based on prior expenditures and anticipated increases.

The NYCDOE and NYCIHO should further be required to review its IHO payment practices and make necessary changes to ensure that payments are made by no later than 30-calendar days from submission of invoices. Should late payments be anticipated, the NYCIHO should be required to have a process in place to inform IHOs of the reason for any late payments and the anticipated timeline by when payments will be made.

2. *IHO Compensation*

SED should immediately determine the Compensation Policy to be inconsistent with New York State law and Policy 01-11 and require corrective action.

The NYCDOE and NYCIHO should be required to adopt a Compensation Policy that compensates IHOs for all prehearing, hearing, and post-hearing activities that are consistent with appropriate, standard legal and best practices, as determined by SED in consultation with experts in the field. The revised policy should, at a minimum, require payments for all conferences held (inclusive of an unlimited number of scheduling, prehearing and status conferences), interim orders issued, and essential administrative tasks (such as certification of the record). A reasonable hourly/fee for transcript review and decision writing should be established and payment should be commensurate with the work rendered.

Invoices should be subject to review and challenge, with SED establishing an independent review fast-track process that also permits the IHO to explain questioned tasks.

C. School District Representatives

The NYCDOE and NYCIHO should be required to have, commensurate with the number calendared hearing matters, a sufficient and reasonable number of school district representatives available to appear in hearing proceedings.

D. Hearing Process

1. *Appointment of IHOs and Recusals*

The NYCDOE and NYCIHO should be required to submit a written plan to SED for review and approval regarding the IHO appointment process. The plan should require the NYCIHO to first ascertain whether an IHO is available to make a determination of sufficiency and to initiate the hearing within 14 calendar days of the applicable time period. Only then should an IHO be appointed to the complaint and recusal be limited to either a personal or professional interest of the IHO that would conflict with his or her objectivity, or an extenuating personal reason that subsequently makes the IHO unavailable.

SED should issue an advisory to IHOs on the New York City rotation list informing them that the appointment of an IHO who is listed as active will be presumed that s/he will accept the case unless the IHO confirms in writing, with detailed reasons provided, that s/he has either a personal or professional interest that conflicts with his or her objectivity, or s/he becomes unavailable because of a subsequent extenuating personal reason. Any abuses to appointment process should be reported to SED for investigation and, if substantiated, disciplined.

2. *Extensions*

SED should issue an advisory to IHOs on the New York City rotation list informing them that a written order that meets the requirements of 8 NYCRR § 200.5(j)(5) is required for each extension request. The use of the CFUS form should be eliminated and IHOs should be permitted, and compensated for, uploading extension information, including the written order, into IHS by the compliance date or within two (2) business days of granting or denying the extension request, whichever is sooner.

3. *Decision Processing*

SED should issue an advisory to IHOs on the New York City rotation list informing them that they are to directly issue all hearing decisions and orders within application timelines to the parties. IHOs should be permitted, and compensated for, uploading the hearing decisions and written orders into IHS by the compliance date or within two (2) business days of issuing the hearing decision or written order, whichever is sooner.

#### 4. *Pendency Orders*

The NYCDOE and NYCISO should be required to stop the ongoing practice of not maintaining a student's *uncontested* current educational placement absent a written order from an IHO. Such practice violates IDEA, delays continued services to students, and increases litigation costs to parents unnecessarily.

### **VIII. ADDITIONAL CONSIDERATIONS**

The evident failings in New York City hearing system will not be resolved alone simply by adopting the recommendations above. It would be naïve to think so. The larger NYCDOE must do its part to alleviate the stressors on the NYCISO. But this would require time. Considerable time. But, as mentioned above, though the NYCISO is not entirely to blame, the pressures brought to bear on it do not excuse its affirmative responsibility to respond to the changing needs. It has had time to do it – these process failures have been long in the making. Its ability to effectuate meaningful and sustainable change on its own is uncertain.

And, therefore, SED should consider a system-wide, substantial restructuring of its hearing system. Further consideration should be given to –

- transitioning from a two-tier to a one-tier hearing system;
- shifting to a contractual full-time IHO model, with provision for part-time IHOs for overflow during peak times or, in the alternative, establishing a uniform, *minimum* hourly rate commensurate with prevailing rates for prehearing, hearing, and post-hearing activities;
- establishing and implementing an IHO evaluation system, inclusive of review of work product;
- adding personnel to the Office of Special Education at SED – if not permanently, at least temporarily – to oversee the NYC due process system changes;
- expanding the systemic oversight of IHOs to include greater monitoring of work-product, technical assistance provided, and intervention and remediation, as needed;
- overhauling State regulations to align hearing procedures to best practices (e.g., mandating prehearing conferences; eliminating 30-day cap to hearing extensions);
- drafting a hearing manual of appropriate standard practices not specifically addressed in regulations; and,

- incorporating model forms and templates to increase uniformity.

## **IX. CONCLUSION**

In short, this review confirms that the New York State hearing system is in crisis, particularly because of the number of due process complaint filings in New York City. Process failures in the NYCIHO complicate an already fragile system. Much is needed.

President John F. Kennedy once said –

*There are costs and risks to a program of action. But they are far less than the long-range risks and costs of comfortable inaction.*

To this reviewer, there is no doubt: the time for decisive action is now.



New York State Education Department  

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Office of Special Education

**New York City Department of Education  
Compliance Assurance Plan**

**May 2019**

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# Overview

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## Purpose

As of February 21, 2019, the New York City Department of Education (NYDOE) has received 7,448 due process complaints related to the provision of special education and related services for the 2018-19 school-year. This surpasses the total number of due process complaints filed with NYCDOE for the 2017-18 school-year (i.e., 7,144).

In addition, NYCDOE has multiple outstanding findings of noncompliance involving the requirements to ensure proper procedural safeguards to students and parents, and the provision of programs and services to preschool and school-age students with disabilities. For the past 13 school years, the New York State Education Department (NYSED) has been addressing the resolution of this noncompliance through the issuance of multiple separate compliance assurance plans aligned to specific schools and/or Community School Districts and meeting monthly with representatives from the NYCDOE Division of Specialized Instruction and Student Support for the provision of technical assistance. While this approach has led to progress in the resolution of some local school or district-specific areas of noncompliance, it has not resulted in the systemic change necessary to sustain compliance and/or scale-up effective approaches to ensuring compliant policies, procedures, and/or practices in the identified areas.

When a public agency has a policy, procedure, or practice applicable to a group of children that is inconsistent with Part B of the Individuals with Disabilities Education Act (IDEA) or the Part B regulations that implement IDEA, this is evidence of systemic noncompliance.<sup>1</sup>

This document provides a detailed report of NYCDOE's provision of a free appropriate public education (FAPE) for students with disabilities and protection of parental and student rights and contains required actions to be taken by NYCDOE to correct noncompliance.

## Background

NYSED has the responsibility under federal law to have a system of general supervision that monitors the implementation of IDEA by local educational agencies (LEA), including NYCDOE. The system must be accountable for enforcing the requirements of IDEA and for ensuring continuous improvement. As identified in section 616 of IDEA, the primary focus of federal and State monitoring activities must be on improving educational results and functional outcomes for all students with disabilities and ensuring that states meet the program requirements under Part B of IDEA, with emphasis on those requirements that are

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<sup>1</sup> United States Department of Education, Office of Special Education Programs: [Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act \(Part B\)](https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/accombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf) (Page 20) (https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/accombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf)

most closely related to improving educational results for students with disabilities. IDEA requires each state to have in place a State Performance Plan (SPP) that evaluates its efforts to implement the requirements and purposes of Part B of IDEA and describes how the state will improve such implementation. The SPP, submitted every six years, includes measurable and rigorous targets for the indicators established under three monitoring priority areas [1. FAPE in the Least Restrictive Environment (LRE); 2. Disproportionality; and 3. General Supervision Part B, including Child Find, Effective Transition, and Effective General Supervision].

Each state is required to make annual determinations about the performance of each public school district based on its annual performance relating to SPP indicators [34 CFR §300.600]. These determinations must be made in consideration of information obtained through monitoring visits, other public information made available, including any audit findings, and whether the data submitted by the district is valid, reliable, and timely. NYSED must consider compliance and may consider other performance indicators in relation to the state's targets for improvement for these indicators. Based upon this information, NYSED makes one of four determinations for each district: meets the requirements and purposes of IDEA, needs assistance in implementing the requirements of IDEA, needs intervention in implementing the requirements of IDEA, or needs substantial intervention in implementing the requirements of IDEA (34 CFR 300.603). NYSED makes its annual IDEA determinations based on consideration of both a district's performance outcomes and compliance status. Additional information on the criteria used for the current IDEA determinations is available in NYSED's *New York State Education Department 2018 Criteria for School District Determinations under the Individuals with Disabilities Education Act (IDEA)*.<sup>2</sup>

NYCDOE has been identified as not meeting the requirements of IDEA for 13 consecutive years due to performance and/or compliance outcomes for the subgroup of students with disabilities and was recently notified of its 2018-19 school year identification as a district that needs intervention in implementing these requirements.<sup>3</sup> In response to these identifications, NYSED has worked with NYCDOE in the development of a special education strategic action plan to support the implementation of effective school teams and Committees on Special Education (CSE) through a focus on Access, Quality Individualized Education Programs (IEP), Behavior, and Transition.<sup>4</sup> Additionally, NYSED and NYCDOE continue to collaborate to address the shortage of appropriately qualified staff to provide the necessary bilingual special education programs and services for students with disabilities.

NYSED has also documented that parents/guardians of students with disabilities are not being provided timely access to an impartial hearing upon the filing of a due process complaint notice with NYCDOE. This is based upon several reasons, many of which are

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<sup>2</sup> Appendix A, *New York State Education Department 2018 Criteria for School District Determinations under the Individuals with Disabilities Education Act (IDEA)*.

<http://www.p12.nysed.gov/specialed/spp/nysdeterminations/documents/determination-criteria-2018.pdf>

<sup>3</sup> Appendix B, Letter from Christopher Suriano, Assistant Commissioner, to Richard Carranza, Chancellor (February 15, 2019) regarding 2018 Accountability Status under Part B of the Individuals with Disabilities Education Act (IDEA).

<sup>4</sup> Appendix C, School Communities Inclusive of All Students Action Plan 2018-19.



described in the attached report, “An External Review of the New York City Impartial Hearing Office.”<sup>5</sup> Under NYCDOE’s new leadership, NYSED has recently met with members of the NYCDOE Office of School Planning and Development responsible for the operation and management of the due process hearings to discuss and resolve challenges highlighted within the external review. Not to be overlooked among the reasons cited in the report is the sheer volume of due process complaints filed against NYCDOE by parents, as well as thousands of other settlements in which NYCDOE engages with parents of students with disabilities under their 10-Day Notice reimbursement procedure.<sup>6</sup> New York State has more special education due process complaints filed annually than any other state, and over 90 percent of those complaints in school year 2017-18 (94 percent) were filed in New York City.

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<sup>5</sup> Appendix D, “An External Review of the New York City Impartial Hearing Office.”

<sup>6</sup> Appendix D page 13, footnote 33

## Section I: Provision of a Free Appropriate Public Education to Preschool Students with Disabilities

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NYCDOE fails to provide a free appropriate public education (FAPE) to students with disabilities, aged 3 through 5 (20 U.S.C. §§1419, 1416(a)(3)(A); 34 CFR §300.101; Educ. Law §4410; 8 NYCRR §§200.4(e)(7), 200.16(f)[6]).

New York State's measurable and rigorous targets pursuant to its SPP, and other objective reviews of NYCDOE data identified the following noncompliance with respect to NYCDOE's obligations to preschool students with disabilities:

1. Failure to complete timely evaluations pursuant to Child Find requirements;
2. Failure to effectively transition children from early intervention (EI) services to preschool special education services;
3. Failure to provide special education services and programs as required by students' individualized education program (IEP); and
4. Failure to provide special education services and programs in the LRE.

While these findings are systemic in nature, it must be noted that this does not mean that the noncompliance affects all children's receipt of FAPE.

### Timely Evaluations

#### *Initial Eligibility Preschool Evaluations and Early Childhood Transition*

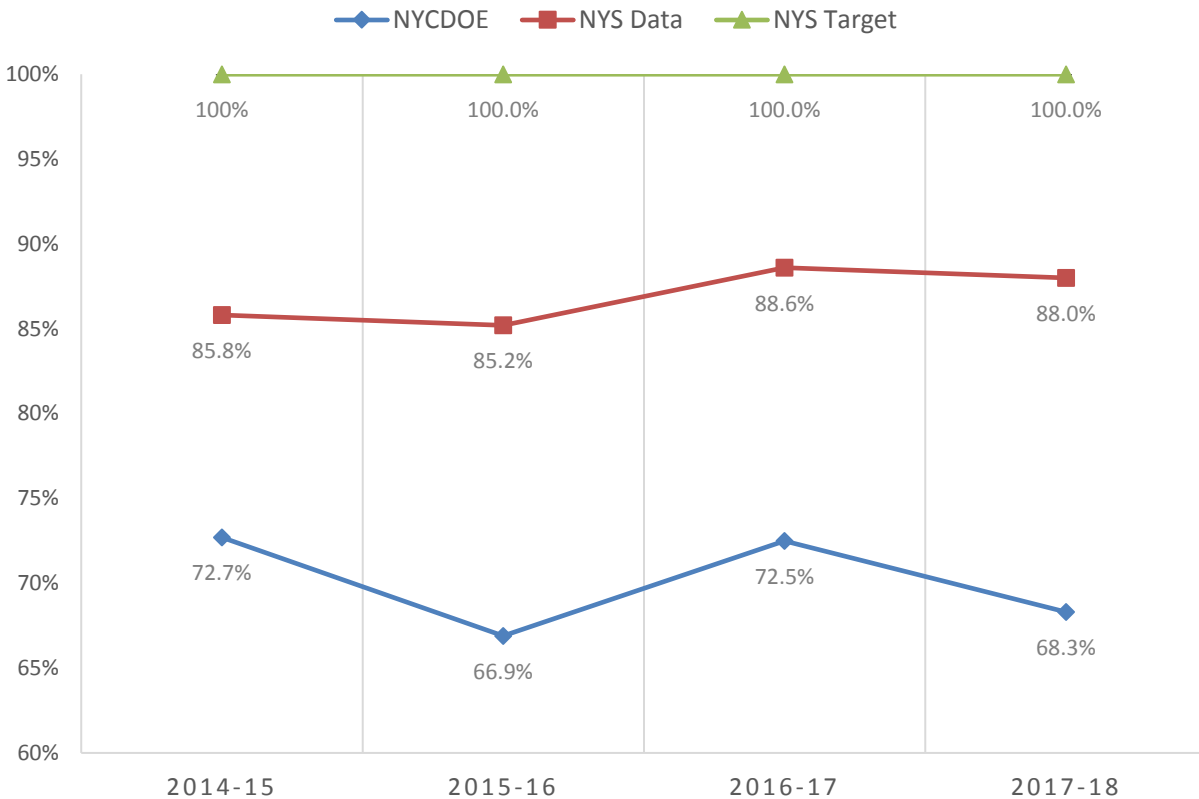
NYCDOE fails to timely evaluate children for eligibility for preschool special education programs and services in accordance with 20 U.S.C. §1416(a)(3)(B); 8 NYCRR §200.16(c), (e), and (f); see also Performance and/or Compliance Indicator 11 from the SPP.

NYCDOE fails to timely transition children from EI (Part C of IDEA) to preschool special education programs and/or services (Part B of IDEA) in accordance with 20 U.S.C. §1416(a)(3)(B); 8 NYCRR §200.16(c), (e), (f); see also Performance and/or Compliance Indicator 12 from the SPP.

#### Description of Noncompliance: Initial Eligibility Preschool Evaluations

NYCDOE annually submits Special Education Verification Report data under SPP Indicator 11 regarding the timeliness of initial evaluations for preschool-age students with disabilities to determine eligibility for special education. NYCDOE has not demonstrated significant improvement in meeting performance targets for the percentage of children with parental consent to evaluate, who were evaluated and whose eligibility was determined within State-established timelines.

### SPP INDICATOR 11 PRESCHOOL COMPLIANCE RATE



Monthly data reports provided by NYCDOE from July through October 2018 indicate that an average of approximately 1,360 open committee on preschool special education (CPSE) cases citywide exceeded the mandated timelines set forth in SPP Indicator 11. For the 10 regional CSEs, which encompass the 32 CPSEs, four of the 10 had an average of over 100 cases per month where initial evaluations were not completed within 60 days of parental consent (one regional CSE had an average of 391 outstanding cases per month in excess of the 60-day timeline).

#### Description of Noncompliance: Early Childhood Transition

New York State Early Childhood Transition data is impacted by the number of children continuing in EI after their third birthday. When this factor is not counted toward noncompliance, the compliance rate for timely early childhood transition increases. While consideration of this factor improves the NYCDOE compliance rate, NYCDOE data submitted in the Special Education Verification Report for SPP Indicator 12 regarding effective transition of children referred from EI (Part C) to CPSE (Part B) demonstrates that NYCDOE's number of records with noncompliant reasons for failure to meet applicable timelines account for almost all such noncompliance statewide.

<b>SPP Indicator 12 Data</b>	2014-15	2015-16	2016-17	2017-18
NYCDOE Number of Records with Noncompliant Reasons	73	63	50	123
Number of Records with Noncompliant Reasons Statewide	97	80	54	130
NYCDOE Compliance Rate*	90.9%	92.3%	92.9%	85.4%
Percent of Noncompliance Attributed to NYCDOE	94.8%	91.3%	92.6%	96.9%

\*This calculation method includes continuation in EI in the compliance rate.

For the 10 regional CSEs, which encompass the 32 CPSEs, the following CSEs, including impacted community school districts, have the highest rate of late eligibility determinations and/or IEP implementation dates: CSE 7 (Community School Districts 20, 21, 31); CSE 4 (Community School Districts 24, 27, 30); CSE 8 (Community School Districts 13, 14, 15, 16); CSE 9 (Community School Districts 1, 2, 4); and CSE 1 (Community School Districts 7, 9, 10).

As identified in meetings between NYSED and NYCDOE, failure of NYCDOE to meet SPP Indicator 11 and/or SPP Indicator 12 performance targets from school year 2015-16 to the present was attributed to:

1. An insufficient number of CPSE administrators to schedule and conduct CPSE meetings;
2. An insufficient number of administrative support staff to input assessment reports from evaluators, eligibility determinations, and IEPs into NYCDOE's data collection and monitoring system - Special Education Student Information System (SESIS); and
3. An insufficient number of available seats to accommodate mandated enrollment in special classes and integrated classes/programs to allow for timely IEP implementation.

## **Programs and Services in the Least Restrictive Environment**

### *Regional Need for Preschool Special Education Programs*

NYCDOE fails to provide preschool special education programs and services in accordance with 20 U.S.C. §1419; Educ. Law §4410; 8 NYCRR §§200.4(e)(7), 200.16(f)(6).

#### Description of Noncompliance:

Regional need data examined jointly by NYSED and NYCDOE demonstrates that the current demand for preschool special education programs and services significantly exceeds the existing number of programs and providers available to appropriately serve the IEPs of preschool students with disabilities residing in New York City. Based on the multiple measures used to evaluate the regional need data and the high level of systemic and continuing unresolved needs, it is determined that NYCDOE is failing to provide special education programs and services in conformity with student IEPs as required by FAPE standards.

NYCDOE supplies multiple data factors to project both current and anticipated placement needs for each of the 32 community school districts. These factors consider capacity of existing programs, trends in the number and type of CPSE placement recommendations, NYCDOE's list of students "awaiting placement" and receiving "partial services," the number of children transitioning from EI, children transitioning to kindergarten and factors attributed to existing placements which may indicate that alternative program options could be utilized, and alignment with bilingual education and related service needs.

NYCDOE's regional need list for preschool special education programs is posted on [NYSED's website](#).<sup>7</sup> NYSED also electronically notifies relevant stakeholders. Developing a comprehensive list and publicly sharing this information allows interested private providers to identify opportunities to create new programs and informs NYCDOE's strategic planning for expanding preschool programs in its community school district-operated classrooms. However, NYCDOE-operated program expansions in recent years have not consistently aligned with the identified published regional need.

### *Least Restrictive Environment*

NYCDOE fails to ensure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and special classes (SC), separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily in accordance with 20 U.S.C. §1412(a)(5); 34 CFR §§300.114, 300.115; Educ. Law §4410; 8 NYCRR §200.16(e)(3)(i); see also Performance and/or Compliance Indicator 6 from the SPP.

### Description of Noncompliance: Separate Setting

NYCDOE annually reports data under SPP Indicator 6 relating to the educational setting in which students with disabilities receive their special education and related services. This data is calculated for SPP Indicator 6B, the percentage of children aged 3 through 5 with IEPs who attend a separate special education class, separate school, or residential facility (separate setting). As these percentages include students 5 years of age, Indicator 6B is based on both preschool-age and school-age student data.

NYCDOE data for students aged 3 through 5 with IEPs attending a separate special education class, separate school, or residential facility exceeds the State's targets in the SPP Indicator 6B:

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<sup>7</sup> <http://www.p12.nysed.gov/specialed/publications/preschool/regional-need.html>

<b>SPP Indicator 6B Data: Separate Setting</b>	2016-17	2017-18	2018-19
New York State target for students aged 3 through 5 in a separate setting	20% or less	19% or less	18% or less
NYCDOE % students aged 3 through 5 in a separate setting	31.1%	29.5%	31.2%
NYCDOE % preschool students only in a separate setting	45.8%	50.4%	52.3%

The number of preschool students with disabilities attending a separate setting LRE data is at odds with the significant investments being made by the State and City to expand early learning opportunities for preschool-aged children. Data and information reported by NYCDOE demonstrates that not all preschool students with disabilities have the same access to the benefits of the State-administered prekindergarten programs which are afforded to other students residing in New York City.

<b>New York State Prekindergarten Final Program Report</b>	2017-18
Number of preschool students who received related services only or SEIS while enrolled in NYCDOE State-administered prekindergarten programs	5,247
Number of preschool students who received SCIS programming in a classroom co-located with a NYCDOE State-administered prekindergarten program	317

NYCDOE enrolls preschool students with disabilities in its State-administered prekindergarten programs when its CPSE has recommended related service only or special education itinerant services (SEIS). Although it is a longstanding practice in New York City to enroll and fund students receiving a special class in an integrated setting (SCIS) programming separate and apart from its State-administered prekindergarten programs, this practice is now leading to inconsistent and limited early learning inclusion opportunities for those preschool students with disabilities who need more than itinerant services but are recommended to receive special education services within an early childhood program with their typically developing peers. For example, while the historic annual enrollment for the SCIS program in NYCDOE is approximately 4,000 students, as demonstrated above, only 317 such students were co-located in a State-administered prekindergarten classroom in 2017-18.

Furthermore, the NYCDOE historic annual enrollment for preschool children recommended for special class is approximately 10,000 students. As it pertains to LRE, this number reflects the need for more comprehensive supports within the early childhood programs administered by NYCDOE to enable the full participation and success of children with disabilities in inclusive settings.

The number of preschool students with disabilities attending a separate setting, combined with the limited preschool inclusion options (i.e., lack of available seats, disparity in length of school day, and restricted school site options), contradicts NYCDOE's continued implementation of separate program eligibility and funding structures for preschool students with disabilities. Failure to provide increased access for preschool students with

disabilities to participate in the early childhood programs operated by NYCDOE violates the requirements of LRE and is not supported by the State-administered prekindergarten program principles and objectives to benefit children of all abilities.

## **Required Corrective Action**

### *Preschool Special Education*

As part of this Compliance Assurance Plan, by June 3, 2019, NYCDOE must provide to NYSED for review and approval a corrective action plan to correct its failure to provide a free appropriate public education to preschool students with disabilities. At a minimum, the corrective action plan must address and/or include:

1. Root cause analysis for each noncompliance item: Child Find, Early Childhood Transition, Provision of Special Education Services and Programs, and LRE.
2. Immediate action steps to address each noncompliance item which must sufficiently describe NYCDOE efforts, provide an implementation timeline, and include the measurable goals and objectives expected to be achieved.
3. Description of how NYCDOE plans to monitor its progress of the corrective action plan.
4. Identification of NYCDOE office and specific NYCDOE staff responsible for the implementation of each step/action item included in the corrective action plan.
5. Process by which the corrective action plan will be adjusted and/or amended, with NYSED approval.
6. The action steps to address Child Find and Early Childhood Transition noncompliance must include, at a minimum:
  - a. An increase in the allocation of staffing resources, including additional CPSE administrators to schedule and conduct CPSE meetings, and additional administrative staff to input data into SESIS.
  - b. The corrective action plan should be specific to each of the 10 regional CSEs, with immediate action steps identified for the community school districts with the highest rates of noncompliance.
  - c. A trend analysis of the last two years; and going forward, the yearly case volume per regional CPSE, including number of cases assigned and completed by each administrator and the number of cases closed by each administrator.
7. The action steps to address the Provision of Special Education Programs and Services in LRE must include, at a minimum:
  - a. A preschool programming action plan which fully addresses the outstanding monolingual and bilingual programs required to ensure the full implementation of preschool students' IEPs within required timelines and in alignment with the continuum of special education services.
  - b. An increase in the allocation of staff assigned to oversee strategic planning and development of preschool program creation and expansions as identified on the February 7, 2019 regional need publication, and any subsequent regional need publication.

- c. Plan for bi-annual reporting to NYSED staff of the following items relating to regional need, to be disaggregated by community school district and borough:
- i. Overall number of children residing in each community school district and known to be enrolled in a preschool program.
  - ii. Overall number of preschool students with disabilities per community school district and the percentage of those students enrolled in SCIS, the percentage of those students enrolled in SC, and the percentage of those students receiving SEIS.
  - iii. Number of students transitioning from EI to CPSE (children turning age 3) during the current school year and the prior school year and the resulting net increase/decrease.
  - iv. Number of students transitioning from CPSE to kindergarten (children turning age 5) during the current school year and prior school year and the resulting net increase/decrease.
  - v. Net change in the number of preschool students with disabilities when comparing Turning-3 and Turning-5 data for the current school year.
  - vi. Number of SCIS classroom seats per community school district, identifying whether the seats are in a monolingual or bilingual program, and the corresponding number of students with a variance attending each program type for the current school year and prior school year.
  - vii. Number of SC classroom seats per community school district per ratio (6, 8, 12, other) identifying whether the seats are in a monolingual or bilingual program and the corresponding number of students with a variance attending each program type for the current school year and prior school year.
  - viii. Number of classroom seats gained via program approval and number of classroom seats lost via program closures per ratio and noting whether the classroom seats were for monolingual or bilingual programs, from the date of the last regional need public posting.
  - ix. Number of impending program closures and the corresponding number of the current student enrollment per ratio in the programs to be closed.
  - x. Number of students with SEIS exceeding a frequency of 20 sessions per week.
  - xi. Number of preschool students in classes of 8 and 12 with a 1:1 aide.
  - xii. Number of students per ratio on NYCDOE's "partial services" list, identifying whether monolingual or bilingual (specifying the language) programs are being sought.
  - xiii. Number of students per ratio that NYCDOE has coded as "placement delayed due to lack of available seats," identifying whether monolingual or bilingual (specifying the language) programs are being sought; and
  - xiv. Report per borough summarizing the Chairpersons' recommendations regarding the need in their specific districts for multidisciplinary evaluation (MDE) and SEIS, including bilingual program needs.
- d. Assurances and processes to ensure that preschool students with disabilities receive appropriate special education programs and services while enrolled in NYCDOE State-administered prekindergarten programs. This must include plans



to incorporate SCIS program offerings within NYCDOE State-administered prekindergarten classrooms and eliminate any barrier to preschool students recommended to receive SCIS also enrolling in NYCDOE State-administered prekindergarten programs and receiving the full program benefits offered to all children.

## Section II: Provision of a Free Appropriate Public Education (FAPE) for School-Age Students with Disabilities

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NYCDOE fails to provide a free appropriate public education to students with disabilities, aged 5 through 21 (20 U.S.C. §1412 (a)(1); 34 CFR §300.101).

New York State's measurable and rigorous targets pursuant to its SPP, and other objective reviews of NYCDOE data, identified the following noncompliance with respect to NYCDOE's obligations to school-aged students with disabilities:

1. Failure to timely evaluate children for eligibility for school-age special education programs and services;
2. Failure to provide special education programs and services as specified on the IEPs of students with disabilities; and
3. Failure to provide related services.

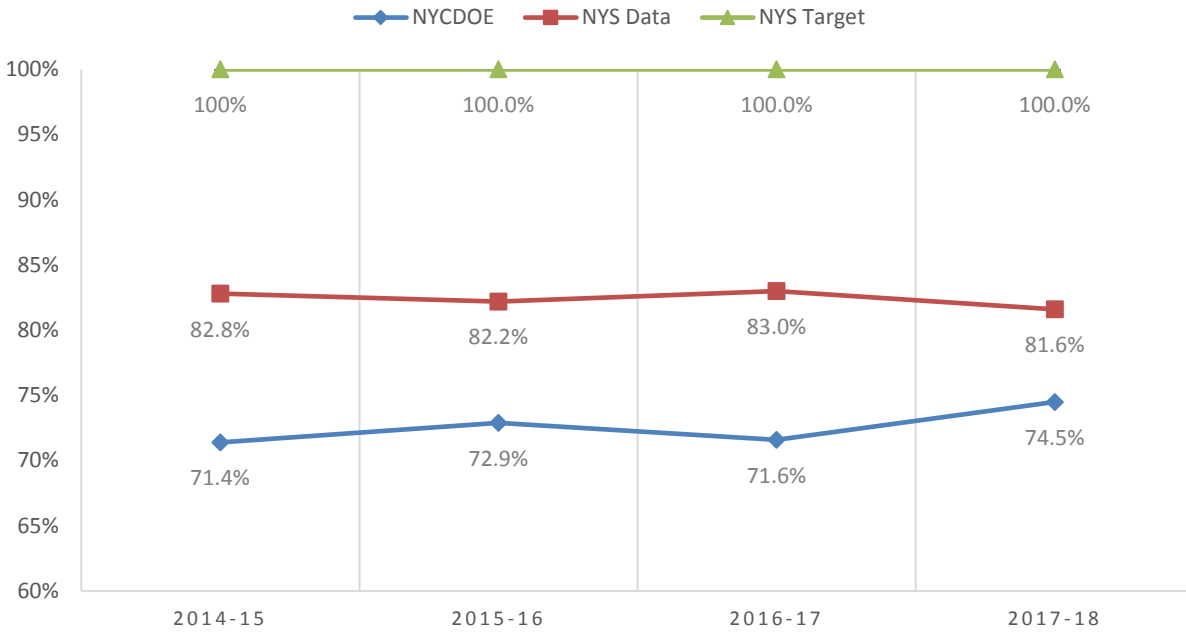
### Timely Evaluations

NYCDOE fails to timely evaluate children for eligibility for school-age special education programs and services in accordance with 20 U.S.C. §1416(a)(3)(B); 34 CFR §300.301; 8 NYCRR §200.4 (b); see also Performance and/or Compliance Indicator 11 from the SPP.

#### Description of Noncompliance:

NYCDOE annually reports data under SPP Indicator 11 regarding the timeline for initial evaluations for school-age students with disabilities to determine eligibility for special education. Over the last four reported years, NYCDOE has not demonstrated improvement in meeting performance targets for the percentage of children with parental consent to evaluate, who were evaluated and whose eligibility was determined within State-established timelines.

### SPP INDICATOR 11 SCHOOL AGE COMPLIANCE RATE



Percentage of Children with Parental Consent to Evaluate, who were Evaluated and Eligibility Determined Within State Established Timelines

Monthly data reports generated for July through October 2018 show that, at any given time, there were an average of approximately 1,132 open school-age cases that had exceeded SPP Indicator 11 timelines. Two of the 10 regional CSEs had an average exceeding 290 cases per month where initial evaluations were not completed within 60 days of parental consent.

## Programs and Services

NYCDOE fails to provide special education programs and services as specified on the IEPs of students with disabilities, including students who attend community schools, District 79, and charter schools. NYCDOE fails to ensure the provision of FAPE to these students in accordance with their IEPs [20 U.S.C. §1414(d)(2)(A), (d)(3); 34 CFR §§300.323, 300.324(a)(2); Educ. Law §§4402(2)(a), 2851(2)(s) and 2853(4); 8 NYCRR §200.4(e)(7)].

### *Community School Districts*

NYCDOE self-reports data documenting that it fails to provide programs and services to students attending community school districts in violation of 20 U.S.C. §§1412(a)(1), 1414(d)(2)(A); 34 CFR §§300.101, 300.323; Educ. Law §4402 (2)(a); 8 NYCRR §200.4 (e)(7).

### Description of Noncompliance:

In November 2018, NYCDOE released its NYCDOE Local Law of 2015 Annual Report on Special Education, School Year 2017-18 (Annual Report)<sup>8</sup>. The Annual Report indicated that:

- 143,394, students (78.4 percent) were fully receiving their mandated IEP special education programs and services;
- 34,906 students (19.1 percent) were only partially receiving their mandated IEP special education programs and services; and
- 4,495 students (2.5 percent) were not receiving any of their mandated IEP special education programs and services.

### *District 79*

NYCDOE requires that students attending the Pathways to Graduation program waive their right to IEP-mandated special education services in violation of 20 U.S.C. §§1412(a)(1), 1414(d)(2)(A); 34 CFR §§300.101, 300.323; Educ. Law §4402 (2)(a); 8 NYCRR §200.4 (e)(7).

### Description of Noncompliance:

By letter dated March 14, 2013, NYSED's Counsel instructed NYCDOE that school districts and State agencies that provide alternative high school equivalency programs (AHSEP) and high school equivalency programs (HSEP) are required to provide special education programs and services to students with disabilities enrolled in such programs. Additionally, when seeking program approval, school districts are required to assure NYSED that special education services are being provided to students with disabilities attending these programs.

By letter dated February 29, 2016, NYSED instructed NYCDOE to revise its policies and procedures requiring that students waive their right to special education when enrolling in the Pathways to Graduation (P2G) program, formerly known as GED+. NYCDOE responded on March 17, 2016, stating that they were reviewing the matter with their general counsel. NYCDOE reports that as of January 31, 2019, there were 1,631 students with disabilities attending P2G programs. To date, NYCDOE continues to require that students waive their right to special education programs and services upon enrolling in the P2G program.

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<sup>8</sup> NYCDOE Local Law of 2015 Annual Report on Special Education, School Year 2017-18 (Annual Report) [https://drive.google.com/file/d/1FIWLiNlqzdm1\\_Ypw6WJ\\_HYyBntJqQvr/view](https://drive.google.com/file/d/1FIWLiNlqzdm1_Ypw6WJ_HYyBntJqQvr/view)

## *Charter Schools*

NYCDOE fails to ensure that students with disabilities who attend charter schools are receiving mandated IEP programs and services in accordance with Education Law 20 U.S.C. §§1412(a)(1), 1414(d)(2)(A); §§34 CFR 300.101, 300.323; Educ. Law §§2851(2)(s), 2853(4) and 4402 (2)(a); 8 NYCRR §200.4 (e)(7).

### Description of Noncompliance:

Based upon the findings of multiple State complaints filed on behalf of students attending charter schools in New York City and the corresponding compliance assurance plans, NYSED determined that NYCDOE failed to adequately demonstrate the implementation of administrative procedures that demonstrate the actions taken by the CSE to ensure:

1. Students are receiving mandated IEP programs and services in charter schools;
2. timely follow-up actions are taken upon notification that mandated IEP programs and services are not being provided; and
3. Progress monitoring of students with disabilities attending charter schools is occurring, including convening the CSE to review, and if appropriate, reevaluate the student.

## *Failure to Provide Related Services as Required on Students' IEPs*

NYCDOE fails to provide related services to students with disabilities as recommended on students' IEPs in accordance with 20 U.S.C. §§1412(a)(1), 1414(d)(2)(A); 34 CFR §§300.101, 300.323; Educ. Law §4402(2)(a); 8 NYCRR §§200.2(d), 200.4(e)(7).

### Description of Noncompliance:

The November 2018, NYCDOE Local Law of 2015 Annual Report on Special Education, School Year 2017-18 (Annual Report), referenced above, indicated that:

- 274,209 (95.7 percent) related service mandates had a matching encounter recorded by a provider in SESIS;
- 10,481 (3.7 percent) related service mandates had no matching encounter recorded by a provider in SESIS; and
- 1,718 (.6 percent) related service mandates had only a partially matching encounter recorded by a provider in SESIS.

## **Required Corrective Action**

### *Provision of Services to School-Age Students with Disabilities*

As part of this compliance assurance plan, by June 3, 2019, NYCDOE must provide to NYSED for review and approval a corrective action plan to correct its failure to provide a free appropriate public education to school-age students with disabilities. At a minimum, the corrective action plan must address and/or include:

1. Root cause analysis for each noncompliance item: Timely Evaluations; Provision of Special Education Services and Programs in community school districts, District 79, and charter schools.
2. Immediate action steps to address each noncompliance item which must sufficiently describe NYCDOE efforts, provide an implementation timeline, and include measurable goals and objectives expected to be achieved.
3. Description of how NYCDOE plans to monitor its progress of the corrective action plan.
4. Identification of NYCDOE office and specific NYCDOE staff responsible for the implementation of each step/action item included in the corrective action plan.
5. Process by which the corrective action plan will be adjusted and/or amended, with NYSED approval.
6. The action steps to address timely evaluations noncompliance must include, at a minimum:
  - a. An increase in the allocation of staffing resources, including additional CSE administrators to schedule and conduct CSE meetings, and additional administrative staff to input data into SESIS.
  - b. The corrective action plan should be specific to each of the 10 regional CSEs, with immediate action steps identified for the community school districts with the highest rates of noncompliance.
  - c. A trend analysis of the last three years analyzing the yearly case volume per regional CSE, including number of cases assigned to each administrator and the number of cases closed by each administrator, broken down monthly.
7. The action steps to address the Provision of Special Education Programs and Services must include, at a minimum:
  - a. An audit of all students with disabilities with outstanding delivery of programs and related service mandates and next steps to ensure the full delivery of all IEP programs and mandated related services within required timelines and in alignment with the continuum of special education services.
    - i. Provide quarterly reports on the use of Related Service Authorizations (RSA) and submit a plan to reduce the use of RSAs.
  - b. With respect to community school districts, the corrective action plan must include, at a minimum:
    - i. Borough, community school district, and school location of all outstanding programs and related services with specific caseload data.
    - ii. Program and related service types.
    - iii. Schedule of field support center (FSC) meetings with managers of school psychologists and related service providers and executive and community school district superintendents to review and develop corrective steps in resolving the outstanding programs and related services.
    - iv. A complete list of all schools that have unserved and/or partially served students which identifies each student and the IEP mandates that are either not being provided or only partially being provided. For each school on the list, a school-specific plan that identifies reasons for the unserved and/or partially served students, the action steps that will be taken to address any

- failure to fully implement these IEPs, and the date of fulfillment of all IEP programs and related services mandates.
- c. With respect to District 79, the corrective action plan must include, at a minimum:
    - i. List of District 79 program locations with their outstanding programs and related services with specific caseload data.
    - ii. Schedule of meetings with District 79 leadership and principals to review all special education programs and related services mandates.
    - iii. Administrative procedures for obtaining IEPs of students enrolled in alternative schools and programs and for ensuring students with disabilities enrolled in alternative schools and programs have timely IEP reviews and receive CSE-recommended special education programs and services.
    - iv. A complete list of all District 79 students who are unserved and/or partially served and the IEP mandates that are either not being provided or only partially being provided.
    - v. Evidence that NYCDOE no longer requires that students waive their right to special education programs and services upon enrolling in the P2G program.
  - d. With respect to charter schools, the corrective action plan must include, at a minimum:
    - i. Administrative procedures ensuring charter schools document the provision of special education programs and services and that the CSE can demonstrate the provision of these services;
    - ii. Administrative procedures describing the actions the CSE must take, including timelines, to proactively ensure that the IEPs of students with disabilities enrolled in charter schools are implemented without delay at the beginning of the school year and following an initial evaluation or reevaluation of the educational needs of a student;
    - iii. Administrative procedures, including timelines, describing the actions the CSE must take when notified that a charter school is unable to provide a special education program or service recommended in the IEP of an enrolled student;
    - iv. Documentation of the professional learning activities provided to the staff responsible for the development, review, and implementation of IEPs for students with disabilities enrolled in charter schools;
    - v. Schedule and calendar of topics of the above-referenced professional learning activities and assurance that a list of all participants will be maintained; and
    - vi. Documentation provided to each charter school serving NYC resident students with disabilities in the jurisdiction of NYCDOE that administrative procedures requiring a shared responsibility with charter schools to ensure the implementation of mandated IEP services occurs and student progress is monitored.

## Section III: Affording Students with Disabilities and Their Parents All the Rights and Procedural Safeguards Required by Federal and State Law and Regulations

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Pursuant to its general supervisory responsibility and authority under IDEA, NYSED is responsible for ensuring that the requirements of Part B of IDEA are followed, including ensuring that each public agency establishes, maintains, and implements procedural safeguards that meet the requirements of 34 CFR §§300.500 through 300.536. NYCDOE fails to afford students with disabilities and their parents with required procedural safeguards. Data indicates that NYCDOE receives the largest number of due process complaints filed with an LEA in the United States. NYCDOE fails to provide parents access to adequate due process after a complaint has been filed, fails to provide access to due process data, fails to ensure access to mediation, and fails provide prior written notice (PWN) (20 U.S.C. §1415(a), (b)(3), (e), (f); 34 CFR §§300.500, 300.503, 300.506, 300.511; Educ. Law §§ 4402, 4404; 8 NYCRR §§200.5(a), (h), (j) and 200.16(h).

NYSED identified the following noncompliance with respect to NYCDOE's obligations to maintain a functioning due process hearing system:

1. Fails to provide parents access to adequate due process after a complaint has been filed;
2. Fails to provide access to due process data to NYSED;
3. Fails to ensure access to mediation; and
4. Fails to provide prior written notice.

### Maintenance of a Functional Due Process Hearing System

#### *Failure to Provide Due Process to Parents*

Parents may file a due process complaint with respect to any matter relating to the identification, evaluation, or educational placement of their child or the provision of FAPE. Once a due process complaint is filed, an Impartial Hearing Officer (IHO) must immediately be appointed, but not later than two business days after receipt of the complaint, and the hearing or prehearing conference must commence within 14 days after any resolution period, if not earlier. [20 U.S.C. §1415(a); 34 CFR §300.500 et seq.; Educ. Law §4404; 8 NYCRR §§200.5(e), (j); 200.5(j)(3), 200.5(m)].

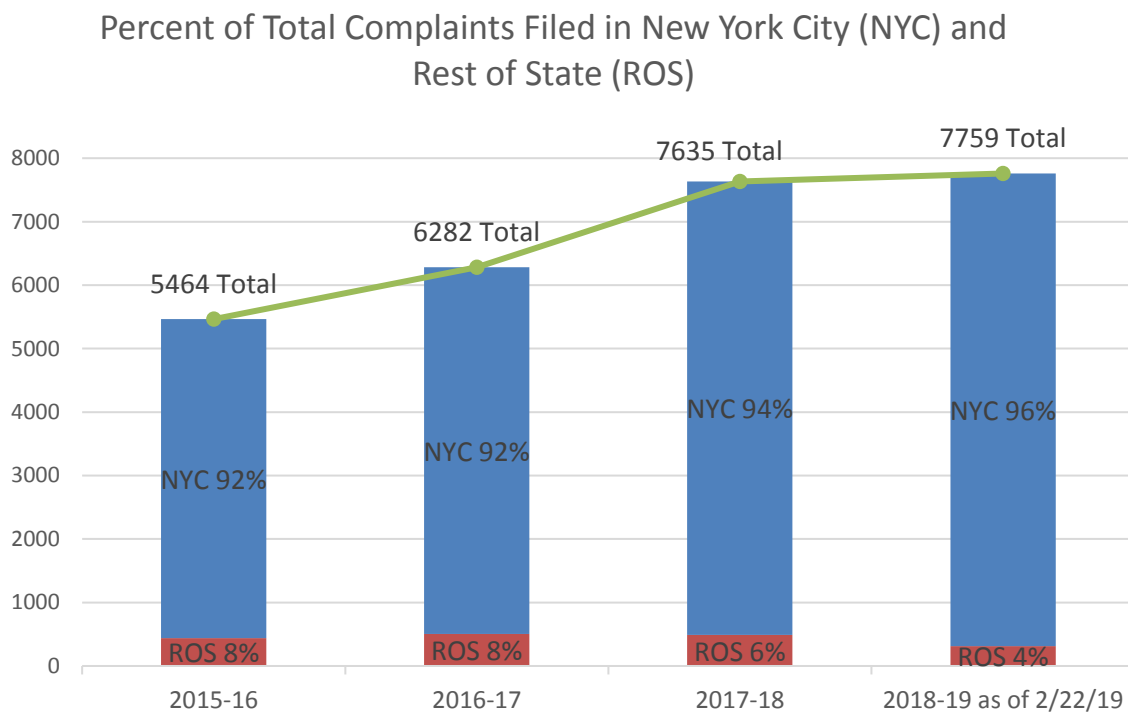
#### Description of Noncompliance:

Data indicates that NYCDOE has received an increasing number of due process complaints over recent years:



Total Number of NYCDOE Due Process Complaints Filed	
2015-16	5,026
2016-17	5,779
2017-18	7,144
2018-19 (July 1, 2018 – February 22, 2019)	7,448

Significantly more due process hearings are filed in NYCDOE as compared to districts in the rest of the State.



NYSED has documented that NYCDOE requires a hearing or IHO determination for pendency, even when a student's pendency is not in dispute, unnecessarily adding to the number of due process complaints filed. In addition, NYCDOE does not defend numerous cases at hearing, but rather admits that it did not provide FAPE and does not offer to settle these cases, adding to the unacceptable number of due process complaints filed.<sup>i</sup>

An independent report commissioned by NYSED and attached hereto (Appendix D), has documented that IHOs, certified by NYSED to serve in New York City, are subject to a convoluted compensation policy, effectively paying them at a rate of \$40 per hour for many tasks, although the State-authorized maximum compensation rate is up to \$100 per hour. Part of the explanation for the reduced pay is that NYCDOE's Impartial Hearing Office (NYCIHO) processes and distributes IHO decisions rather than the IHOs themselves. Because of shortages in staff at NYCIHO, however, this practice has resulted in hearing decisions being

issued after the compliance date. Additionally, IHOs are often not paid for months at a time because inadequate funds are allocated to the payment of IHOs.

The report further documented that:

- NYCISO's physical space is limited and inadequate;
- Hearings are only held in NYCDOE's Brooklyn North FSC location and not in the other boroughs in New York City;
- Hearings are not scheduled for a full day and may be limited to one hour due to limited space availability;
- There are 10 hearing rooms with, on average, 122 calendared matters per day for those rooms;
- There is inadequate waiting room space for parents, attorneys, and witnesses, and the lunch room also serves as the holding room for NYCDOE's reassigned teachers;
- Hearing spaces are uncomfortably hot or cold requiring doors to remain open during hearings, violating the confidentiality of students, there is limited access to amenities, and the space is unkempt.

NYCISO utilizes an automatic IHO appointment process, whereby an IHO is granted access to a case file before his/her availability is confirmed. Under this process, NYSED has documented that IHOs frequently recuse themselves from cases to maintain manageable caseloads and because of their unwillingness to handle certain hearing matters. NYCISO had 5,634 recusals during the 2017-18 school year and already has over 7,000 for the 2018-19 school year. This practice results in a process at NYCISO where many parents are not receiving an appointed IHO who will maintain the case long enough to commence the hearing process within the required timeframes.

### *Failure to Provide Due Process Data*

NYCDOE is required to regularly provide data, as well as copies of rendered IHO decisions, to NYSED in order for NYSED to maintain accurate due process data [8 NYCRR 200.5(j)(3)(xvi), 200.5(j)(5)].

#### Description of Noncompliance:

NYSED has documented that NYCISO has failed to timely enter data to NYCISO's Impartial Hearing System for download to NYSED's data system and has failed to mail NYSED copies of IHO decisions. Of the 1,754 decisions rendered in calendar year 2018, only 168 have been provided to NYSED.

### *Failure to Ensure Access to Mediation*

NYCDOE is required to ensure that mediation procedures are established and implemented so that disputes may be resolved outside of the hearing process [20 U.S.C. §1415(e); 34 CFR §§300.508, 300.148; 8 NYCRR §§200.5(h), 200.5 (j)].

### Description of Noncompliance:

NYCDOE's Standard Operating Procedure Manual (SOPM) does not allow mediation of issues pertaining to unilateral placements in non-NYSED-approved schools. Additionally, NYCDOE's SOPM and "[Resolving Issues](#)" webpage<sup>9</sup> inform parents that requests for mediation may be made directly to the Community Dispute Resolution Center or Parent Centers; however, NYSED's guidance and the procedural safeguards notice (PSGN) state that requests must be made to the district or CSE (CPSE). NYCDOE is not resolving or attempting to resolve enough matters through mediation, considering the large number of due process complaints filed, and its policies discourage mediation.

<b>Total Number of NYCDOE Mediations</b>	<b>Requested</b>	<b>Held</b>
2014-15	244	133
2015-16	258	129
2016-17	231	115
2017-18	214	126

## **Prior Written Notice (PWN)**

NYCDOE fails to consistently provide parents PWN on the form prescribed by the Commissioner of Education as required by 8 NYCRR §200.5(a) and a reasonable time before the school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student in accordance with 20 U.S.C. §§1412(a)(6) and 1415(b)(3); 34 CFR §300.503; 8 NYCRR §§200.5(a) and 200.16(h)(1).

### Description of Noncompliance:

As part of a monitoring review conducted during the 2017-18 school year, NYCDOE was required to submit PWNs for a selected sample of students. Upon review, NYSED identified the following procedural and/or substantive issues with NYCDOE's PWNs:

1. NYCDOE failed to provide PWN to parents within a reasonable time before the school district proposed or refused to initiate or change the identification, evaluation, educational placement of students, or the provision of FAPE to students to provide parents a reasonable time to consider and respond to the action before it is implemented;
2. NYCDOE provided parents PWN using its own templates, not the State's mandatory PWN form as required by 8 NYCRR §200.5(a)(1). NYCDOE's form failed to inform parents of the information they need and are entitled to have under 34 CFR §300.503 and 8 NYCRR §200.5(a)(3).
3. For preschool students with disabilities, through monthly meetings during the 2017-18 school year with CSE chairpersons and review of case studies, it was determined that the CPSEs within the 10 regional CSEs did not consistently utilize PWN at the

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<sup>9</sup> <https://www.schools.nyc.gov/special-education/help/resolving-issues>

required times, consistent with the requirements of 8 NYCRR §200.16(h)(1), specifically:

- a. For initial evaluations, PWNs were not sent to parents in the evaluation packets.
  - b. For initial evaluations, multi-disciplinary evaluation agencies/sites send emails to CPSEs requiring additional evaluations, and PWNs were not provided to parents when additional evaluations were to be conducted.
  - c. For requested IEP reviews and annual reviews, CPSEs used NYCDOE's Final Notice of Recommendation form in lieu of the State's mandatory PWN form.
4. CSE and CPSE administrators have reported insufficient professional development and guidance regarding the use of PWN and have reported that the State's required form is not accessible in SESIS.

## **Required Corrective Action**

As part of this compliance assurance plan, by June 3, 2019, NYCDOE must:

1. Increase the number of staffing resources to NYC IHO.
2. Procure additional hearing space and improve the existing hearing space in appearance, ventilation and amenities, including a separate area for NYCDOE reassigned teachers.
3. Address how it will ensure that allocation of resources is adequate to ensure regular, prompt payment to IHOs.

By June 17, 2019, NYCDOE must provide to NYSED a corrective action plan to correct its failure to provide students with disabilities and their parents all the rights and procedural safeguards required by federal and State law and regulations. At a minimum, the corrective action plan will address and/or include:

1. Provide a plan to revise its IHO compensation policy, subject to NYSED approval.
2. Immediate action steps to address each noncompliance item which must sufficiently describe NYCDOE efforts, provide an implementation timeline, and include measurable goals and objectives expected to be achieved.
3. Description of how NYCDOE plans to monitor its progress of the corrective action plan.
4. Identification of NYCDOE office and specific NYCDOE staff responsible for implementation of each step/action item included in the corrective action plan.
5. Process by which the corrective action plan will be adjusted and/or amended, with NYSED approval.
6. With respect to failure to maintain a functioning due process system, the corrective action plan must include, at a minimum, the following additional action steps:
  - a. Root cause analysis of the specific reasons for due process requests, including, but not limited to, the volume of cases in which NYCDOE concedes its failure to provide FAPE and why it does not or is unable to provide FAPE, and whether those cases should be resolved through settlement processes, broken down by community school district.
  - b. How it will increase the use of mediation and IEP facilitation.
  - c. How it will reduce its volume of due process impartial hearing requests.

- d. Eliminate NYC IHO's role in processing and distributing hearing decisions for IHOs. IHOs will be responsible for completing, dating redacting and sending their own decisions.
  - e. Ensure IHO availability before appointment. If within 24 hours an IHO fails to respond or is unreachable after reasonable efforts by NYCDOE (which must be documented), each successive IHO whose name appears next on the rotational appointment list shall be offered appointment until such appointment is accepted.
  - f. Ensure uncontested pendency matters are not brought before IHOs.
  - g. Ensure that staff representing NYCDOE at due process hearings are authorized to enter into settlement or may do so subject to approval, which approval will take no longer than 30 days after request for approval, which request will be made no later than 5 days after agreement has been reached.
7. With respect to PWN, the corrective action plan must include, at a minimum, the following additional action steps:
- a. Administrative procedures must be instituted to ensure that all PWNs are provided to parents on the State's mandatory PWN form, including documentation of the directive to all CSEs, CPSEs, and Subcommittees requiring the use of the State's mandatory form.
  - b. Administrative procedures must be instituted to ensure that PWN is issued within a reasonable time before NYCDOE proposes to or refuses to initiate or change the identification, evaluation, educational placement of students, or the provision of FAPE to students.
  - c. A schedule for the updates to SESIS to ensure that all generated PWNs are in compliance with 8 NYCRR §200.5(a); and
  - d. A schedule and supporting documentation of the Inclusive Schools Learning Collaborative professional training activities provided to all staff responsible for the issuance of the prior written notices.

# Verification of Compliance

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## *Technical Assistance and Support*

NYSED will work in collaboration with NYCDOE to provide ongoing and targeted support to assist NYCDOE in developing a plan to address the issues identified in this compliance assurance plan and achieve the prescribed corrective actions. Support will be provided by NYSED's Office of Special Education leadership and staff from its Central Office and Special Education Quality Assurance New York City Regional Office, as well as its funded technical assistance partners to support NYCDOE in reviewing and revising policies, identifying improvement strategies, and implementing practices necessary to ensure compliance with IDEA requirements and improved results for students with disabilities.

## *Monthly Progress Status Reports*

NYSED's Office of Special Education leadership will schedule progress monitoring meetings at least monthly with NYCDOE special education leadership to review the status of corrective action steps.

At these monthly meetings, a schedule of which is attached hereto as Appendix E, NYCDOE must present a written status update regarding the initial drafting and/or amendment of the corrective action plans, as well as the progress of those corrective action plans, including, at a minimum:

1. Immediate action steps to address each noncompliance item, which must sufficiently describe NYCDOE efforts, provide an implementation timeline, and include the measurable goals and objectives expected to be achieved.
2. Description of how NYCDOE plans to monitor its progress of the corrective action plan.
3. Identification of NYCDOE office and specific NYCDOE staff responsible for the implementation of each step/action item included in the corrective action plan.
4. Documentation that demonstrates the completion of the immediate action steps required by June 3, 2019, as documented in the "Failure to Afford Students with Disabilities and Their Parents All the Rights and Procedural Safeguards Required by Federal and State Law and Regulations" above.
5. Technical assistance and review of requested CAP deliverables from the previous month's monitoring meeting.

# Appendices

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1. Appendix A, New York State Education Department 2018 Criteria for School District Determinations under the Individuals with Disabilities Education Act (IDEA). <http://www.p12.nysed.gov/specialed/spp/nysdeterminations/documents/determination-criteria-2018.pdf>
2. Appendix B, Letter from Christopher Suriano, Assistant Commissioner, to Richard Carranza, Chancellor (February 15, 2019) regarding 2018 Accountability Status under Part B of the Individuals with Disabilities Education Act (IDEA).
3. Appendix C, School Communities Inclusive of All Students Action Plan 2018-19.
4. Appendix D, “An External Review of the New York City Impartial Hearing Office.”
5. Appendix E, Compliance Assurance Plan Monthly Progress Status Report.

## Related Documents of Interest

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1. State Performance Plan/Annual Performance Report, Indicator Results;  
<https://data.nysed.gov/lists.php?type=district>
2. Annual IDEA district determinations;  
<http://www.p12.nysed.gov/specialed/spp/nysdeterminations/home.html>
3. Special Education Preschool Regional Need List;  
<http://www.p12.nysed.gov/specialed/publications/preschool/regional-need.html>
4. NYCDOE Standard Operating Procedures Manual (SOPM);  
<https://infohub.nyced.org/partners-and-providers/special-ed-partners/standard-operating-procedures-manual>
5. Prior Written Notice Form;  
<http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html>
6. NYCDOE Local Law of 2015 Annual Report on Special Education, School Year 2017-18 (Annual Report)  
[https://drive.google.com/file/d/1FIWLiNlqzdm1\\_Ypw6WJ\\_HYyBNtJlqQvr/view](https://drive.google.com/file/d/1FIWLiNlqzdm1_Ypw6WJ_HYyBNtJlqQvr/view)
7. United States Department of Education, Office of Special Education Programs: Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act (Part B)  
<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/accombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf>



## Acronyms and Abbreviations

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CSE	Committee on Special Education
CPSE	Committee on Preschool Special Education
EI	Early Intervention
FAPE	Free Appropriate Public Education
FSC	Field Support Center
IHO	Impartial Hearing Officer
IDEA	Individuals with Disabilities Education Act
IEP	Individualized Education Program
ISLC	Inclusive Schools Learning Collaborative
LEA	Local Educational Agency
LRE	Least Restrictive Environment
MDE	Multidisciplinary Evaluation
NYCDOE	New York City Department of Education
NYCIHO	New York City Impartial Hearing Office
NYSED	New York State Education Department
PSGN	Procedural Safeguards Notice
PWN	Prior Written Notice
ROS	Rest of State
SC	Special Class
SCIS	Special Class in an Integrated Setting
SEIS	Special Education Itinerant Services
SEISIS	Special Education Student Information System
SOPM	Standard Operating Procedures Manual
SPP	State Performance Plan

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<sup>i</sup> *M.M. v. New York City Dep't of Educ.*, 2017 WL 1194685, at \*4 (S.D.N.Y. Mar. 30, 2017) (“At the April 8, 2014 hearing, both parties proposed evidence on the record ... Defendants conceded that they had failed to provide [the student] a FAPE and did not call any witnesses.”)

*L.K. v. New York City Dep't of Educ.*, 2016 WL 899321, at \*4 (S.D.N.Y. Mar. 1, 2016), *aff'd in part, remanded in part*, 674 F. App'x 100 (2d Cir. 2017) (“On March 19 and March 26, 2014, a[n] ...IHO .... held a hearing on the Parents' Due Process Complaint. The Department conceded at the hearing that it had not provided [the student] a FAPE for the 2013-14 school year.”) (internal citations omitted)

*M.W. v. New York City Dep't of Educ.*, 2015 WL 5025368, at \*4 (S.D.N.Y. Aug. 25, 2015) (“Defendants concede they failed to provide [the student] with a FAPE for eleven years. This was not a deviation from an IEP, it was a catastrophic oversight ....”)

*A.R. ex rel. F.P. v. New York City Dep't of Educ.*, No. 12 CIV. 4493 PAC, 2013 WL 5312537, at \*3 (S.D.N.Y. Sept. 23, 2013) (“DOE concedes that it did not offer the Student a FAPE for the 2010–11 school year”)

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*M.F. v. New York City Bd. of Educ.*, 2013 WL 2435081, at \*2 (S.D.N.Y. June 4, 2013) (“Here, DOE conceded at the impartial hearing that the placement it offered to [the student] was not appropriate ... Given DOE's concession that it did not offer [the student] a FAPE for the 2010–11 school year, the first prong of the Burlington/Carter test is satisfied.”) (internal citations omitted)

*S.H. v. New York City Dep't of Educ.*, 2011 WL 609885, at \*5 (S.D.N.Y. Feb. 18, 2011) (“At the hearing, DOE conceded that it had not provided [the student] with a FAPE for the 2008–09 school year”)

*E. Z.-L. ex rel. R.L. v. New York City Dep't of Educ.*, 763 F. Supp. 2d 584, 590 (S.D.N.Y. 2011), *aff'd sub nom. R.E. v. New York City Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012) (“At the impartial hearing, the DOE conceded that it failed to offer a FAPE to the child ...”)

*R.B. v. New York City Dep't of Educ.*, 713 F. Supp. 2d 235, 241 (S.D.N.Y. 2010) (“At the hearing, the DOE conceded that, by not offering C.Z. a placement for the 2007–2008 school year, it had failed to provide C.Z. with a FAPE ....”)

*Stevens ex rel. E.L. v. New York City Dep't of Educ.*, 2010 WL 1005165, at \*4 (S.D.N.Y. Mar. 18, 2010) (“At the impartial hearing, the defendant conceded that it had not provided a FAPE for the Student for the 2007–08 school year.”)

*N.R. ex rel. T.R. v. Dep't of Educ. of City Sch. Dist. of City of New York*, 2009 WL 874061, at \*4 (S.D.N.Y. Mar. 31, 2009) (“At an impartial hearing requested by Plaintiff, the Department conceded its failure to provide a free and appropriate education”)