



**TO:** The P-12 Education Committee

**FROM:** Angelique Johnson-Dingle *Angelique Johnson-Dingle*

**SUBJECT:** Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings

**DATE:** February 2, 2023

**AUTHORIZATION(S):** *Don McG* *Bellotti*

### **SUMMARY**

#### **Issue for Discussion**

Should the Board of Regents adopt the proposed amendment of section 200.5 of the Regulations of the Commissioner of Education relating to special education due process hearings?

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

Review of policy.

#### **Proposed Handling**

The proposed rule is being presented to the P-12 Education Committee for discussion at the February 2023 Regents meeting. A copy of the proposed amendment is included (Attachment A).

#### **Procedural History**

A Notice of Proposed Rule Making will be published in the State Register on March 1, 2023, for a 60-day public comment period. Supporting materials are available upon request from the Secretary to the Board of Regents.

## **Background Information**

### **Extensions:**

State and federal law generally require that a special education impartial hearing decision be rendered within 75 days of receipt of a due process complaint.<sup>1</sup> Impartial hearing officers (IHOs) may grant extensions to this timeframe if requested by the parties provided certain requirements are met. Despite the existing requirements in regulation, IHOs in New York City grant an inordinate number of extensions, resulting in delays in dispute resolution. This is contrary to the purpose of the special education due process hearing system, which is to timely resolve disputes between parents and school districts.

During the 2021-2022 school year, IHOs granted over 80,000 extensions in New York State, 79,203 (99 percent) of which originated from New York City. This has resulted in exceptionally lengthy hearings. Many such extensions are granted where, despite an agreement between the parties, the parties await final approval of a settlement by the New York City Department of Education. Cases can be extended for months or even years after the original 75-day period has passed<sup>2</sup> and yet still be considered timely as a result of extensions.

Therefore, the Department proposes to amend section 200.5(j)(5) of the Commissioner's regulations related to the issuance of extensions. Specifically, the proposed amendment:

- Includes additional reasons for an IHO to consider in determining whether good cause exists to grant an extension;
- Permits no more than a single extension unless there is a showing of exceptional circumstances by the parties. Exceptional circumstances may include the need to present additional witness testimony that could not reasonably be completed within the length of an ordinary hearing day. The parties must file an affirmation of an actual conflicting engagement when seeking an additional extension on this basis; and
- Creates a process by which parents or guardians who have settled with a school district may withdraw their complaints and remain in their then-current education placement until final execution of a settlement.

The Department anticipates that the proposed amendments will ameliorate overreliance on extensions by the parties and the IHOs in New York City and ensure more efficient and timely decisions.

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<sup>1</sup> IHOs have 45 days to render a decision following the end of the 30-day resolution period.

<sup>2</sup> Some of New York State's oldest cases have been open for over 1,000 days.

## Mediation and Resolution:

Mediation and resolution are viable but underutilized due process hearing dispute resolution mechanisms in New York State. In the 2021-2022 school year, there were 18,200 due process complaints filed in New York State, and only 355 requested special education mediation. Of the 355 requests, only 202 mediation agreements were reached. Concerning resolution, the regulations require that a resolution meeting be held in the vast majority of cases prior to proceeding to the hearing (see 8 NYCRR 200.5(j)(2)).<sup>3</sup> Nevertheless, of the 18,200 due process complaints filed, only 983 resolution meetings were held, and only 345 written settlement agreements were reached through resolution.

If a district fails to implement an agreed-upon mediation or resolution agreement, such agreements are enforceable “in any State court of competent jurisdiction or in a district court of the United States” (8 NYCRR 200.5(h)(1)(vi), 200.5(j)(2)(iv)). This is likely to be an expensive and lengthy process that may further discourage parents from engaging in mediation and/or resolution. However, the state complaint procedures available in section 200.5(l) of the Commissioner’s regulations is an alternative process that parents may find more accessible, and preferable, than judicial enforcement. Moreover, while federal regulations only address the use of judicial enforcement of mediation and resolution agreements, nothing in the federal regulations prohibits the use of nonjudicial mechanisms to resolve allegations that the public agency did not implement a mediation agreement, provided the State’s mechanism is not mandatory and does not otherwise delay or deny a parties’ right to seek enforcement of the agreement through the judicial enforcement mechanisms (see 34 CFR 300.506(b)(7), 300.510(d)(2); <https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/accombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf>).

Given the overwhelming number of due process complaints filed in New York State, the Department intends to make mediation more readily available and accessible to families and to further encourage family participation in resolution sessions, consistent with regulatory requirements. Therefore, the Department proposes to amend sections 200.5(h) and 200.5(j)(2) of the Commissioner’s regulations to allow for enforcement of mediation and resolution agreements through the state complaint process outlined in section 200.5(l) of the Commissioner’s regulations. Additionally, to promote the use of mediation, the Department proposes to amend section 200.5(h)(1) of the Commissioner’s regulations to encourage the use of mediation, consistent with Education Law §4404-a(2).

## Rules of Conduct:

The Department has received several complaints from school districts concerning the conduct of non-attorney advocates during impartial due process hearings. Therefore, on September 13, 2022, the Department communicated to all certified IHOs that they must accord all parties a meaningful opportunity to exercise their rights during the impartial hearing and if a party, witness, or advocate engaging in abusive or harassing conduct despite warning or admonishment, an IHO should take remedial measures.

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<sup>3</sup> In cases where the due process complaint is brought by a school district, districts are not required to hold resolution meetings.

It is imperative that all individuals appearing before an IHO, attorneys and non-attorney representatives alike, remain respectful and courteous throughout the hearing process. Therefore, the Department proposes to amend section 200.5(j)(3) of the Commissioner's regulations to provide that attorneys and representatives must be familiar with, and comply with, all applicable laws, rules, orders, and directions of an IHO. This regulation provides that all attorneys and representatives must conduct themselves at all times in a dignified, orderly, and decorous manner; they are specifically prohibited from engaging in abusive or disorderly behavior. Additionally, they may not disregard the IHO's authority, including refusing to comply with the directions of an IHO during proceedings.

The Department expects that these amendments will ensure a more efficient hearing process and reduce the time in which it takes IHOs to complete hearings.

#### Use of In-Person, Teleconference, and Videoconference:

The Department proposes to amend section 200.5(j)(3)(xii)(h) and (i) of the Commissioner's regulations, regarding the use of teleconference and videoconference hearings and whether such hearings are permissible, to simplify the requirements and provide additional flexibility to parents and IHOs. The Department proposes to amend such provisions to provide that IHOs may determine, with the consent of the parent, whether a hearing should be conducted in person, by teleconference, or videoconference. The Department anticipates that this will reduce inefficiencies and confusion related to the use of teleconference and videoconference for such hearings.

#### **Related Regents Items**

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>)

March 2020: [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](https://www.regents.nysed.gov/common/regents/files/320p12d4.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/320p12d4.pdf>)

July 2020: [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](https://www.regents.nysed.gov/common/regents/files/720brd4revised.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/720brd4revised.pdf>)

October 2020: [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](http://www.regents.nysed.gov/common/regents/files/1020p12d1revised.pdf)  
(<http://www.regents.nysed.gov/common/regents/files/1020p12d1revised.pdf>)

March 2021: [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](https://www.regents.nysed.gov/common/regents/files/321p12a4.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/321p12a4.pdf>).

### **Recommendation**

Not applicable.

### **Timetable for Implementation**

It is anticipated that the proposed amendment will be presented for permanent adoption at the June 2023 Regents meeting, after publication of the proposed amendment in the State Register, holding of public hearings as required by the Individuals with Disabilities Education Act (IDEA),<sup>4</sup> and expiration of the 60-day public comment period required under the State Administrative Procedure act. If adopted at the June 2023 meeting, the revised proposed rule will become effective on June 28, 2023.

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<sup>4</sup> The public hearing notice will be published as part of the Notice of Proposed Rule Making in the March 1, 2023 State Register Publication.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 107, 207, 305, 3214, 4403, 4404, and 4410 of the Education Law.

1. Paragraph (5) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(5) ...

(i) ...

(ii) [The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors] The initial request for an extension may be granted only for good cause shown and only for the minimum necessary length of time. Although the party's consent to an extension request weighs in favor of granting the request, their consent does not, by itself, constitute good cause for an extension. The impartial hearing officer shall consider the following in deciding whether there is good cause for an extension:

(a) ...

(b) ...

(c) ...

(d) whether there has already been a delay in the proceeding through the actions of one of the parties[.];

(e) the amount of time the proceedings have been pending;

(f) whether the extension will inconvenience any witnesses;

(g) whether the extension is requested due to facts beyond the requesting party's control; and

(h) any other fact or consideration that the impartial hearing officer considers relevant.

(iii) [Absent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts, or other similar reasons. Upon a finding of good cause based on the likelihood that a settlement may be reached, an extension may be granted for settlement discussions between the parties. The impartial hearing officer shall not rely on the agreement of the parties as a basis for granting an extension.] No proceeding or deadline may be extended more than once, except upon a showing of exceptional circumstances as determined by the impartial hearing officer. Exceptional circumstances may include the need to present additional witness testimony that could not reasonably be completed within the length of an ordinary hearing day (i.e., eight hours with reasonable breaks, including lunch). In addition, where an attorney requests an extension based upon time constraints imposed by another pending legal matter, the attorney must submit an affirmation to the impartial hearing officer that states the nature of the conflicting matter, the court or tribunal hearing the matter, the judge or impartial hearing officer before whom the matter is scheduled, and the date, time, place and approximate duration of the engagement. If the parent is accompanied by a non-attorney representative who requests an extension based upon time constraints imposed by other advocacy work, the non-attorney representative must submit an affirmation to the impartial hearing officer that states the nature of the conflicting matter, the court or tribunal hearing the matter, the impartial hearing officer before whom the

matter is scheduled, and the date, time, place and approximate duration of the engagement.

(iv) Notwithstanding any other provision of this section, if the parties have made substantial progress toward settlement, as determined by the impartial hearing officer, they may jointly request that the matter be dismissed, without prejudice, until the parties finalize such settlement agreement. The statute of limitations applicable to a due process complaint shall be tolled for a period of six months from the date of such dismissal. The student's right to remain in his or her then-current educational placement, pursuant to subdivision (m) of this section, shall continue until a settlement agreement is executed or until expiration of the six-month tolling of the statute of limitations. No extension shall be granted after the record close date.

(v) A party may not withdraw and refile or amend a due process complaint for the primary purpose of obtaining additional extensions of time. If an impartial hearing officer determines that a party refiled or amended such a complaint primarily for such reason, he or she shall dismiss the complaint for abuse of process.

~~[(iv)]~~(vi) The impartial hearing officer shall promptly respond in writing to each request for an extension and shall set forth the facts relied upon for each extension granted. The response shall become part of the record. The impartial hearing officer may render an oral decision to an oral request for an extension if the discussions are conducted on the record, but shall subsequently provide that decision in writing and include it as part of the record. For each extension granted, the impartial hearing officer shall set a new date for rendering his or her decision, notify the parties in writing of such date, and as required, revise the schedule of remaining hearing dates set forth in the

written prehearing order issued pursuant to clause (3)(xi)(b) of this subdivision to ensure that the impartial hearing officer's decision is issued by the revised decision due date.

~~[(v)]~~(vii) The impartial hearing officer shall determine when the record is closed and notify the parties of the date the record is closed. The decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact. The impartial hearing officer shall attach to the decision a list identifying each exhibit admitted into evidence. Such list shall identify each exhibit by date, number of pages, and exhibit number or letter. In addition, the decision shall include an identification of all other items the impartial hearing officer has entered into the record. The decision shall also include a statement advising the parents and the board of education of the right of any party involved in the hearing to obtain a review of such a decision by the State review officer in accordance with subdivision (k) of this section. The decision of the impartial hearing officer shall be binding upon both parties unless appealed to the State review officer. Impartial hearing officers must sign and date their decisions as of the date the decision is being distributed and shall distribute the decision to the parties on that same day. This date shall also constitute the case closure date reported by a district to the Office of Special Education in the New York State Education Department.

~~[(vi)]~~(vii) For purposes of this section, the record shall include copies of:

- (a) ...
- (b) ...
- (c) ...

(d) ...

(e) ...

(f) ...

(g)...

(h) ...

2. Subdivision (h) of section 200.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(h) Mediation.

(1) During the resolution period pursuant to paragraph (2) of subdivision (j) of this section, the parties may agree to engage in mediation for any matter for which an impartial due process hearing may be brought. Parties may also agree to engage in mediation at any time, including prior to the filing of a due process complaint notice, for any matter in which an impartial due process hearing may be brought. Where parties agree to engage in mediation prior to the filing of a due process complaint, the student has the right to remain in his or her then-current educational placement, consistent with subdivision (m) of this section. If the parties determine that they are unable to resolve the complaint in mediation, the parent must file a due process complaint concerning the matter that is the subject of mediation within 14 days of such determination to continue their current placement, unless the parties otherwise agree. Each school district must ensure that procedures are established and implemented to allow parties to resolve disputes [involving any matter for which an impartial due process hearing may be brought, including matters arising prior to the filing of a due process complaint notice] through a mediation process. Such procedures must ensure that:

(i) ...

(ii) ...

(iii) ...

(iv) ...

(v) ...

(vi) In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding written agreement that sets forth the resolution and that states that all discussions that occurred during the mediation process shall remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any federal or State court. The agreement shall be signed by both the parent and a representative of the school district who has the authority to bind the school district. The written, signed agreement is enforceable in any State court of competent jurisdiction, [or] in a district court of the United States, or, with respect to matters concerning Part B of the Individuals with Disabilities Education Act, through the state complaint procedures outlined in subdivision (l) of this section.

(2) ...

(3) ...

(4) ...

(5) ...

3. Paragraph (3) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended by adding a new subparagraph (xviii) to read as follows:

(xviii) At all times throughout an impartial hearing, representatives of the parties, including attorneys and non-attorney representatives must:

(a) Be familiar with and comply with all applicable laws and rules, and the orders and directions of the impartial hearing officer. Attorneys and representatives shall not disregard the authority of the impartial hearing officer.

(b) Conduct themselves at in a dignified, orderly, and decorous manner. At the hearing, attorneys or representatives must address themselves to the impartial hearing officer at all times and cooperate with the orderly conduct of the proceedings. Attorneys and representatives shall not engage in abusive behavior or any disturbance that directly or indirectly disrupts, obstructs, or interrupts the proceedings.

4. Clauses (h) and (i) 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:

(h) [The impartial hearing officer may conduct the impartial hearing by video conference during a declared State of emergency issued by the Governor pursuant to an Executive Order,] The impartial hearing officer, with the consent of the parent, may conduct the hearing in person, by video conference or teleconference, provided that all personally identifiable data, information or records pertaining to students with disabilities during such hearing shall be subject to the requirements of paragraph (e)(2) of this section.

[(i) The impartial hearing officer may conduct the impartial hearing by video conference or teleconference with the consent of the parent which may be obtained at a pre-hearing conference, or 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. Subparagraph (iv) of paragraph (2) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(iv) Written settlement agreement. If during the resolution process, the parent and school district reach an agreement to resolve the complaint, the parties shall execute a legally binding agreement that is signed by both the parent and a representative of the school district who has the authority to bind the school district. Such agreement shall be enforceable in any State court of competent jurisdiction, [or] in a district court of the United States, or, with respect to matters concerning Part B of the Individuals with Disabilities Education Act, through the state complaint procedures outlined in subdivision (l) of this section. A party may void such agreement within three business days of the agreement's execution.