




THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY,
NY 12234

TO: P-12 Education Committee

FROM: Ken Slentz 

SUBJECT: Proposed Amendment of Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings

DATE: January 6, 2012

AUTHORIZATION(S):

SUMMARY

Issue for Discussion

Should the Board of Regents amend sections 200.1 and 200.5 of the Regulations of the Commissioner of Education to ensure that special education impartial hearings are conducted in an efficient and expeditious manner in accordance with federal regulations governing the timeline requirements to conduct these hearings?

Reason for Consideration

Review of policy to address both process and cost efficiencies in New York State's special education due process system and to ensure timely decisions by impartial hearing officers (IHOs).

Proposed Handling

The proposed amendment is before the P-12 Education Committee for discussion at the January 2012 meeting.

Procedural History

In accordance with the federal Individuals with Disabilities Education Act (IDEA), section 300.500 of the Code of Federal Regulations (34 C.F.R. §300.500) requires that every state prescribe procedures for providing impartial hearings on due process complaints. Sections 300.511-300.515 of these regulations establish special education impartial hearing procedures, which include the requirement that impartial hearings be adjudicated within a 45-day timeline, or within a timeline that is properly extended by the

IHO at the request of either party, or in the case of an expedited hearing, within the applicable timeline required.

In implementing these federal requirements, the New York State Education Department (Department) has adopted regulations prescribing procedures and timeline requirements for conducting these hearings (8 NYCRR §200.5). Most recently, in 2004, the Department amended section 200.5(j) of the Commissioner's Regulations to tighten the timeline requirements for conducting these hearings to ensure that the hearings would be conducted in a timely manner in compliance with IDEA and its corresponding regulations (34 CFR Part 300).

Background Information

The Department is responsible for monitoring and enforcing compliance with the hearing procedures prescribed in Part 200 of the Commissioner's Regulations. Additionally, pursuant to its investigatory authority granted under Education Law section 4404(1) and section 200.21 of the Commissioner's Regulations, the Department may investigate an IHO's failure to issue a decision in a timely manner pursuant to regulatory authority.

The U.S. Department of Education, Office of Special Education, recently determined that New York State (NYS) "Needs Assistance" in part, because it failed to ensure that 100 percent of impartial hearings were adjudicated in a timely manner. In 2010, only 84.25 percent of the State's special education impartial hearings were adjudicated within the required timelines. As a result, the State must review and revise its policies and procedures and improvement activities as appropriate to address this noncompliance issue.

Accordingly, this proposed amendment would further align this State's timeline requirements for issuing decisions to the federal requirements; address factors leading to delays in the completion of impartial hearings; and would address other issues relating to the manner in which an impartial hearing is conducted.

Proposed Policy

The proposed amendment will promote the timely issuance of hearing decisions by providing a more efficient and expeditious process for conducting hearings, in consideration of various causes of delay that have been identified by the Department over the past few years. The proposed rule addresses six procedural issues relating to impartial hearings:

1. Certification and appointment of IHOs;
2. Consolidation of multiple due process requests for the same student;
3. Prehearing conferences;
4. Withdrawals of requests for due process hearings;
5. Extensions to the timelines for an impartial hearing decision; and
6. Timeline to render a decision.

Certification and appointment of IHOs:

The proposed rule would require an individual certified by the Commissioner as a hearing officer to be willing and available to accept appointment to conduct impartial hearings, and would provide for the rescinding of an IHO's certification if he or she is unavailable or unwilling to accept an appointment within a two-year period of time, unless good cause is shown.

The proposed rule would also prohibit an IHO from accepting appointment as an IHO if he or she is an attorney involved in a pending due process complaint involving the same school district, or has, within a two-year period of time, served in the same district as either an attorney in a due process complaint or as a provider of special education advocacy to parents of students with disabilities.

Consolidation of multiple due process requests for the same student:

In the interests of judicial economy and in furtherance of the student's educational interests, the proposed rule would establish procedures for the consolidation of multiple due process hearing requests filed for the same student, including the factors that must be considered in determining whether to consolidate separate requests for due process.

Prehearing conferences:

The proposed rule would require that IHOs conduct prehearing conferences for all due process requests received on or after July 1, 2012 and that the IHO issue a prehearing order to address certain procedural matters and to identify the factual issues to be adjudicated at the hearing. These requirements will provide IHOs with the tools to move the hearing forward in a smooth, orderly fashion, and to render decisions in an efficient and expeditious manner.

Withdrawals of requests for due process hearings:

The proposed rule would address existing concerns regarding the withdrawal and subsequent resubmission of the same or substantially similar due process complaints by establishing procedures for the withdrawal of a due process complaint and requiring a withdrawal to be made on notice to the IHO if it is made after the commencement of the hearing. In particular, the amendment would establish procedures for the withdrawal of a due process complaint, which would require a withdrawal to be made on notice to the IHO if it is made after the commencement of the hearing; would expressly authorize the IHO to dismiss a due process complaint with prejudice if the other party to the claim would be prejudiced by the withdrawal; and would provide for the same IHO to be appointed if the party who withdrew subsequently files another due process complaint within one year from the withdrawal that is based on or includes the same or substantially similar claims as made in a prior complaint.

Extensions to the due date for rendering the impartial hearing decision:

The proposed amendment further reinforces the importance of granting extensions for only limited purposes, while addressing the practical concerns IHOs may face in conducting a hearing when the parties attempt to engage in settlement negotiations. The amendment would expressly prohibit an IHO from soliciting extensions for purposes of his or her own scheduling conflicts; prescribe additional considerations an IHO must consider in granting an extension; prohibit an IHO from granting an extension after the record close date; and require the IHO to set forth the facts relied upon for each extension granted. The proposed amendment authorizes an IHO to grant up to one 30-day extension for the purpose of settlement discussions between the parties.

Timeline to render a decision:

To further align the State's timeline requirements for issuing decisions with the federal requirements, the proposed amendment would clarify that:

- when a district files a due process complaint, the decision is due 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; and
- when a parent files a due process complaint notice, the decision must be rendered 45 days after the date on which one of the following conditions occurs first: (1) the IHO receives the parties written waiver of the resolution meeting, (2) the IHO receives the parties written confirmation that a mediation or resolution meeting was held but no agreement could be reached, or (3) the expiration of the 30-day resolution period (unless the parties agree in writing to continue mediation at the end of the 30-day resolution period).

Overall, the proposed amendment will streamline the process for conducting hearings, which will in turn, facilitate a more efficient and expeditious hearing. This improved process will promote timely due process decisions and is likely to result in costs savings to districts.

It is anticipated that a Notice of Proposed Rule Making will be published in the State Register on or about January 25, 2012. Supporting materials for the proposed amendment are available upon request from the Secretary to the Board of Regents.

Timetable for Implementation

The proposed amendment is before the P-12 Education Committee for discussion in January 2012 and, following the receipt of public comment, will be submitted for action at the April meeting with a proposed effective date of May 16, 2012.

Attachment

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 207, 305, 3214, 4403, 4404 and 4410.

1. Subdivision (x) of section 200.1 of the Regulations of the Commissioner of Education is amended, effective May 16, 2012, as follows:

(x) Impartial hearing officer means an individual assigned by a board of education pursuant to Education Law, section 4404(1), or by the commissioner in accordance with section 200.7(d)(1)(i) of this Part, to conduct a hearing and render a decision. No individual employed by a school district, school or program serving students with disabilities placed there by a school district committee on special education may serve as an impartial hearing officer and no individual employed by such schools or programs may serve as an impartial hearing officer for two years following the termination of such employment, provided that a person who otherwise qualifies to conduct a hearing under this section shall not be deemed an employee of the school district, school or program serving students with disabilities solely because he or she is paid by such schools or programs to serve as an impartial hearing officer. An impartial hearing officer shall:

(1) ...

(2) ...

(3) ...

(4) be certified by the commissioner as an impartial hearing officer eligible to conduct hearings pursuant to Education Law, section 4404(1) and subject to suspension or revocation of such certification by the commissioner for good cause in accordance with the provisions of section 200.21 of this Part. In order to obtain and retain such a certificate, an individual shall:

(i) ...

(ii) ...

(iii) . . .

(iv) possess knowledge of, and the ability to understand, the provisions of Federal and State law and regulations pertaining to the Individuals with Disabilities Education Act and legal interpretations of such law and regulations by Federal and State courts; [and]

(v) possess knowledge of, and the ability to conduct hearings in accordance with appropriate, standard legal practice and to render and write decisions in accordance with appropriate standard legal practice[.]; and

(vi) be willing and available to accept appointment to conduct impartial hearings.

Notwithstanding the provisions of section 200.21 of this Part, unless good cause has been provided to the commissioner including, but not limited to, cause resulting from poor health as certified by a physician, active military services or other similar extenuating circumstances, the certification of an impartial hearing officer shall be rescinded upon a finding that the impartial hearing officer was not willing or available to conduct an impartial hearing within a two-year period of time.

2. Paragraph (3) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended, effective May 16, 2012, as follows:

(3) Initiation of an impartial due process hearing. Upon receipt of the parent's due process complaint notice, or the filing of the school district's due process complaint notice, the board of education shall arrange for an impartial due process hearing to be conducted in accordance with the following rules:

(i) [Appointment] Except as provided in subparagraph (ii) of this paragraph and

_____ from the impartial hearing officer list must be made in accordance with the rotational selection process established in section 200.2(e)(1) of this Part and the administrative procedures established by the board of education pursuant to section 200.2(b)(9) of this Part.

(a)

(b)

(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 has provided direct special education advocacy to parents of students with disabilities in the same school district within a two-year period;

(ii) The board of education or trustees shall immediately appoint an impartial hearing officer to conduct the hearing. A board of education may designate one or more of its members to appoint the impartial hearing officer.

(a) Consolidation and multiple due process hearing requests. While a due process complaint is pending before an impartial hearing officer selected in accordance with the rotational selection process established in section 200.2(e)(1) of this Part, any additional due process complaints subsequently filed on a separate issue relating to the same subject student, shall be assigned to and scheduled before the same impartial hearing officer, who may consolidate the complaints or provide that they proceed separately as individual complaints. When considering whether to consolidate one or more separate requests for due process, in the interests of judicial economy and the interests of the student, the impartial hearing officer shall consider factors that include,

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- (1) the similarity of the issues of the due process complaints;
 - (2) the potential negative effects on the child's educational interests or well-being which may result from the consolidation;
 - (3) any adverse financial or other detrimental consequence which may result from the consolidation of the due process complaints;
 - (4) whether the parties have sought mediation with regard to a due process complaint notice pursuant to subdivision (h) of this section; and
 - (5) whether consolidation would:
 - (i) impede a party's right to participate in the resolution process prescribed in paragraph (2) of this subdivision;
 - (ii) prevent a party from receiving a reasonable opportunity to present its case in accordance with subparagraph (xiii) of this paragraph; or
 - (iii) prevent the impartial hearing officer from timely rendering a decision pursuant to paragraph (5) of this subdivision.
 - (b) Nothing in this section shall be construed to preclude a parent from filing a due process complaint on an issue separate from a due process complaint already filed.
 - (c) If an impartial hearing officer becomes unavailable to accept further appointments in accordance with this subparagraph, a new impartial hearing officer shall be appointed from the rotational list, established in section 200.2(e)(1) of this Part, to serve as the impartial hearing officer for such due process complaint and shall be authorized to consolidate any new complaint in accordance with this paragraph.

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(x)

(xi) [A] The impartial hearing officer may schedule a prehearing conference with the parties [may be scheduled] within the timeline specified in subparagraph (iii) of this paragraph, to facilitate a fair, orderly and expeditious hearing, except that, for impartial hearings requested on or after July 1, 2012, the impartial hearing officer shall schedule a prehearing conference. Such conference may be conducted by telephone. A transcript or a written summary of the prehearing conference shall be entered into the record by the impartial hearing officer.

(a) A prehearing conference [is] shall be held for the purposes of:

[(a)] (i) simplifying or clarifying the factual issues in dispute;

[(b)] (ii) establishing dates for [the completion of] conducting and completing the hearing and for rendering the impartial hearing officer's decision;

[(c)] (iii) identifying evidence to be entered into the record;

[(d)] (iv) identifying the number of witnesses expected to provide testimony;

and/or

[(e)] (v) addressing other [administrative] matters as the impartial hearing officer deems necessary to complete a timely hearing.

(b) Upon the conclusion of the prehearing conference, the impartial hearing officer shall promptly issue and deliver to the parties, or their legal representative, a written prehearing order which confirms and/or identifies the:

(1) time, place, and dates of the hearing;

(2) factual issues to be adjudicated at the hearing;

(3) relief being sought by the parties;

(4) deadline date for final disclosure of all evidence intended to be offered at the hearing and for the identification of all witnesses intended to testify at hearing, which must be no later than at least five business days prior to the first scheduled date of the hearing;

(5) the briefing schedule, if any;

(6) the date by which the final decision of the impartial hearing officer shall be issued; and

(7) any other information determined to be relevant by the impartial hearing officer.

(c) With the consent of all parties, an impartial hearing officer may, in his or her discretion, dispense with the parties' presence at a prehearing conference and rely upon alternative methods of communication regarding matters set forth in this subparagraph, provided, however, that the use of such methods of alternative communications shall

in conformity with the requirements set forth in this subparagraph.

(d) If a party fails to attend or participate in the prehearing conference, the impartial hearing officer may proceed with the conference. A party's failure to attend the prehearing conference shall not relieve the impartial hearing officer of the duty to issue the written prehearing order in conformity with paragraph (b) of this subdivision.

(e) The impartial hearing officer shall include the prehearing order and any amendments thereto in the hearing record.

(f) Nothing in this section shall preclude the impartial hearing officer from requiring additional conferences prior to or after the hearing has commenced to aid in the disposition of the hearing.

(xii)

(xiii)

(xiv)

(xv)

(xvi)

(xvii)

3. Paragraph (4) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended effective May 16, 2012, as follows:

(4) Decision of the impartial hearing officer. (i) In general. Subject to subparagraph (ii), a decision made by an impartial hearing officer shall be made on substantive grounds based on a determination of whether the student received a free appropriate public education.

(ii)

(iii) Settlement agreements. An impartial hearing officer shall not issue a so-ordered decision on the terms of a settlement agreement reached by the parties in other matters not before the impartial hearing officer. Nothing in this subdivision shall preclude a party from seeking to admit a settlement agreement or administrative decision into evidence.

4. Paragraph (5) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended, effective May 16, 2012, 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[, and to the Office of Special Education of the State Education Department,] not later than 45 days from the [date required for commencement of the impartial hearing in accordance with subparagraph (3)(iii) of this subdivision] 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 notice, the decision is due not later than 45 days from the day after one of the following events, whichever shall occur first: the date upon which the impartial hearing officer receives the parties' written waiver of the resolution meeting; or the date the impartial hearing officer receives the parties' written confirmation that a mediation or resolution meeting was held but no agreement could be reached; or the expiration of the 30-day resolution period except when the parties agree in writing to continue mediation at the end 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. 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 two copies of 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] one of the copies forwarded to the Office of Special Education. Whenever possible, copies submitted to the State Education Department shall be transmitted by secure electronic document submission or in another electronic format.

(i) An impartial hearing officer may grant specific extensions of time beyond the periods set out in this paragraph, in subparagraph (3)(iii) of this subdivision, or in section 200.16(h)(9) of this Part at the request of either the school district or the parent. The impartial hearing officer shall not solicit extension requests or grant extensions on his or her own behalf or unilaterally issue extensions for any reason. Each extension shall be for no more than 30 days. Not more than one extension at a time may be granted. The reason for each extension must be documented in the hearing record.

(ii) The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

(a) [the impact on] whether the delay in the hearing will facilitate other matters that will positively contribute to the child's educational interest or well-being [which might be occasioned by the delay];

(b) [the need of a party for additional time to prepare or present the party's position at the] whether a party has been afforded a fair opportunity to present its case at the hearing in accordance with the requirements of due process;

(c) any adverse financial or other detrimental consequences likely to be suffered by a party in the event of delay; [and]

(d) whether there has already been a delay in the proceeding through the actions of one of the parties[.];

(e) whether the reasons for the delay were foreseeable; and

(f) whether granting the extension is likely to contribute to reaching a final decision within the revised timeline or is likely to cause additional extension requests.

(iii) Absent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of [school] vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, [settlement discussions between the parties], avoidable witness scheduling conflicts or other similar reasons. [Agreement] The impartial hearing officer shall not rely on the agreement of the parties [is not a sufficient] as a basis for granting an extension. No extension shall be granted after the record close date. Not more than one 30-day extension shall be granted for the purpose of settlement discussions between the parties.

(iv) The impartial hearing officer shall promptly respond in writing to each request for an extension and shall set forth the facts relied upon for each extension granted. The response shall become part of the record. The impartial hearing officer may render an oral decision to an oral request for an extension if the discussions are conducted on the record, but shall subsequently provide that decision in writing and include it as part of the record. For each extension granted, the impartial hearing officer shall set a new date for rendering his or her decision, [and] notify the parties in writing of such date, and as required, revise the schedule of remaining hearing dates set forth in the written prehearing order issued pursuant to subparagraph (ix)(c) of this paragraph to ensure that the impartial hearing officer's decision is issued by the revised decision due

date.

(v)

5. Section 200.5(j) of the Regulations of the Commissioner of Education is amended by adding a new paragraph (6), effective May 16, 2012, as follows:

(6) Withdrawal of a Due Process Complaint. A due process complaint may be withdrawn by the party requesting a hearing as follows:

(i) Prior to the commencement of the hearing or prehearing conference, a voluntary withdrawal by the party requesting the hearing shall be without prejudice unless the parties otherwise agree.

(ii) Except for withdrawals in accordance with subparagraph (i) of this paragraph, a party's withdrawal shall be with prejudice and the impartial hearing officer must terminate the hearing upon receipt of the notification of withdrawal, provided however, a party may submit a motion to withdraw without prejudice after the prehearing conference has been conducted for good cause shown. Upon receipt of a motion to withdraw without prejudice, the impartial hearing officer shall issue a written decision determining whether the withdrawal shall be with or without prejudice and the party seeking to withdraw shall, upon receipt of the impartial hearing officer's determination, immediately notify the impartial hearing officer of the party's intent to withdraw.

(iii) The withdrawal of a due process complaint does not alter the timeline pursuant to paragraph (1)(i) of this subparagraph for requesting an impartial hearing.

(iv) If the party subsequently files a due process complaint within one year of the withdrawal of a complaint that is based on or includes the same or substantially similar claim as made in a prior due process complaint that was previously withdrawn by

the prior complaint unless that impartial hearing officer is no longer available to hear the case.

(v) Nothing in this part shall preclude an impartial hearing officer, in his or her discretion, from issuing a decision in the form of a consent order that resolves matters in dispute in the proceeding.

6. Section 200.16(h)(9) is amended, effective May 16, 2012, as follows:

(9) Impartial due process hearings. Impartial due process hearings shall be conducted in accordance with section 200.5(j) of this Part, provided that the decision of the impartial hearing officer shall be rendered, in accordance with section 4410 of the Education Law, not later than 30 days after the time period pursuant to section [200.5(j)(3)(iii)] 200.5(j)(5) of this Part [or after the initiation of such hearing by the board].