



**TO:** P-12 Education Committee  
**FROM:** James N. Baldwin   
**SUBJECT:** Proposed Amendment of Sections 200.2(e) and 200.5(j) of the Regulations of the Commissioner of Education Relating to Special Education Due Process System Procedures

**DATE:** March 10, 2022

**AUTHORIZATION(S):**



**SUMMARY**

**Issue for Discussion**

Should the Board of Regents adopt the proposed amendment of sections 200.2(e) and 200.5(j) of the Regulations of the Commissioner of Education relating to special education due process system procedures?

**Reason(s) for Consideration**

Review of Policy.

**Proposed Handling**

The proposed amendment is presented to the P-12 Education Committee for discussion at its March 2022 meeting. A copy of the proposed rule is included as Attachment A.

**Procedural History**

A Notice of Proposed Rule Making will be published in the State Register on March 30, 2022 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 May 2019, the Department's Office of Special Education (OSE) imposed a compliance assurance plan (CAP) on the New York City Department of Education (NYCDOE). The CAP requires, among other actions, that the NYCDOE address the volume of due process special education complaints filed annually, with the expectation that these actions would eventually lead to a reduction in due process complaint filings. Since January 2020, the Department, through its consultant Deusdedi Merced, has trained and certified an additional 107 new impartial hearing officers (IHOs) to work exclusively in New York City (NYC). The purpose of this training and certification of IHOs was to assist in addressing the volume of due process complaints in NYC. Despite this influx of hearing officers and the imposition of the CAP, there are still thousands of complaints awaiting IHO appointment.

At the November 2021 Regents meeting, it was noted that in the 2020-2021 school year, 14,141 special education due process complaints were filed in NYC as compared to 10,798 filings during the 2019-2020 school year. As of February 18, 2022, the volume of cases has resulted in a waitlist of approximately 4,049 due process complaints in NYC that do not yet have an IHO appointed.

## **Proposed Amendments**

In order to ensure that appointments of IHOs occur as smoothly and efficiently as possible, the Department proposes to amend section 200.2(e) of the Commissioner's regulations to address the rotational selection process for assignment of IHOs to due process complaints. The proposed amendment provides that in New York City, any impartial hearing officers employed by, or reporting to, a permanent, standing administrative tribunal shall be first in an alphabetical rotation when new cases are assigned, and any other impartial hearing officer will be listed in alphabetical order thereafter. Additionally, this proposed amendment permits IHO's serving in New York City to accept more than one appointment at a time, and such tribunal may reassign cases between impartial hearing officers employed by or reporting to such tribunal to manage administrative needs.

Additionally, to provide clarification of terms and promote timeliness of impartial hearing decisions, the Department proposes to amend section 200.5(j)(5)(v) of the Commissioner's regulations to define the "date of decision" as it applies to impartial hearing officer findings of fact and decisions and aligns the date of decision with the distribution date and case closure date.

Finally, the Department proposes to amend section 200.5 (j)(3)(i)(c) of the Commissioner's regulations to address how impartial hearing officers must handle conflicts of interest. The proposed amendment provides that an IHO shall not accept appointment if the IHO has a personal bias or prejudice concerning a party or a party's lawyer, has personal knowledge of facts that are in dispute in the case, is likely to be a material witness in the matter in controversy, or has a personal or fiduciary interest in the matter. Additionally, an individual may not serve as an impartial hearing officer if he or she is simultaneously employed by: (1) a school district; or (2) a school or program

servicing students with disabilities placed by a school district committee on special education, nor may an individual employed by a school or program serving students with disabilities placed by a school district committee on special education serve as an impartial hearing officer for two years following the termination of such employment.

### **Related Regents Items**

November 2021: [Proposed Amendment 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/1121p12d2.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/1121p12d2.pdf>).

September 2021: [Proposed Amendment to Sections 52.30, 63.9, 70.4, 74.6, 75.2, 75.5, 76.2, 79-9.3, 79-10.3, 79-11.3, 79-12.3, 80-5.3, 80-5.4, 83.5, 87.2, 87.5, 145-2.15, 155.17, 200.5, 200.6, and 279.15 of the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/921brca8.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/921brca8.pdf>)

February 2021: [Proposed Amendment to Sections 52.21, 60.6, 61.19, 80-1.2, 80-3.7, 100.1, 100.2, 100.4, 100.5, 100.6, 100.7, 100.19 and 151-1.3 and the addition of Section 80-5.27 to the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/1021brca6.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/1021brca6.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>)

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>)

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>)

### **Recommendation**

Not applicable.

### **Timetable for Implementation**

It is anticipated that the proposed rule will be presented for permanent adoption at the September 2022 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the public comment period required under the

State Administrative Procedure Act. If adopted at the September 2022 meeting, the proposed amendment will become effective on September 28, 2022.

**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. Subparagraph (ii) of paragraph (1) of subdivision (e) of section 200.2 of the Regulations of the Commissioner of Education is amended to read as follows:

(ii) available to serve in the district in hearings conducted pursuant to Education Law [, section] §4404(1). Appointment of impartial hearing officers pursuant to Education Law [, section] §4404(1), except as otherwise provided in this subparagraph, shall be made only from such list and in accordance with the rotation selection process prescribed herein and the timelines and procedures in section 200.5(j) of this Part. 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. Provided,

however, that in a city school district having a population of one million or more inhabitants:

(a) Any impartial hearing officers employed by, or reporting to, a permanent, standing administrative tribunal employing more than one impartial hearing officer shall be first in an alphabetical rotation when new cases are assigned, and any impartial hearing officer not employed by, or reporting to, a permanent standing administrative tribunal, will be listed in alphabetical order thereafter.

(b) Any certified impartial hearing officer available for appointment may accept more than one case at a time.

(c) Any permanent standing administrative tribunal employing more than one impartial hearing officer at a time may reassign cases between impartial hearing officers employed by, or reporting to such permanent standing administrative tribunal, to manage administrative needs such as workload distribution.

2. Subparagraph (v) of paragraph (5) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education, is amended to read as follows:

(v) 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.

3. Clause (c) of subparagraph (i) 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 shall not accept appointment if [he or she is serving as the attorney in a due process complaint in the same school district or has served as the attorney in a due process complaint in the same school district within a two-year period of time preceding the offer of appointment; or if he or she is an individual with special knowledge or training with respect to the problems of children with disabilities who has accompanied and advised a party from the same school district in a due process complaint within a two-year period]the impartial hearing officer has a personal bias or prejudice concerning a party or a party's lawyer, has personal knowledge of facts that are in dispute in the case, is likely to be a material witness in the matter in controversy, or has a personal or fiduciary interest in the matter. Additionally, an individual may not serve as an impartial hearing officer if he or she is simultaneously employed by: (1) a school district; or (2) a school or program serving students with

disabilities placed by a school district committee on special education, nor may an individual employed by a school or program serving students with disabilities placed by a school district committee on special education serve as an impartial hearing officer for two years following the termination of such employment.