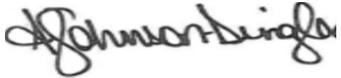




TO: The Honorable Members of the Board of Regents

FROM: Angelique Johnson-Dingle 

SUBJECT: Proposed Amendment of Sections 200.5(j) and 200.21(a) and Addition of Section 200.5(o) to the Regulations of the Commissioner of Education Relating to Special Education Due Process System Procedures

DATE: May 5, 2022

AUTHORIZATION(S): 

SUMMARY

Issue for Decision (Consent)

Should the Board of Regents adopt the proposed amendment of sections 200.5(j) and 200.21(a) and addition of 200.5(o) to the Regulations of the Commissioner of Education relating to special education due process system procedures?

Reason(s) for Consideration

Required by State Statute.

Proposed Handling

The proposed amendment is presented to the Full Board for adoption as an emergency rule at its May 2022 meeting. A copy of the proposed rule is included as Attachment A and a statement of facts and circumstances justifying emergency action is included as Attachment B.

Procedural History

The proposed amendment was presented to the P-12 Education Committee for discussion and recommendation to the Full Board for adoption as an emergency rule at the March 2022 meeting of the Board of Regents. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on March 30, 2022, for a 60-day public comment period.

Because the March emergency action will expire on June 12, 2022, a second emergency action is necessary to ensure the emergency rule remains continuously in effect until it can be permanently adopted at the September 2022 Regents meeting. A Notice of Emergency Adoption will be published in the State Register on June 1, 2022. 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 IHOs and the imposition of the CAP, there are still thousands of complaints awaiting IHO appointments in NYC.

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.

Chapter 812 of the Laws of 2021 (Chapter 812) was enacted to address the timely resolution of due process complaints. Chapter 812, effective March 29, 2022, amends Education Law §4404 to permit the immediate appointment of an IHO to due process complaints that have been on the waitlist for 196 days so that the IHO can issue an order based on a proposed order of relief submitted by the parent identifying appropriate and individualized programs and services for the student.

Therefore, the Department proposes to amend the Commissioner's regulations to conform such with Chapter 812. Specifically, the proposed rule amends section 200.5(j)(3)(i)(a) of the Commissioner's regulations to permit the immediate appointment of an IHO to conduct an accelerated review of a due process complaint. Also proposed is the addition of section 200.5(o) to the Commissioner's regulations which establishes the process by which a parent may request an accelerated review and indicates the timelines and procedures for an IHO to issue an accelerated order of relief or finding. Finally, the proposed amendment to section 200.21(a) of the Commissioner's regulations establishes the compensation rate for IHOs that have been appointed to accelerated due process cases.

Related Regents Items

March 2022: [Proposed Amendment of Sections 200.5\(j\) and 200.21\(a\) and Addition of Section 200.5\(o\) to the Regulations of the Commissioner of Education Relating to Special Education Due Process System Procedures](https://www.regents.nysed.gov/common/regents/files/322p12a3.pdf)

(<https://www.regents.nysed.gov/common/regents/files/322p12a3.pdf>)

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

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

VOTED: That section 200.5(j) and 200.21(a) of the Regulations of the Commissioner of Education be amended and section 200.5(o) of the Regulations of the Commissioner of Education be added, as submitted, effective June 13, 2022, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare to conform the Commissioner's regulations to Chapter 812 of the Laws of 2021 on its effective date, and to ensure that the emergency

action taken at the March 2022 meeting remains continuously in effect until the rule can be permanently adopted.

Timetable for Implementation

If adopted as an emergency rule at the March Regents meeting, the emergency rule will become effective June 13, 2022. It is anticipated that the proposed amendment will be presented for permanent adoption at the September 2022 Board of 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. Because the emergency action will expire before the September 2022 Regents meeting, it is anticipated that an additional emergency action will be presented for adoption at the July 2022 Regents meeting. If adopted at the September 2022 meeting, the proposed amendment will become effective as a permanent rule 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 and Chapter 812 of the Laws of 2021.

1. Clause (a) 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:

(a) (1) The rotational selection process must be initiated immediately, but not later than two business days after receipt by the school district of the due process complaint notice or mailing of the due process complaint notice to the parent.

(2) Notwithstanding subclause (1) of this clause, pursuant to Education Law §4404(1-a), if an impartial hearing officer is not appointed within 196 days from receipt by the district of a due process complaint filed by the parent regarding the evaluation, educational placement, provision of a free appropriate public education to the student or in accordance with Education Law §3602-c, an opportunity to seek accelerated relief pursuant to subdivision (o) of this section shall be provided. Temporary appointment of an impartial hearing officer to determine the student's placement during the pendency of a proceeding brought pursuant to this Part, consolidation of cases, or provision of an independent educational evaluation, or when a refiled case is assigned pursuant to subparagraph (iv) of paragraph (6) of this subdivision and subsequently placed back on the list of due process complaint notices awaiting appointment of an impartial hearing officer shall not constitute appointment of an impartial hearing officer for the purposes of the paragraph above.

2. Section 200.5 of the Regulations of the Commissioner of Education is amended by adding a new subdivision (o) to read as follows:

(o) Accelerated review and order of relief.

(1) Pursuant to Education Law §4404(1-a) a district shall notify a parent in writing no later than five business days after 196 days have elapsed since the filing of the due process complaint. Thereafter, the parent may request immediate appointment of an impartial hearing officer to undertake an accelerated review, under the following circumstances:

(i) the complaint does not involve a claim regarding initial identification as a student with a disability or a manifestation determination;

(ii) the parent requests initiation of accelerated review; and

(iii) the parent agrees that the review will be conducted based exclusively on the written record developed pursuant to this section.

(2) When accelerated review is sought, the district shall be deemed to have denied the student a free appropriate public education by virtue of the delay in the appointment of an impartial hearing officer. This finding is binding and shall not be subject to appeal to a State review officer of the State Education Department pursuant to subdivision (k) of this section.

(3) The accelerated review shall be conducted in place of the hearing procedures specified in subdivision (j) of this section and shall be conducted in accordance with the following schedule:

(i) Within one business day of receipt of a parent's request for accelerated review, an impartial hearing officer shall be appointed pursuant to subdivision (e) of section 200.2 of this Part to conduct the accelerated review.

(ii) Within two business days of appointment, the impartial hearing officer shall notify the parties via email of the schedule for the electronic submission by the parent of a proposed order of relief and supporting written documentation pursuant to this section; such documentation may include affidavits, affirmations, and/or declarations as well as exhibits.

(iii) The schedule must require completion of the parent's submission of all documentation via email to the impartial hearing officer and to the district's representative no later than 10 business days after the date of the impartial hearing officer's notification pursuant to subparagraph (ii) of this paragraph.

(iv) Within two business days after receipt of the parents' electronic submission, the school district may file objections to the proposed relief together with a proffer of any documentation it wishes to be permitted to enter into the record for review by the impartial hearing officer. The district's objections and any supporting documentation must be submitted via email to the impartial hearing officer and the parent.

(v) Within two business days after receipt of the school district's objections to the proposed relief, if any, the parent may submit a written response via email to the impartial hearing officer and to the district's representative.

(vi) Within two business days after receipt of the parent's response, if any, or two business days after receipt of the parents' proposed order and evidence, if no objections and supporting documentation are submitted, the impartial hearing officer shall determine what documents are to be admitted, and shall certify the record that forms the basis for the order of relief or finding.

(vii) Within two business days after certification of the record, the impartial hearing officer shall issue a final determination in the form of:

(a) the order of relief proposed by the parents;

(b) the order of relief proposed by the parents as modified by the impartial hearing officer based upon the written record; or

(c) a finding that no relief is warranted based upon the written record.

(vii) If either party disagrees with the impartial hearing officer's order of relief or finding, they retain the right to appeal to a State review officer of the State Education Department consistent with paragraph two of this subdivision and with the procedures outlined in subdivision (k) of this section, except that a parent cannot appeal a final determination in the form of the order of relief proposed by the parent.

(4) School districts that have had due process complaint notices resolved pursuant to this subdivision shall report annually, on a form and in a format prescribed by the Commissioner, the number of complaints that sought accelerated relief, the nature of the particular relief sought, and the resolution of such complaints, to the governor, the Commissioner, the temporary president of the senate, the speaker of the assembly, the chair of the Senate education committee, the chair of the senate city of New York education committee and the chair of the assembly education committee.

3. Subdivision (a) of section 200.21 of the Regulations of the Commissioner of Education is amended to read as follows:

(a) *Impartial hearing officer rates.* Commencing July 1, 1995, impartial hearing officers shall be compensated in an amount not to exceed the applicable rate prescribed in a schedule of maximum rates approved by the director of the Division of the Budget.

Provided, however, that any impartial hearing officers, other than impartial hearing officers assigned by a permanent, standing administrative tribunal in a city school district having a population of one million or more inhabitants, who are appointed to

conduct an accelerated review as outlined in subdivision (o) of section 200.5 of this Part shall be compensated at a flat rate of \$500 per case.

Attachment B

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE EMERGENCY ACTION

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 107 new impartial hearing officers (IHOs) to work exclusively in New York City (NYC). The purpose of these hiring was to help address the volume of due process complaints in NYC. Despite this influx of hearing officers and the imposition of the CAP, the number of due process complaints awaiting IHO appointments continues to grow in NYC.

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, this 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.

Chapter 812 of the Laws of 2021 (Chapter 812) was enacted to address the timely resolution of due process complaints. Chapter 812, effective March 29, 2022, amends Education Law §4404 to permit immediate appointment of an IHO to due process complaints that have been on the waitlist for 196 days so that the IHO can

issue an order based on a proposed order of relief submitted by the parent identifying appropriate and individualized programs and services for the student.

Therefore, the Department proposes to amend the Commissioner's regulations to conform such with Chapter 812. Specifically, the proposed rule amends section 200.5(j)(3)(i)(a) of the Commissioner's regulations to permit the immediate appointment of an IHO to conduct an accelerated review of a due process complaint. Also proposed is the addition of section 200.5(o) to the Commissioner's regulations which establishes the process by which a parent may request an accelerated review and indicates the timelines and procedures for an IHO to issue an accelerated order of relief or finding. Finally, the proposed amendment to section 200.21(a) of the Commissioner's regulations establishes the compensation rate for IHOs that have been appointed to accelerated due process cases.

The proposed amendment was presented to the P-12 Education Committee for recommendation to the Full Board for adoption as an emergency rule at the March 2022 meeting of the Board of Regents, effective March 29, 2022. Since the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be adopted by regular (non-emergency) action after expiration of the public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5) would be the September 2022 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earliest effective date of the proposed rule, if adopted at the September 2022 meeting, would be the date the Notice of Adoption would be published in the State Register.

However, the emergency rule will expire on June 12, 2022. Therefore, a second emergency action is necessary at the May 2022 meeting for the preservation of the general welfare to immediately conform the Commissioner's regulations to Chapter 812

of the Laws of 2021 and to ensure that the emergency action taken at the March 2022 meeting remains continuously in effect until the rule can be permanently adopted.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at the September 2022 meeting, which is the first scheduled meeting after expiration of the 60-day public comment period mandated by SAPA for state agency rulemaking. However, since the emergency action will expire before the September 2022 Regents meeting, it is anticipated that an additional emergency action will be presented for adoption at the July 2022 Regents meeting.