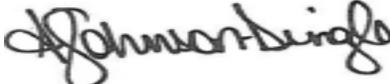




**TO:** The Honorable Members of the Board of Regents

**FROM:** Angelique Johnson-Dingle 

**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:** September 1, 2022

**AUTHORIZATION(S):** 

#### **SUMMARY**

#### **Issue for Decision (Consent)**

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 submitted to the Full Board for adoption as a permanent rule at the September 2022 Regents meeting. A copy of the proposed rule is included (Attachment A).

#### **Procedural History**

The proposed amendment was presented to the P-12 Education Committee for discussion at the March 2022 meeting of the Board of Regents. A Notice of Proposed Rule Making was 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). Following publication in the State Register, the Department received comments on the proposed rule. An Assessment of Public Comment is included (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 September 28, 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. The purpose of this training and certification of IHOs was to assist in addressing the volume of due process complaints in New York City. 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 New York City 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 New York City that did 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 IHOs 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 IHOs 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 IHO 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 IHOs 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 IHO 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 IHO for two years following the termination of such employment.

### **Related Regents Items**

March 2022: [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](#)

(<https://www.regents.nysed.gov/common/regents/files/322p12d4.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 sections 200.2(e) and 200.5(j) of the Regulations of the Commissioner of Education be amended, as submitted, effective September 28, 2022.

## **Timetable for Implementation**

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.

ASSESSMENT OF PUBLIC COMMENT

Following publication of the Notice of Proposed Rule Making in the State Register on March 30, 2022, the Department received the following comments on the proposed amendment:

COMMENT:

One commenter stated that the proposed rotational IHO system will change the way that New York City (NYC) families and students receive due process. Another commenter stated that impartial hearings would be governed by a different set of appointment procedures than for students and families residing outside of NYC and would result in inherent unfairness and discrimination in treating similarly situated New York State (NYS) residents differently based on their locality.

DEPARTMENT RESPONSE:

The timely appointment of an IHO is a required component of the due process procedures afforded to all families in NYS pursuant to section 200.5(j)(3)(i)(a) of the Commissioner's regulations. However, this is a persistent problem in NYC, where more than 95 percent of all due process complaints in the State are filed (i.e., 10,798 in 2019-2020; 14,264 in 2020-21; and 17,874 in 2021-22). This amendment promotes efficiency by permitting IHOs to accept more than one case at a time. Moreover, the purpose of a rotational system is to ensure that cases are distributed fairly and impartially. So long as the identities of the parties are unknown to the assigned IHO, the amount of cases accepted at any specific time is immaterial.

The Department disagrees that the proposed rule will result in inherent unfairness and discrimination by treating NYS residents differently based on their

locality. Other parts of the State do not have the volume of due process complaints that NYC does. Of the 18,292 due process complaints filed in New York State in the 2021-2022 school year, 17,974 of those complaints were filed in NYC. The Department believes that a delay in assigning an IHO for any family in the State to be intolerable. Therefore, no changes to the proposed rule are needed.

COMMENT:

One commenter stated that allowing an administrative tribunal to reassign cases after assignment to an IHO would violate the IHO selection process.

DEPARTMENT RESPONSE:

Any permanent standing administrative tribunal employing more than one IHO at a time would be responsible for managing caseloads of IHOs employed by or reporting to, such tribunal. The proposed amendments to section 200.2(e)(1)(ii) of the Commissioner's regulations allow a tribunal to reassign cases between its IHOs to manage administrative needs, including workload distribution, which ensures a timely and responsive due process system in NYC. There are many instances that might justify reassignment of cases; for example, an IHO's medical leave, parental leave, extended absence, or resignation. Therefore, no changes to the proposed rule are needed.

COMMENT:

Commenters stated that the proposed amendment allows for IHOs employed by an administrative tribunal to take precedence over contract IHOs when due process cases are assigned.

DEPARTMENT RESPONSE:

The proposed amendments to section 200.2(e)(1)(ii)(a) of the Commissioner's regulations provide that "[a]ny 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." The volume of due process complaints in NYC (as described above) has necessitated utilization of an administrative tribunal with full-time employees to ensure that students and families have full access to a timely and responsive due process system. Moreover, it is the Department's contention that assigning cases to employees in an administrative tribunal first would be the most efficient way to ensure that the tribunal is effectively utilized and to further the Department's goal of ensuring access to a timely and responsive due process system. Therefore, no changes to the proposed rule are necessary.

COMMENT:

Several commenters generally objected to the proposed regulations but did not provide detail as to the reasons for their objections.

DEPARTMENT RESPONSE:

The Department acknowledges the responses but is unable to respond as it is not clear why the commenters are objecting to the proposed regulations. Therefore, no changes to the proposed rule are necessary.

COMMENT:

Some commenters provided general statements about their experiences with the NYCDOE and the due process hearing system in NYC, opined on the legality of

administrative tribunals accepting cases, and speculated as to how due process hearings would be handled by NYC's Office of Administrative Trials and Hearings.

DEPARTMENT RESPONSE:

These comments are outside the scope of the proposed regulation. Therefore, no response is necessary.