



TO: The Honorable the Members of the Board of Regents

FROM: Kimberly Young Wilkins *Kimberly Young Wilkins*

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

DATE: July 10, 2020

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

SUMMARY

Issue for Discussion

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 (IHO) and the special education due process system procedures?

Reason(s) for Consideration

Implementation of policy.

Proposed Handling

The revised proposed rule is being presented to the Full Board for discussion at its July 2020 meeting. A copy of the proposed amendment is attached as Attachment A.

Procedural History

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 New York State Education Department (NYSED) received numerous comments on the proposed amendment. An assessment of public comment is included as Attachment B. Based on comments received, the Department has revised the proposed amendment to permit IHO's to conduct hearings by "teleconference" in addition to video conference. 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 applicants of IHOs to hear special education due process complaints filed in New York City. A presentation by NYSED's Office of Special Education's (OSE) consultant, Deusdedi Merced from Special Education Solutions, LLC, provided data on the number of due process complaints filed in New York State compared to the rest of the country. New York State exceeds, by 63 percent, the next most active state (California) for due process complaint filings.

Additionally, as discussed at the January and February 2020 meetings, within New York State, the overwhelming majority of due process complaints are filed in New York City. In the 2018-19 school year, 10,189 special education due process complaints were filed in New York State; of these, 9,694 filings, or 95 percent, were in New York City. For the 2019-20 school year, there have been more than 10,000 special education due process complaints filed in New York City. The number of due process complaints is expected to increase as parents may be seeking compensatory services as a result of the COVID-19 health crisis.

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

Expanding the Pool of Potential IHO Applicants in New York City

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

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

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

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

2) Allowing for Certification of Non-Attorney IHOs in New York City

NYSED further proposes to amend section 200.1(x) of the Regulations of the Commissioner of Education to allow for the certification of non-attorney IHOs to hear complaints filed in *New York City*, as well as set qualifications for these candidates. Currently, there are 102 certified IHOs assigned to more than 10,000 due process complaints in New York City, with approximately 1,700 cases waiting assignment of an IHO. Expanding the pool of applicants and having more IHOs available to take cases will assist with this volume. Non-attorney IHOs will be required to possess a minimum of a Master's degree in education, special education, psychology, or a related field and two years of experience applying knowledge of federal or State law and regulations pertaining to IDEA in education, special education, or a related field.

3) Privacy

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

4) IHOs must render decisions in a consistent format

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

5) IHOs may receive testimony by video conference

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

6) IHOs may conduct hearings by video conference

To address concerns of the more than 10,000 due process cases in New York City, NYSED proposes to add clause (i) to section 200.5(j)(3)(xii) to allow an IHO to conduct hearings by video conference and teleconference, with the consent of parties, 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.

Proposed Revisions

In response to public comment, NYSED has revised the amendments made to section 200.5 of the Commissioner's regulations to permit IHO's to conduct hearings by "teleconference" in addition to video conference and clarified language to reflect that written consent may be requested at a pre-hearing conference, if one is held.

Related Regents Item(s)

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>)

January 2014: [Proposed Amendment to Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings](https://www.regents.nysed.gov/common/regents/files/114p12a2%5B1%5D_0.pdf)
(https://www.regents.nysed.gov/common/regents/files/114p12a2%5B1%5D_0.pdf)

October 2013: [Proposed Amendment of Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings](https://www.regents.nysed.gov/common/regents/files/1013p12d3%5B1%5D.pdf)
(<https://www.regents.nysed.gov/common/regents/files/1013p12d3%5B1%5D.pdf>)

November 2012: [Proposed Amendment of Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings](https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/November2012/1112p12a4.pdf)
(<https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/November2012/1112p12a4.pdf>)

January 2012: [Proposed Amendment of Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings](https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/January2012/112p12d3.pdf)
(<https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/January2012/112p12d3.pdf>)

June 2012: [Proposed Amendment of Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings](https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/June2012/612p12d1.pdf)
(<https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/June2012/612p12d1.pdf>)

Recommendation

Not applicable.

Timetable for Implementation

It is anticipated that the revised proposed amendment will be presented for permanent adoption at the October 2020 Regents meeting, after publication of the revised proposed amendment in the State Register and expiration of the 45-day public comment period required under the State Administrative Procedure Act for revised rulemaking. If adopted at the October 2020 meeting, the revised proposed rule will become effective on November 4, 2020.

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

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

(2) Each public school, public agency [and],₁ 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 parties, which may be obtained at the pre-hearing conference if one is held, 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 March 18, 2020, the State Education Department (SED) received the following comments on the proposed amendment.

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 Commissioner's Regulations (CR). 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 CR 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 6 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 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 Deusedi 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.