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: June 30, 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 a permanent rule at its July 2022 meeting. A copy of the proposed rule is included as (Attachment A).

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 was set to expire on June 12, 2022, a second emergency action was necessary at the May 2022 meeting to ensure the emergency rule remained continuously in effect until it could be permanently adopted. A Notice of Emergency Adoption was published in the State Register on June 29, 2022.

Following publication in the State Register, the Department received comments on the proposed amendment. An Assessment of Public Comment is included as (Attachment B). No changes to the proposed amendment are recommended at this time. A Notice of Adoption will be published in the State Register on July 27, 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.

Non-Substantial Revisions

In response to public comment, after publication of the proposed rule in the State Register, the Department has made one revision to the proposed rule to clarify that the school district may also file objections to supporting written documentation submitted by the parents, in addition to objections to the proposed relief.

Related Regents Items

May 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/522brca5.pdf)

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)

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).

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)

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)

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)

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)

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)

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 July 27, 2022.

Timetable for Implementation

If adopted at the July 2022 meeting, the proposed amendment will become effective as a permanent rule on July 27, 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 the 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 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 and any supporting written documentation submitted by the parents, 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 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.

(viii) 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

ASSESSMENT OF PUBLIC COMMENT

Following publication of the Notice of Emergency Adoption and Proposed Rule Making in the State Register on March 30, 2022, the State Education Department (Department) received the following comment on the proposed amendment:

1. COMMENT:

One commenter stated that there could be significant costs to school districts. Additionally, the commenter felt there needed to be flexibility in the proposed timelines. Specifically, the commenter states that "what happens if the Director of [special education] is out of the office for various reasons and wants to file an appeal? Does the two-business day requirement still remain in place?"

DEPARTMENT RESPONSE:

The commenter appears to state that compliance with the proposed rule's timeliness will impose a cost on school districts. Chapter 812 of the Laws of 2021 (Chapter 812) was enacted to address the timely resolution of due process complaints in New York City. Upon parent request, Chapter 812 mandates the immediate appointment of an impartial hearing officer (IHO) to due process complaints that have been on a list awaiting the appointment of an impartial hearing officer for 196 days from the date of filing. Since March 29, 2022, the effective date of Chapter 812, there have been no due process complaints that have exceeded 196 days on the waitlist. Districts must follow specific timelines, as outlined in the proposed rule, for any complaints exceeding 196 days without an IHO appointed, and the IHO must issue a final determination within 21 business days. The regulation does not require that the school district's Director of Special Education file an appeal. It is expected that school districts

identify a designee with authority to handle such processes, including an alternate designee to cover staff absence. Moreover, this process will only become available if a school district has failed to appoint an impartial hearing officer for more than six months, an egregious delay of due process. The Department does not anticipate that these timelines will impose a significant cost to districts and such timelines are consistent with the intent of Chapter 812 as they are necessary to ensure students and families have full access to a timely and responsive due process system. Therefore, no changes to the proposed rule are necessary.

2. COMMENT:

One commenter commented upon section 200.5(3)(i)(a)(2) of the proposed rule, which provides that an appointment of an IHO to address consolidation of cases, or when a refiled case assigned to an IHO is placed back on the list of cases awaiting appointment do not count as appointment of an IHO. The commenter opined that the time period during which the case is with the IHO in these situations should be excluded from any calculation towards the 196-day time period. The commenter reasoned that this time should not count because "While the case is with the IHO, the district cannot appoint the case to another IHO during that time and must, until a case is returned, act as if the first assigned IHO will be handling the case."

DEPARTMENT RESPONSE:

Education Law §4404(1-a), added by chapter 812 of 2021, requires a school district to immediately appoint an IHO if an IHO is not appointed within 196 days after the parent or person in parental relation files a due process complaint. The statute does not provide discretion in calculation of the 196 days. Therefore, no changes to the proposed rule are needed.

3. COMMENT:

One commenter stated that section 200.5(o)(1) of the proposed rule requires the district to notify the parent within 5 days after 196 days have elapsed and that the parent may request immediate appointment of an IHO. The commenter noted that the statute does not impose the notification requirement on the district; accordingly, this obligation should fall on the State Educational Agency (SEA), with a notice simultaneously being sent to the local educational agency (LEA) to verify that an IHO has not been assigned. The commenter states that: "The regulation should be revised to give parents a deadline to request an accelerated review. At minimum, once the notice is given, the parent's ability to make such a request should terminate at the point the district appoints an IHO. Absent an outside time in which a request for accelerated review must be made, a parent could elect this review even after an IHO has been appointed for a full hearing and a hearing scheduled. The regulation should be revised to afford the parent 10 business days from receipt of the notice in which to request an accelerated hearing; thereafter, if the parent hasn't made a request, the right to request a hearing terminates once an IHO has been assigned to hear the case in full."

DEPARTMENT RESPONSE:

4. School districts are required to manage the due process complaint process regardless of the number of days since the parent filed a due process complaint. The SEA does not maintain students' personally identifiable information contained within a due process complaint and, therefore, has no jurisdiction for notifying parents of their right to request accelerated review. Additionally, if the school district does not appoint an IHO after 196 days, parents may exercise their right to accelerated review at any time. If they do not elect such a right and proceed to an impartial hearing, it is

presumed that parents have elected not to invoke accelerated relief. To the extent the commenter seeks more prescriptive advice, the Department plans to issue clarifying guidance. Therefore, no changes to the proposed rule are needed. COMMENT:

One commenter stated that section 200.5(o)(1)(ii) is redundant and should be deleted.

DEPARTMENT RESPONSE:

Section 200.5(o)(1)(ii) of the proposed rule clarifies that the parent requests initiation of accelerated review and does not conflict with Section 200.5(5)(o)(1). Therefore, no changes to the proposed rule are needed.

5. COMMENT:

One commenter stated that section 200.5(o)(2) of the proposed rule adds a provision that the delay in appointing an IHO is deemed a denial of a free appropriate public education (FAPE). The commenter provides that there is no such language in the statute imposing this finding, it should be removed, and any FAPE determination should be left to the IHO to address. The commenter further states that: “Many cases pertain to a parent’s request for services or tuition for a school placement or service in which the child is enrolled. In many cases, the child has pendency once the due process complaint is filed, so the child is receiving the services that the parent is seeking to obtain in the hearing and therefore has not been harmed by any delay in holding the hearing. In some cases, a due process claim for tuition or payment is not filed until after the applicable year. In these instances, it cannot be said that the delay in holding the hearing itself is a denial of FAPE. Moreover, FAPE is generally not at issue in Ed. Law 3602-c cases, as the parent has parentally-placed the student by choice and is not seeking (and was never seeking) a public placement or claiming a denial of a free and

appropriate public education; thus, it is incorrect to find a denial of FAPE in these circumstances."

DEPARTMENT RESPONSE:

While the commenter suggests a "no harm no foul" analysis for severely delayed hearings, the Department believes that a delay of 196 or more days in assigning an IHO, let alone completing a hearing, to be intolerable. Should the parent elect an accelerated review, FAPE is deemed denied based on the delay. This interpretation is supported by case law (*see Blackman v. District of Columbia*, 277 F.Supp.2d 71 (2003) [stating that a failure to provide timely due process hearings and determinations months after the expiration of the 45–day period constitutes [a] denial of a free appropriate education])."

Additionally, the Department disagrees with the commenter's suggestion that delay would be acceptable if a student remained in her or his then-current educational placement. Under this analysis, it would be acceptable for due process proceedings to sit for 6 months—or perhaps even a year or more—so long as a student remains in her or his then-current educational placement (which, if unilaterally placed, is at the LEA's expense). This is not consistent with IDEA or Article 89 of the Education Law. An LEA's due process system is not designed to be a holding tank for students to remain in their then-current educational placement.

To the extent that the commenter questions whether a denial of FAPE is an appropriate finding in certain types of cases, Chapter 812 provides that the accelerated review process is available to due process complaint notices seeking an impartial due process hearing with respect to the evaluation, educational placement, provision of FAPE or in accordance with Education Law § 3602(c). Therefore, no changes to the proposed rule are needed.

6. COMMENT**:**

One commenter objected to the short timeline in section 200.5(o)(3)(iv) of the proposed rule to respond to the parent's submission; *i.e*., 2 business days from receipt of the parent's submission. The commenter opined that the district should have an equal amount of time—10 business days—in which to respond to the parent's submission, stating that "[t]his is particularly important given the lack of any limitation on what the parent may submit for consideration."

DEPARTMENT RESPONSE:

As stated in the Department's response to Comment 1, the timelines outlined in the proposed rule are consistent with the intent of Chapter 812 as they are necessary to ensure students and families have full access to a timely and responsive due process system. While 2 days may be relatively short, it presupposes that an LEA has failed to appoint an IHO for 196 days. A time period of over six months provides ample time to review a due process complaint notice and prepare a response. Moreover, if an LEA has not already sent a prior written notice to a parent regarding the subject matter in the parent's due process complaint notice, it is required, within 10 days of receiving the complaint, to send the parent a response (8 NYCRR 200.5 [i] [4]). Therefore, no changes to the proposed rule are necessary.

7. COMMENT:

One commenter stated that section 200.5(o)(3)(vi) of the proposed rule allows the IHO to decide what documents are to be admitted into the record. The commenter states that the regulation should be modified to allow either party to object to a decision not to admit a particular document into the record and proposed the following language to be added to section 200.5(3)(iv) of the proposed rule: "within ten [two] business days

after receipt of the parents' electronic submission, the school district may file objections to the proposed relief, any documentary evidence submitted by the parents, together with a proffer of any documentation …"

DEPARTMENT RESPONSE:

The Department has revised section 200.5(o)(3)(iv) to clarify that the school district may also file objections to documentary evidence submitted by the parents, in addition to objections to the proposed relief. The IHO, however, as the presiding officer of the hearing, retains the discretion to decide what information shall be admitted into the record.

8. COMMENT:

One commenter stated that section 200.5(o)(3)(vii) of the proposed rule should include an additional option that the IHO can enter an order of relief as proposed by the district. The commenter stated that the regulation should also clarify that an IHO may only issue an order identifying appropriate and individualized programs and services for the student.

DEPARTMENT RESPONSE:

Education Law §4404(1-a), as added by Chapter 812, requires an IHO to issue an order based upon a proposed order of relief submitted by the parent or person in parental relation of the student. The statute does not allow other parties to submit a proposed order of relief. It would be particularly inequitable for an LEA, having sidelined a due process complaint for over six months, to obtain an order tailored to its specifications.

It is unnecessary to, after certification of the record, the IHO issues a final determination in the form of either: 1) the order of relief proposed by the parent, 2) the

order of relief proposed by the parent as modified by the IHO based upon the written record, or 3) a finding that no relief is warranted based upon the record before them. Therefore, no changes to the proposed rule are necessary.