



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

TO: P-12 Education Committee

FROM: Kimberly Young Wilkins *Kimberly Young Wilkins*

SUBJECT: Proposed Amendments to Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearing Officers and the Special Education Due Process System Procedures

DATE: February 28, 2020

AUTHORIZATION(S): *[Signature]* *Sharon L. Fiske*

SUMMARY

Issue for Discussion

Should the Board of Regents amend Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education relating to special education impartial hearing officers and the special education due process system procedures?

Reason(s) for Consideration

Review of State policy.

Proposed Handling

The proposed amendment is submitted to the P-12 Education Committee for discussion at its March 2020 meeting. A copy of the proposed rule is attached.

Procedural History

A Notice of Proposed Rule Making will be published in the State Register on March 18, 2020 for a 60-day public comment period in accordance with the State Administrative Procedure Act (SAPA). Supporting materials are available upon request to the Secretary of the Board of Regents.

Background Information

In January 2020, the Board of Regents was presented with a discussion item regarding expanding the pool of applicants of Impartial Hearing Officers (IHOs) to hear special education due process complaints filed in New York City. A presentation by the New York State Education Department's (NYSED's) Office of Special Education's (OSE) consultant, Deusdedi Merced from Special Education Solutions, LLC, provided data on the number of due process complaints filed in New York State compared to the rest of the country. New York exceeds by 63 percent the next most active state (California) with due process complaint filings.

Additionally, within New York State, the overwhelming majority of due process complaints are filed in New York City. In the 2018-2019 school year, 10,189 special education due process complaints were filed in New York State; of these, 9,694 filings, or 95 percent, were in New York City. That amount is expected to increase during the 2019-2020 school year. This unprecedented volume of special education due process complaints is overwhelming the New York City due process system.

NYSED is proposing certain regulatory changes to expand the pool of IHO applicants in New York City and to clarify certain IHO duties and responsibilities. Many of these additional changes were listed in the January 2020 Regents item as possible amendments to address deficiencies in the hearing process that might help alleviate some of the pressure on the New York City Department of Education's special education due process system.

Summary of Proposed Amendments

Expanding the Pool of Potential IHO Applicants in New York City

In accordance with the Individuals with Disabilities Education Act (IDEA), all IHOs must be held to a standard of appropriate legal practice when presiding over and rendering decisions in special education due process hearings. However, as discussed at the January 2020 Board of Regents meeting, New York State's current requirements for IHOs far exceed those required by IDEA to address the unprecedented number of open special education due process complaints in New York City.

1) Widening the Pool of Attorney IHO Candidates to Become IHOs

NYSED proposes to amend section 200.1(x) of the Regulations of the Commissioner of Education to remove the restriction that all IHO attorney candidates be licensed in New York State, thereby providing for the certification of qualified candidates from neighboring states. These candidates must be in good standing in their licensed state. The amendment would further expand the areas of relevant law practice and experience for attorney candidates to better align with the requirements of IDEA by including reference to administrative law. The proposed amendment would also reduce the number of years of experience and/or practice for attorney candidates from two years

to one year. While these proposed changes may widen the pool of applicant IHOs, it is important to note that when seeking a new cohort of IHOs for certification, NYSED seeks resumes, an extensive application, a writing sample, and three references, as well as conducting interviews of candidates, before inviting the applicant to attend a rigorous five-day training program. In other words, IHO candidates are rigorously vetted.

2) Allowing for Certification of Non-Attorney IHOs

NYSED further proposes to amend section 200.1(x) of the Regulations of the Commissioner of Education to allow for the certification of non-attorney IHOs to hear complaints filed in *New York City*, as well as set qualifications for these candidates. Because 95 percent of the volume of New York State's cases are in New York City, and, during stakeholder engagement, the Rest of State (ROS) did not endorse this change in qualifications for the IHOs handling due process hearings in their districts, this change would only pertain to New York City. The New York City Department of Education endorses this change in order to expand the number of certified IHOs accepting cases in New York City. Currently, there are 67 certified IHOs assigned to more than 10,000 due process complaints in New York City with approximately 1,700 cases waiting assignment of an IHO. Expanding the pool of applicants and having more IHOs available to take cases will assist with this volume. Non-attorney IHOs will be required to possess a minimum of a Masters degree in education, special education, psychology, or a related field and two years of experience applying knowledge of federal or State law and regulations pertaining to the Individuals with Disabilities Education Act in education, special education, or a related field.

Privacy

1) IHOs must maintain student confidentiality.

NYSED proposes to amend section 200.5(e) of the Regulations of the Commissioner of Education to add IHOs to this section listing out who is required to maintain confidentiality of students' personally identifiable information.

2) IHOs must render decisions in a consistent format.

Additionally, and in accordance with section 200.5(e), NYSED proposes to amend section 200.5(j) requiring IHOs to render decisions in a format consistent with NYSED guidelines that comply with the Family Educational Rights and Privacy Act (FERPA). This requirement will eliminate the need for local educational agencies or NYSED to have to redact decisions so that they comply with FERPA before making the decisions publicly available as required by IDEA.

Use of Video Conference

1) IHOs may receive testimony by video conference.

The regulations currently allow IHOs to receive testimony by telephone. NYSED proposes amending section 200.5(j)(3)(xii)(c) of the Regulations of the Commissioner of Education to allow IHOs to receive testimony via video conference to better accommodate needed witnesses, provided that such testimony shall be made under oath and shall be subject to cross-examination.

- 2) IHOs may conduct hearings by video conference.

To address concerns of the more than 10,000 due process cases in New York City, NYSED proposes to add clause (h) to section 200.5(j)(3)(xii) to allow an IHO to conduct hearings by video conference with the consent of parties so long as all personally identifiable data, information, or records pertaining to students with disabilities during such hearing is subject to section 200.5(e), pertaining to privacy, described above.

Related Regents Items

January 2020: [Expanding the Pool of Applicants to Serve as Impartial Hearing Officers to Hear Special Education Due Process Complaints Filed in New York City](http://www.regents.nysed.gov/common/regents/files/120p12d3.pdf)
(<http://www.regents.nysed.gov/common/regents/files/120p12d3.pdf>)

January 2014: [Proposed Amendment to 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/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)
(<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)
(<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)
(<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

Not applicable.

Timetable for Implementation

Following the 60-day public comment period required under SAPA, it is anticipated that the proposed rule will be presented to the Board for permanent adoption at the July 2020 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, 305, 3214, 4403, 4404 and 4410 of the Education Law.

1. Paragraph (1) of subdivision (x) of section 200.1 of the Regulations of the Commissioner of Education is amended to read as follows:

(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] one year of practice and/or experience in the areas of education, special education, disability rights [or], civil rights or administrative law; or be an individual certified by the State of New York as an impartial hearing officer on September 1, 2001; or for complaints filed in the city school district of the city of New York be an individual possessing a minimum of a Master's degree in education, special education, psychology, or a related field and two years of experience applying knowledge of federal or State law and regulations pertaining to the Individuals with Disabilities Education Act in education, special education, or a related field.

2. Paragraph (2) of subdivision (e) of section 200.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(2) Each public school, public agency [and], approved private school, and impartial hearing officer subject to the provisions of this Part shall preserve the confidentiality of personally identifiable data, information or records pertaining to students with disabilities. Such confidentiality must be preserved in a manner consistent with the procedures adopted pursuant to section 200.2(b)(6) of this Part and/or in accordance with 20 USC 1232(g) and the provisions of part 99 of title 34 of the Code of Federal Regulations or its successor and sections 300.610 through 300.625. (United

States Code, 2006 edition, volume 12, 2008; Superintendent of Documents, U.S. Government Printing Office, Stop SSOP, Washington, DC 20402-9328: 2004; Code of Federal Regulations, 2009 edition, title 34, part 99, Superintendent of Documents, U.S. Government Printing Office, Stop SSOP, Washington, DC 20402-0001; Code of Federal Regulations, 2009 edition, title 34, sections 300.610-300.625, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001; 2009 - available at the Office of Counsel, New York State Education Department, State Education Building, Room 148, 89 Washington Avenue, Albany, NY 12234).

3. Clause (c) of subparagraph (xii) of paragraph (3) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(c) The impartial hearing officer may receive any oral, documentary or tangible evidence except that the impartial hearing officer shall exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious. The impartial hearing officer may receive testimony by telephone or video conference, provided that such testimony shall be made under oath and shall be subject to cross examination.

4. Subparagraph (xii) of paragraph (3) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended by adding a new clause (h) to read as follows:

(h) The impartial hearing officer may conduct the impartial hearing by video conference with consent of the parties, which may be obtained at the pre-hearing conference, or at a minimum of 10 days before the scheduled hearing date, provided that all personally identifiable data, information or records pertaining to students with

disabilities during such hearing shall be subject to the requirements of section 200.5(e)(2) of this Part.

5. The opening paragraph of paragraph (5) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education are amended to read as follows:

(5) Timeline to render a decision. Except as provided in section 200.16(h)(9) of this Part and section 201.11 of this Title, if a school district files the due process complaint, the impartial hearing officer shall render a decision and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents and to the board of education not later than 45 days from the day after the public agency's due process complaint is received by the other party and the State Education Department. Except as provided in section 200.16(h)(9) of this Part and section 201.11 of this Title, if the parent files the due process complaint notice, the decision is due not later than 45 days from the day after one of the following events, whichever shall occur first: (a) both parties agree in writing to waive the resolution meeting; (b) after either 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; (c) if both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process; or (d) the expiration of the 30-day resolution period. In cases where extensions of time have been granted beyond the applicable required timelines, the decision must be rendered and mailed no later than 14 days from the date the impartial hearing officer closes the record. The date the record is closed shall be indicated in the decision.

Whether the parent or school district filed the due process complaint, the impartial

hearing officer shall render a decision in a format consistent with State Education Department guidelines wherein all personally identifiable data, information or records pertaining to students with disabilities shall be subject to the requirements of section 200.5(e)(2) of this Part. After a final decision has been rendered, the impartial hearing officer shall promptly transmit the record to the school district together with a certification of the materials included in the record. The record of the hearing and the findings of fact and the decision shall be provided at no cost to the parents. Within 15 days of mailing the decision to the parties, the impartial hearing officer shall submit the decision to the Office of Special Education of the State Education Department. All personally identifiable information, in accordance with the guidelines provided by the commissioner, shall be deleted from the copy forwarded to the Office of Special Education.

