

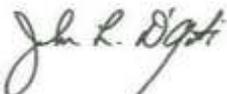


TO: P-12 Education Committee

FROM: 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: March 4, 2021

AUTHORIZATION(S):   

SUMMARY

Issue for Decision

Should the Board of Regents adopt the proposed amendments to sections 200.1 and 200.5 of the Regulations of the Commissioner of Education relating to special education impartial hearing officers (IHOs) and the special education due process system procedures?

Reason(s) for Consideration

Implementation of policy.

Proposed Handling

The proposed rule will be presented to the P12 Education Committee for discussion and the Full Board for adoption at its March 2021 meeting. A copy of the proposed amendment is included as Attachment A.

Procedural History

At its March 2020 meeting, the Board of Regents was presented with a detailed summary of the proposed amendment, and the Board of Regents voted to authorize New York State Education Department (“NYSED” or “Department”) staff to publish the proposed amendment in the State Register for the 60-day public comment period. A Notice of Proposed Rulemaking was published in the State Register on March 18, 2020. Additionally, public hearings were held via WebEx on May 18, 2020 and June 11, 2020 as required by the Individuals with Disabilities Education Act (IDEA). Following the 60-day public comment period required under the State Administrative Procedure Act, the

Department received numerous comments on the proposed amendment. An assessment of public comments received during the first public comment period is included in Attachment D.

Based on comments received, the Department revised the proposed amendment. A Notice of Revised Rule Making was published in the State Register on July 29, 2020. Following the 45-day public comment period required under the State Administrative Procedure Act, the Department received numerous comments on the proposed amendment. An assessment of public comment received during the second public comment period is included as Attachment C. Based on comments received, the Department proposed and discussed additional revisions at its October 2020 meeting. A Notice of Proposed Rule Making was again published in the State Register on January 6, 2021. The Department again received numerous comments on the proposed amendment, including comments from school district administrators, parents, school psychologists, teachers, related service providers, special education advocates/advocacy organizations, attorneys, and others. An assessment of public comment received during the third public comment period is included as Attachment B. No additional revisions are proposed by the Department based upon the third round of comments. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

In January 2020, the Board of Regents was presented with a discussion item regarding expanding the pool of IHO applicants to hear special education due process complaints filed in New York City. A presentation by the 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 has 63 percent more due process complaint filings than the next most active state (California).

Additionally, as discussed at the January and February meetings, within New York State, the overwhelming majority of due process complaints are filed in New York City. The 2019-2020 school year data continues to show an increase in special education due process complaint filings. In the 2019-2020 school year 11,267 special education due process complaints were filed in New York State; of those, 10,797, or 96 percent, were in New York City. For the 2020-2021 school year, there are expected to be as many as 12,000 special education due process complaints filed in New York City alone. This increase, in part, may be due to parents seeking compensatory services as a result of COVID-19.

NYSED is proposing certain regulatory changes to expand the pool of IHO applicants and to clarify certain IHO duties and responsibilities. Many of these additional changes were included 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

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 potential 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 IHO applicants, it is important to note that NYSED continues to rigorously vet new cohorts of IHOs for certification by requiring a resume, an extensive application, a writing sample, and three references. NYSED also conducts an interview of each candidate before inviting the individual to attend an intensive five-day training program.

2) Privacy

NYSED proposes to amend section 200.5(e) of the Regulations of the Commissioner of Education to clarify that IHOs are to maintain confidentiality of students' personally identifiable information.

3) Consistent Format for IHO Decisions

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

4) Hearing 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.

5) Conducting of Hearings by Video Conference and Teleconference

NYSED proposes to add clause (i) to section 200.5(j)(3)(xii) to allow an IHO to conduct hearings by video conference and teleconference with the consent of the parent or guardian, provided 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 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>)

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>)

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>)

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)

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>)

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>)

Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: That sections 200.1 and 200.5 of the Regulations of the Commissioner of Education be amended, as submitted, effective March 31, 2021.

Timetable for Implementation

If adopted at the March Regents meeting, the proposed amendment will become effective March 31, 2021.

Attachment A

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;_

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 (i) to read as follows:

(i) The impartial hearing officer may conduct the impartial hearing by video conference or teleconference with consent of the parent which may be obtained at a 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.

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Revised Rule Making in the State Register on January 6, 2021, the State Education Department (SED or the Department) received the following comments.

Allowing Impartial Hearing Officer (IHO) to Conduct the Impartial Hearing by Video Conference or Teleconference with Consent of the Parent

1. COMMENT:

One comment was received in support of the proposed amendment allowing special education impartial hearings to continue remotely, and to give parents the decision-making power to choose that these hearings be remote. The commenter indicated that it's important to support families undergoing multiple stresses and to prioritize the needs of the child in that context. These needs are best met by reducing the costs and delays associated with in-person hearings, and that this will maximize the welfare of the child while reducing costs to the city and to families.

DEPARTMENT RESPONSE:

Comment is supportive; therefore, no response needed.

2. COMMENT:

Numerous commenters indicated the proposed rule to allow hearing officers to conduct hearings remotely, with the consent of the parent, did not go far enough to protect the interest of parents and their witnesses indicating that:

- Prior to conversion to remote hearings due to pandemic, certain hearing officers categorically refused to permit remote testimony under any

circumstances. To prevent return to that practice once the pandemic restrictions are relaxed, rule should be amended to give parents the unilateral right to present testimony remotely for reasons of convenience.

- In-person hearings are fraught with delays due to inadequate facilities or scheduling difficulties. It is not uncommon for parents and their witnesses to wait for hours at the hearing office until a conference room or hearing officer is available or to be told that they must return another day.
- Educators and clinicians who usually only testify for 30-45 minutes must typically leave their students and patients for entire morning or afternoon. The additional time required to testify in person also increases the cost of paying an outside expert to testify (such as doctors or clinicians who evaluate or treat their child) – disproportionately impacting low-income parents.
- Given the positive experience with remote hearings reported by participants in hearings, it should be evident that affording parents the flexibility to present remote testimony for reasons of convenience will prejudice no one and instead lead to greater efficiency for all.

DEPARTMENT RESPONSE:

The Department acknowledges the importance of parent choice in the manner in which an impartial hearing is conducted, as well as the commenters' justifiable concerns regarding hearing delays due to inadequate facilities or scheduling difficulties, the need to reschedule due to delays, and the additional time and expense of testifying in person and the burden on low-income families. The Department has also received accounts of positive experiences regarding remote hearings. Nevertheless, the Department declines

to change the proposed regulations. Consistent with the United States Department of Education's Office of Special Education Programs' Letter to Anonymous (23 LRP 3438), IHOs have substantial discretion as to how they conduct hearings. IHOs may justifiably decline to conduct a hearing by telephone or videoconference after determining, for example, that it is necessary to personally observe a witness to judge his or her credibility. If a party feels that an IHO made an inappropriate decision with respect to witness testimony via telephone or videoconference, the party may challenge that decision on appeal.

The Department also acknowledges that a small number of IHOs initially refused to allow hearings by videoconference following the April 2020 emergency regulations allowing IHOs to conduct special education due process hearings by videoconference during the COVID-19 crisis. The Department quickly worked with those IHOs to ensure they were providing parents with access to telephone and/or videoconferencing and will continue to provide guidance to IHOs to encourage them to do so, as appropriate. Additionally, after conducting hearings by video conference as afforded by these emergency regulations, many IHOs indicated support of the option of videoconferencing. Finally, if an individual believes that an IHO unreasonably refuses to allow remote testimony, he or she may file a complaint consistent with section 200.21 of the Regulations of the Commissioner of Education.

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Revised Rule Making in the State Register on July 29, 2020, the State Education Department (SED or the Department) received the following comments. These comments were previously published as part of the July and October 2020 Board of Regents Items.

Allowing for Certification of Non-Attorney Impartial Hearing Officers (IHO) in New York City (NYC)

1. COMMENT:

Numerous commenters opposed certification and use of non-attorney IHOs indicating that:

- Non-attorneys do not have training or expertise required to conduct research and effectively understand, interpret, and apply federal and State law to cases, run a hearing in accordance with standard legal practice and tackle complex legal issues; will not be able to interpret the legislative intent of the Individuals with Disabilities Education Act (IDEA) and analyze complex body of law; do not have requisite knowledge and skills to adjudicate special education claim;
- Necessary skills cannot be learned in a brief “turn-key” training;
- Difficult to ascertain how a typical layperson who has not completed law school would be able to fulfill the mandates of 20 U.S.C. §1415(f)(3)(A)(i)-(iv) which requires knowledge and ability to understand federal and State regulation, legal interpretations and court decisions regarding IDEA, conduct

- hearings and possess knowledge and render and write decisions in accordance with appropriate, standard legal practice;
- IDEA also requires an understanding of federal and State law, rules of evidence and how to apply applicable case law; non-lawyers cannot meet these requirements;
 - IDEA uses the term “standard legal practice” requirement; non-lawyers cannot meet IDEA requirements;
 - Due to legal complexity, attorneys are required to adjudicate special education due process hearings to ensure that legal procedures are properly followed, and the law is correctly applied;
 - Someone with experience interpreting law must be the person who is ruling at hearings;
 - Decision will result in IHOs who do not have the requisite knowledge and skills to adjudicate special education claims;
 - Background in psychology, special education, or education administration may be qualification for service as a school psychologist, special education teacher or school administrator - such education and experience are not per se qualifications for service as an administrative law judge;
 - No one would presume that a lawyer could step into the role of a clinician or educator, why is the reverse acceptable;
 - Cases heard by non-attorney IHOs could contribute to increased appeals to a State Review Officer and federal court;
 - Assigning non-attorney IHOs exclusively to NYC is indefensible;

- Proposal will prolong the already lengthy road to resolution; parents of students with disabilities have already suffered due to delays at the Office of State Review;
- Other State agencies find well-qualified attorneys to serve as hearing officers in their administrative tribunals, SED should be able to also;
- Proposal is disparate compared to the rest of the State which would have IHOs that are attorneys;
- Proposal would result in students and litigants in NYC having IHOs who are less qualified than IHOs hearing cases in the rest of New York State (NYS);
- This is a change in SED's position from 2001 when it stated that it had concerns that non-attorneys did not have the requisite skills and expertise; hearings are even more complex than in 2001;
- NYS abandoned using non-attorneys in 2001; SED is reversing a well-reasoned policy that NYSED put in place more than 20 years ago without justification,
- Change would be inconsistent with nationwide trend (42 states require attorney IHOs);
- Bringing back a failed policy as a solution to a problem in NYC is a disservice to parents and vulnerable children;
- Negative effects of certifying non-attorney IHOs will disproportionately impact low-income families and communities of color;
- Proposal creates a two-tiered system of educational justice and will result in de facto racial segregation and educational inequality;

- Proposal invites significant bias into the impartial hearing process;
- COVID-19 demonstrates that hearings can be held remotely, there is no need to establish watered-down qualifications;
- Courts give deference to IHO decisions, this will dilute the nature of the process;
- Pro-se parents would be reliant on IHOs to guide them through the legal processes;
- Non-lawyers are not bound by the rules of professional conduct; and
- Non-lawyers are not subject to continuing legal education.

DEPARTMENT RESPONSE:

The Department has considered the multitudinous comments received regarding the proposal to certify non-attorneys as IHOs in NYC and determined, after much forethought, to revise its proposed amendment and remove this provision.

2. COMMENT:

Dismayed that SED has failed to respond to overwhelming public comment in opposition to the proposed regulation permitting non-attorneys to serve as IHOs. The response SED published in the July 29, 2020 NYS Register merely stated that the “Department is currently reviewing these comments.”

DEPARTMENT RESPONSE:

See response to Comment 1. The Department has determined that it will withdraw its proposal to have non-attorneys certified to become IHOs in NYC.

3. COMMENT:

Agree that the State and NYC must take urgent action and appreciate SED’s

recognition of the need to address the delays in impartial hearings; however, NYS must still have IHOs that are attorneys so that law is correctly applied.

DEPARTMENT RESPONSE:

See response to Comment 1. The Department has determined that it will withdraw its proposal to have non-attorneys certified to become IHOs in NYC.

4. COMMENT:

Any system wherein non-attorney IHOs are assigned “simpler” cases or would receive the same compensation as attorney IHOs is problematic. A system where non-attorney IHOs handle certain cases would violate the rotation system requirements.

DEPARTMENT RESPONSE:

See response to Comment 1. The Department has determined that it will withdraw its proposal to have non-attorneys certified to become IHOs in NYC.

5. COMMENT:

Proposal does not address inadequate compensation of IHOs. Problem with system is that IHOs have to get paid better.

DEPARTMENT RESPONSE:

Comments regarding NYC IHO Compensation policy are beyond scope of rule.

6. COMMENT:

Backlog does not justify resorting to non-attorney IHOs. Returning to already failed policy does not address underlying causes of problems. Proposal to allow certification of non-attorneys does not address the problem at its source – the New York City Department of Education’s (DOE) widespread inability to provide appropriate evaluations, individualized education programs, services and placements to all children

with disabilities. SED should explore other solutions. Suggest adding impartial personnel to facilitate meaningful resolution periods, resolve cases where the DOE has no defense; pay for the parents' provider where the DOE has failed to find one; get DOE to timely complete its investigations. Endorse radical change throughout the system to streamline the process and cut down on the number of cases every year. Compliance assurance plan has done nothing as NYS continues to fail to repair the broken educational system.

DEPARTMENT RESPONSE:

See response to Comment 1. The Department has determined that it will withdraw its proposal to have non-attorneys certified to become IHOs in NYC. The Comprehensive Compliance Assurance Plan addresses numerous systemic failures by NYCDOE pertaining to its implementation of IDEA. The Department agrees that all possible solutions must be explored to reduce the excessive volume of special education due process complaints filed in NYC.

7. COMMENT:

Proposed amendment was driven by need to expand the pool of certified IHOs. There are better ways to work through the backlog of cases including certifying more attorney IHOs. SED has certified 35 new IHOs who are attorneys and just needs to use more aggressive recruitment efforts. Use attorneys from all over the world. Include entire country because telephone and video are now allowed.

DEPARTMENT RESPONSE:

The Department's proposed regulations include allowing attorneys from other states to become certified IHOs, and the Department has begun to train attorneys from

other states. The Department agrees with the comment that the use of video and telephonic hearings, in combination with certifying attorneys outside of the State of New York, should help to expand the pool of IHOs who may conduct hearings in NYC.

Use of Video Conference to Receive Testimony and Conduct Hearings

8. COMMENT:

Many commenters generally support the use of video conferencing technology in impartial hearings. Videoconferencing could alleviate travel burden for families, lessen space constraints, and allow for scheduling of more meetings in a day. Many commenters also supported the addition of telephonic hearings and pointed out that hearings have been run successfully in NYC in this manner during COVID-19 shut-downs.

DEPARTMENT RESPONSE:

Comments supportive; therefore, no response needed.

9. COMMENT:

The proposed amendment to section 200.5(j)(3)(xii) of the Regulations of the Commissioner which requires both parties to consent to a video or telephonic hearing a minimum of 10 days before the scheduled hearing date will present problems because the NYCDOE often does not respond to emails or communicate before the day of the scheduled hearing. This requirement gives school districts veto power to allow hearings to take place by video or telephone. Requiring the consent of the parent only is consistent with 8 NYCRR §200.5(j)(3)(x) which requires that the hearing be conducted at a place convenient to the parent and student. Requiring both parties to consent to a hearing by video or telephone violates 34 CFR §300.515(d) which states that oral

arguments must take place at a time and place that is reasonably convenient to the parents and child.

DEPARTMENT RESPONSE:

In consideration of several comments received and in conformance with 34 CFR §300.515(d) and section 200.5(j)(3)(x) of the Regulations of the Commissioner, the Department has revised section 200.5(j)(3)(xii) to reflect that only the parent needs to consent to the use of telephonic or video hearings ten days before the hearing.

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Proposed Rule Making in the State Register on March 18, 2020, the State Education Department (SED) received the following comments on the proposed amendment. These comments were previously published as part of the July and October 2020 Board of Regents Item.

Widening the Pool of Attorney Impartial Hearing Officer (IHO) Candidates to Become IHOs: Remove the restriction that all IHO attorney candidates be licensed in New York State (NYS), reduce the number of years of experience from two years to one year, and expand the areas of relevant law practice to include administrative law.

1. COMMENT:

Support allowing attorneys from other states to serve as IHOs but require them to have two years of legal experience and training on Part 200 of the Regulations of the Commissioner. Individuals with Disabilities Education Act (IDEA) requires IHOs to possess knowledge of federal and state statutes, regulations, and case law. Understanding of NYS practice and administrative law is an important qualification for IHOs, since the record may be reviewed and remanded within the NYS Unified Court System, and certifying IHOs who are licensed in other states could reduce the quality of hearings. Even two years of legal experience is insufficient to ensure an attorney has developed “standard legal practice.”

DEPARTMENT RESPONSE:

SED acknowledges the importance of IHOs possessing knowledge of and having a fundamental understanding of IDEA, as well as federal and State statutes,

regulations, policy and case law. All IHO applicants are rigorously vetted before being invited to attend a five-day training program, which includes NYCRR Part 200. After training, IHO applicants must pass a test before becoming a NYS-certified IHO for special education due process. Additionally, each year, IHOs must participate in a seven-and-one-half-hour in-person training as well as six-webinar-hours of continuing legal education classes pertaining to special education law provided by SED. Even with the proposed reduction to one year of experience, SED is confident it will be able to continue to find appropriate IHO candidates who are able to provide standard legal practice.

2. COMMENT:

Administrative law is too broad of a category and would allow attorneys who practice in irrelevant fields (e.g., labor to zoning) and do not have relevant knowledge or experience to adjudicate claims regarding the education of students with disabilities to become IHOs.

DEPARTMENT RESPONSE:

Administrative law is one of several areas of practice and/or experience needed to become an IHO as defined in CR §200.1(x). Most commenters agree that administrative law experience is an asset to becoming an IHO.

Allowing for Certification of Non-Attorney IHOs

3. COMMENT:

Several commenters opposed certification and use of non-attorney IHOs. These commenters noted the following:

- Proposal will hurt children and increase cases being improperly handled.

Need individuals who are reliable interpreters of law;

- Law school requires three years of training, including civil procedure, rules of evidence, state and federal legal system, how to read and interpret case law, legal writing, and other relevant courses;
- Attorney IHOs have passed the NYS Bar, which ensures a basic level of expertise. Other reasons non-attorneys are not qualified to be IHOs include: lack of knowledge to read, research, and interpret case law; lack of knowledge of civil procedure and rules of evidence; uneven power dynamic when experienced attorneys can sway non-attorney IHOs who will not have background/experience to handle situations. Many parents' attorneys have expressed the same concerns.
- Do not believe this would lead to an improved due process system and that the idea failed when attempted in past. Forty-two other states use attorneys, and no other state has reversed their decision to use attorneys;
- Amendment is not equitable, and crisis should not be used to push through a policy that the rest of the State would not be willing to adopt.
- Changing the eligibility criteria for IHOs in New York City (NYC) only, is discriminatory and denies NYC parents equal access to justice;
- School professionals such as district representatives and others have little understanding of the intent, process or provision of IDEA;
- Non-attorneys are less likely to be impartial adjudicators;
- Non-attorneys would require intensive training to support their ability to make sound decisions based on the law;

- Many former NYC Department of Education (NYCDOE) employees will be attracted to position and will be biased;
- There will be additional unintended consequences – number of appeals may rise dramatically, and length and complexity of hearings would increase. SRO’s office already struggled with backlog in 2014. Parent attorneys would become insistent on extremely comprehensive records in anticipation of SRO appeal;
- SED’s reason for revising regulations in 2001 to require IHOs be attorneys was that “since hearings have become increasingly complex and require individuals with expertise in substantive and procedural law involving special education in this State.” Current proposal is completely inapposite to SED’s former position; Special education law is one of most difficult legal topics to practice. Insulting to current IHOs to imply non-attorneys can do this work. Non-attorney IHOs would not be held to same code of ethics as attorneys. Non-attorney IHO’s should not be paid same as attorney IHOs;
- Proposed regulation does not address true problem of a dysfunctional NYC impartial hearing system. Address inadequate compensation of IHO’s and problems cited in Deusdedi Merced’s February 2019 report. Eliminate uncontested pendency from impartial hearing process and cases in which NYCDOE has conceded that it has denied a student a free appropriate public education; and
- Proposed regulation makes it look like bodies are just needed, which will ultimately backfire. Other ideas can potentially speed up and decrease the

number of cases in NYC including: not holding unnecessary pendency hearings for uncontested pendency cases; enhanced rate cases (account for huge number of outstanding NYCDOE cases); increase maximum amount providers can be paid and provide benefits so there are truly qualified providers at schools and parents will be happy with services provided; and, develop system where additional years of private school for certain students can be vetted quickly for settlement.

DEPARTMENT RESPONSE:

SED acknowledges that by changing the regulations to allow for non-attorney IHOs in NYC, it is changing the regulations implemented in 2001, which specifically required that all IHOs, with the exception of those individuals who were grandfathered, be an individual admitted to practice law in NYS. The Department is currently reviewing these comments.

4. COMMENT:

One commenter favored adopting the regulation to allow for certification of non-attorney IHOs. There are people who are sufficiently knowledgeable about NYS's special education laws and regulations, capable of making wise decisions, and able to write effectively and within the Family Educational Rights and Privacy Act (FERPA) requirements.

DEPARTMENT RESPONSE:

Comments supportive; no response necessary.

IHOs Must Maintain Student Confidentiality

5. COMMENT:

Support SED's recommendation to extend confidentiality provisions of CR §200.5(e) to IHOs. Parents are entitled to confidentiality at all stages of special education process, and all persons involved in their child's education should be subject to confidentiality provisions.

DEPARTMENT RESPONSE:

Comments supportive; no response needed.

IHOs Must Render Decisions in a Consistent Format

6. COMMENT:

IHOs already lack critical support needed to do their jobs in a timely and efficient manner. Proposal could add administrative tasks to IHOs for which they are not paid and have unintended consequence of slowing their work and adding to, rather than reducing, backlog of cases in NYC.

DEPARTMENT RESPONSE:

Requirement to render decisions in consistent format is necessary to address FERPA-compliant decisions and the confidentiality requirements of IDEA (20 U.S.C. §1412 (a)(8) and 34 CFR §300.610 et. seq.). In accordance with 34 CFR §300.513(d)(2), SED is required to make IHO decisions available to the public. All IHOs must comply with FERPA and submit decisions that are written in a manner so as not to reveal any personally protected information regarding a student or must redact decisions before submission to SED.

Use of Video Conference to Receive Testimony and Conduct Hearings

7. COMMENT:

Many commenters generally support the use of video conferencing technology in impartial hearings. Videoconferencing could alleviate travel burden for families, lessen space constraints, and allow for scheduling of more meetings in a day. Critical that districts be required to use technology that is reliable, confidential, and secure. Mandate that video and audio from any testimony provided via video conference be recorded to ensure accuracy in the transcript. Recommended regulations require IHOs to take testimony by video conference when requested, rather than leaving it to discretion of individual IHOs. Support efforts to modernize impartial hearing process, but decision must belong to the parents rather than the IHO. IHO should be the decision maker as to whether a hearing proceeds via video, not the parent. Develop form that parent can use at the start of hearing process to indicate if requesting an in-person hearing or a hearing via video conference, with an explanation of the technology needed to participate in the video conference.

Use of hearings by teleconference was successful and expeditious in NYC during COVID-19 shut-downs. Revise regulations to allow for hearings to be conducted by telephone also.

DEPARTMENT RESPONSE:

CR §200.5(j)(3)(v) requires all hearings, whether in person or by telephone or video, be transcribed, or at option of parents, recorded electronically verbatim; therefore, it is unnecessary to have an additional requirement for recording. Proposed rule only allows hearings to be conducted by video conference with consent of parties.

SED agrees that the parent must consent to proceed by video or telephone. The type of video platform used is at the discretion of the district and IHO, as long as information is maintained in a confidential manner. Districts may choose to utilize a form asking parents if they are interested in a video or phone hearing that explains the necessary equipment and how confidentiality will be maintained.

SED agrees that hearings should be able to proceed by telephone as well as by video conference and is amending the proposed rule to add telephone hearings to §200.5(j)(3)(xii).

8. COMMENT:

Proposed regulations as drafted would allow IHO from another part of NYS or jurisdiction to accept case on assumption that parties will agree to a videoconference only to learn that the parent does not have the technology needed or does not wish to participate via videoconference.

DEPARTMENT RESPONSE:

It would be inappropriate for IHOs to accept cases on the premise that they will proceed via video or phone conference only. Additionally, it would be inappropriate for an IHO to recuse if a parent will not agree to conduct a hearing remotely. The proposed rule does not allow IHOs to presume that hearings will proceed by video or telephone. IHOs were reminded of proper reasons for recusal in November 2019. IHOs are subject to review when complaints are filed against them in accordance with CR §200.21 and may be subject to suspension or revocation.

Compensation Policy

9. COMMENT:

One commenter submitted comments pertaining to the newly revised NYC IHO Compensation Policy.

DEPARTMENT RESPONSE:

Comments regarding NYC IHO Compensation policy is beyond scope of rule; therefore, no response is necessary.