



**TO:** Higher Education Committee

**FROM:** John L. D'Agati *John L. D'Agati*

**SUBJECT:** Proposed Amendment of Section 30-1.3 of the Rules of the Board of Regents and Subpart 82-1 and Addition of a New Subpart 82-3 of the Regulations of the Commissioner of Education Relating to Probationary Appointments and Tenured Teacher Hearings to Implement Subparts D and G of Chapter 56 of the Laws of 2015

**DATE:** September 9, 2015

**AUTHORIZATION(S):** *Richard A. Santorum* *Margaret E. Eis*

### **SUMMARY**

#### **Issue for Decision**

Should the Board of Regents adopt as an emergency measure the proposed amendment of Section 30-1.3 of the Rules of the Board of Regents and Subpart 80-2.1 and addition of Subpart 80-2.3 of the Commissioner's Regulations relating to probationary appointments and tenure teacher hearings to implement the requirements of Subparts D and G of Part EE of Chapter 56 of the Laws of 2015?

#### **Reason(s) for Consideration**

State statute.

#### **Proposed Handling**

This item will come before the Higher Education Committee for recommendation and to the Full Board for adoption as an emergency action at the September 2015 Regents meeting, effective September 21, 2015. A copy of the proposed rule and a Statement of the Facts and Circumstances Which Necessitate Emergency Action are attached as Attachments A and B, respectively.

## **Procedural History**

The provisions of Subpart G of Part EE of Chapter 56 of the Laws of 2015 relating to the procedures for tenured teacher hearings were discussed at the May 2015 Regents meeting. The proposed amendment was adopted as an emergency measure by the Board of Regents at its June meeting, effective June 23, 2015. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on July 8, 2015. Supporting materials are available upon request from the Secretary to the Board of Regents. Following the 45-day public comment period, the Department recommends that the proposed amendment be revised. A Notice of Revised Rule Making will be published in the State Register on October 7, 2015.

## **Background Information**

Subpart D of Part EE of Chapter 56 of the Laws of 2015 amends the provisions of various tenure laws (Education Law §§ 2509, 2573, 3012 and 3014) to require that teachers appointed on or after July 1, 2015 be appointed for probationary terms of four years provided that, in the case of classroom teachers and building principals, the teacher or principal must have received composite or overall ratings of Effective or Highly Effective on his/her Annual Professional Performance Review (APPR) in order to receive tenure and cannot have received an Ineffective rating on the APPR in the final year of his or her probationary period.

Regents Rule 30-1.3(d), which relates to board of education resolutions making a probationary appointment, currently requires that the expiration date of the probationary appointment be specified in the board resolution. For probationary appointments made on or after July 1, 2015, it is no longer possible to specify a fixed end date for the probationary appointment in the board resolution for a classroom teacher or building principal because the amendments to Education Law §§ 2509, 2573, 3012 and 3014 made by Chapter 56 of the Laws of 2015 make the grant of tenure contingent on future events, namely the APPR ratings that the teacher and principal receive. Therefore, a conforming amendment to Regents Rule §30-3.1 is needed so that the board resolutions for probationary appointments of classroom teachers and building principals made on or after July 1, 2015 will be consistent with the requirements of Education Law §§ 2509, 2573, 3012 and 3014, as amended by Chapter 56 of the Laws of 2015. This will ensure that classroom teachers and building principals given a probationary appointment on or after July 1, 2015 are put on notice at the time of their probationary appointment that their appointment on tenure will be dependent on their APPR ratings, to the extent provided by Chapter 56 of the Laws of 2015.

Specifically, the proposed amendment would require that board resolutions making probationary appointments of classroom teachers or building principals on or after July 1, 2015 reflect that, to the extent consistent with Education Law §§ 2509, 2573, 3012 and 3014, in order to receive tenure classroom teachers or building principals must have received composite or overall APPR ratings pursuant to Education Law §3012-c and/or 3012-d of Effective or Highly Effective in at least three of the four preceding years and a classroom teacher or building principal who receives an

Ineffective composite or overall APPR rating in the final year of the probationary period shall not be eligible for tenure at that time. The proposed amendment also defines “classroom teacher” and “building principal” for this purpose as such terms are defined in Sections 30-2.2 and 30-3.2 of the Rules of the Board of Regents.

In addition, Subpart G of Part EE of Chapter 56 of the Laws of 2015, which took effect July 1, 2015, amends Education Law §§ 3020 and 3020-a relating to tenured teacher hearings and adds a new Education Law §3020-b to establish a new expedited hearing process for classroom teachers and building principals charged with incompetence based on their receipt of two or three consecutive composite or overall APPR ratings of Ineffective pursuant to Education Law §3012-c and/or §3012-d.

The amendments to Education Law §3020 conformed the statutory provisions authorizing collectively bargained alternative tenured teacher hearing procedures in New York City to the provisions of Education Law §3020-b relating to the evidentiary weight to be given to two or three consecutive Ineffective APPR ratings, and those specific amendments do not need to be addressed in these proposed regulations.

There were several amendments made in Chapter 56 to Education Law §3020-a, however, that do require conforming amendments to the provisions of Part 82 of the Regulations of the Commissioner of Education relating to procedures in tenured teacher hearings. Notably, Subpart G of Part EE of Chapter 56 made the following changes to Education Law §3020-a:

- The use of a three-member panel for incompetency cases was eliminated and all §3020-a hearings must be held before a single hearing officer.
- The prior expedited hearing process applicable to a pattern of ineffective teaching based on two consecutive Ineffective APPR ratings was repealed, and replaced by the new expedited hearing procedures in Education Law §3020-b.
- A new expedited hearing process was established for cases involving charges of misconduct constituting physical or sexual abuse of a student.
- For employees charged on or after July 1, 2015 with misconduct constituting physical or sexual abuse of a student, the board of education is authorized to suspend the employee without pay pending an expedited hearing, provided that a probable cause hearing must be held within 10 days in accordance with procedures prescribed in the Regulations of the Commissioner.
- A provision was added to require the hearing officer at the pre-hearing conference to provide for full and fair disclosure of the witnesses and evidence to be offered by the employee. Previously, only the employing board was required to provide full and fair disclosure of the nature of the case and evidence against the employee.
- A provision was added to require the hearing officer, in determining the penalty to be imposed on an employee, to give serious consideration to the penalty recommended by the employing board, and if he or she rejects the recommended penalty, the

rejection must be based on reasons in the record and expressed in the written decision.

- A provision was added authorizing a child witness under the age of 14 to testify through the use of a live, two-way closed circuit television under certain specified conditions.

New Education Law §3020-b, which took effect July 1, 2015, establishes procedures for expedited hearings commenced by the filing of charges of incompetence against a classroom teacher or building principal based on receipt of either two or three consecutive Ineffective composite or overall APPR ratings under Education Law §3012-c and/or 3012-d. Section 3020-b requires the Commissioner to adopt regulations prescribing the necessary rules and procedures for the conduct of hearings. The procedures set forth in the statute for an expedited hearing based on two Ineffective APPR ratings are significantly different from those for an expedited hearing based on three Ineffective APPR ratings. The two processes are summarized below:

### **1. Expedited Proceedings Based on two Ineffective APPR Ratings:**

- Where the charges are based on two Ineffective ratings pursuant to the APPRs conducted pursuant to Education Law §§ 3012-c or 3012-d, the school *may* bring charges of incompetence.
- The school must have developed and substantially implemented a Teacher Improvement Plan or Principal Improvement Plan in accordance with Education Law §§ 3012-c or 3012-d for the educator following the first evaluation in which the educator was rated Ineffective, and the immediately preceding evaluation if the employee was rated Developing.
- The parties jointly select the hearing officer.
- Two consecutive Ineffective APPR ratings are prima facie evidence of incompetence overcome only by clear and convincing evidence that the employee is not incompetent in light of the surrounding circumstances.
- The final hearing date must be within 90 days of the date of the hearing request. Adjournments that would extend the hearing beyond the 90 day period may be granted if the hearing officer determines that the delay is attributable to a circumstance or occurrence beyond the control of the requesting party and an injustice would result if the adjournment were not granted.
- The hearing officer must render a decision within 10 days of the last day of hearing.

## 2. Expedited Proceedings Based on Three Ineffective APPR Ratings:

- Where the charges are based on three Ineffective ratings pursuant to APPRs conducted pursuant to Education Law §§ 3012-c or 3012-d, the school **shall** bring charges of incompetence.
- The Commissioner selects the hearing officer, instead of the parties.
- Three Ineffective ratings are prima facie evidence of incompetence which may be overcome only by clear and convincing evidence that the calculation of one or more of the underlying components on the APPR was fraudulent, which includes mistaken identity.
- The final hearing date must be within 30 days of the date of the hearing request. Adjournments that would extend the hearing beyond the 30 day period may be granted if the hearing officer determines that the delay is attributable to a circumstance or occurrence beyond the control of the requesting party and an injustice would result if the adjournment were not granted.
- The hearing officer must render a decision within 10 days of the last day of hearing.

Education Law §3020-b includes many, but not all of the procedural provisions included in Education Law §3020-a. For example, §3020-b does not include the provision requiring charges to be brought between the opening and closing of school, the provision giving the parties 15 days to select a hearing officer or various other provisions prescribing the timelines for pre-hearing conferences and other steps in the hearing process between the request for the hearing and the 30(for expedited hearings based upon 3 ineffective ratings) or 90 days (for expedited hearings based upon 2 ineffective ratings) within which the expedited hearing must be completed. In fact, Education Law §3020-b specifically charges the Commissioner with responsibility to establish timelines in regulations to ensure that the duration of the hearing is no longer than 30 days or 90 days, as applicable.

The proposed amendments also add a new Subpart 82-3 to the Rules of the Board of Regents to establish procedural requirements that will apply to tenured teacher hearings commenced by the filing of charges on or after July 1, 2015. The changes made by Chapter 56 have effectively established different procedures for standard §3020-a proceedings and expedited hearings under §3020-a and §3020-b.

The categories of expedited hearings are as follows:

- expedited hearings upon revocation of a teaching certificate;
- expedited hearings on charges of misconduct constituting the physical or sexual abuse of students;

- expedited 3020-b hearings based on two consecutive Ineffective APPR ratings; and
- expedited 3020-b hearings based on three consecutive Ineffective APPR ratings.

In addition, the Commissioner is charged with adopting regulations prescribing the procedures for probable cause hearings when a board of education suspends an employee for misconduct that constitutes the physical or sexual abuse of students.

The new Subpart 82-3, which applies to §3020-a hearings commenced prior to July 1, 2015, like the old Subpart 82-1, sets forth the procedures on charges, requests for hearings and general hearing procedures that apply across all §3020-a and §3020-b hearing proceedings.

The new §82-3.6 establishes different procedures for the appointment of hearing officers for standard §3020-a hearings and the four categories of expedited hearings.

Section 82-3.9 sets forth the special hearing procedures that apply to each of the four categories of expedited hearings.

Section 82-3.10 establishes procedures for probable cause hearings related to suspensions without pay of employees charged with misconduct constituting the physical or sexual abuse of a student. By statute, the hearing officers in such probable cause hearings must be appointed from a rotational list in a manner similar to the rotational selection process contained in Education Law §4404, and the proposed amendment clarifies that this will be a rotational list of hearing officers who have agreed to serve under the terms and conditions set forth in Education Law §3020-a(2)(c).

With very few exceptions, the procedures set forth in Subpart 82-1, which apply to §3020-a hearings commenced prior to July 1, 2015, are carried forward without substantive change except where they would conflict with Chapter 56 of the Laws of 2015 or other laws. One exception is that a provision is added relating to selection of hearing officers in §3020-a proceedings to address what happens after the second time that hearing officer selected by the parties declines to serve. This situation is not addressed in §3020-a, and in order to ensure the timeliness of the hearings, the proposed amendment specifies that the Commissioner would appoint a hearing officer from the list after two declinations. In addition, a technical amendment is made to the provisions related to reimbursement of hearing officers to clarify that reimbursement will be made for actual days of service, defined as 7 hours, and pro-rated to the nearest 1/10 hour.

During the 45-day public comment period, the Department received several comments on the proposed rule. An Assessment of Public Comment is attached as Attachment C. As a result of the comments, the Department proposes the following regulatory amendments:

- One commenter indicated that the requirement for a TIP/PIP for charges relating to three ineffective ratings is inconsistent with the statute and has requested a technical amendment to remove this requirement for charges brought for three consecutive ineffective ratings. In an effort to conform the regulatory language with the statute, the Department recommends that this requirement be eliminated from 80-3.9(e)(2).
- A commenter suggested that the 5 calendar day period within which parties in expedited hearings pursuant to Education Law §3020-b must select a hearing officer that was prescribed in proposed §82-3.6(b) is unrealistic and recommended that it be changed to 5 business days. To accommodate the concern, the Department recommends a revision to §82-3.6(b) to require that the parties select the hearing officer within 7 calendar days. That provides equivalent relief and is less burdensome for the Department to track than a 5 business day rule.
- A commenter requested that the regulation be modified to conform with SED's current practice of allowing two business days of being notified of the hearing officer's declination or failure to confirm or fifteen days from receipt of the hearing officer list for parties to select a second hearing officer, whichever is later, for the parties to select another hearing officer if the first selection declines or fails to respond, before SED may make the selection. The Department recommends an amendment to proposed §82-3.5(f) to allow the selection of another hearing officer within either two business days from the first declination or failure to confirm or 15 days from the parties' receipt of the hearing officer list, whichever is later. For expedited hearings under Education Law §3020-b, however, the 15 day period from Education Law §3020-a does not apply, and the proposed regulation as revised instead requires that the parties select a hearing officer within 7 days. A similar change has been made to proposed §82-3.6(b)(1) to clarify that following a declination or failure to confirm, the parties may select another hearing officer within the 7 day period.
- One commenter suggested that the regulations be limited to pre-hearing disclosure of the teacher's witnesses and evidence that the teacher will offer at the hearing, which they assert is the only material authorized by the statute. Education Law §3020-a(3)(i)(C) was very specifically amended by Chapter 56 to require the hearing officer, at the prehearing conference, to "set a schedule and manner for full and fair disclosure of the witnesses and evidence to be offered by the employee. However, the Department recommends a revision to 82-3.7(c)(3)(ii) to conform to the literal language of Education Law §3020-b(3)(c)(iii)(C) to clarify that the hearing officer shall consider requests for production of relevant and material evidence and information including witness statements, investigatory statements or notes, exculpatory evidence or any other evidence, including district or student records, "relevant and material to the employee's defense". This phrase was inadvertently omitted from the proposed regulation.

- One commenter expressed concern that the emergency regulations on pre-hearing motions includes a provision for five days' notice for motions to discuss, amend or consolidate, but omits such provision for other preliminary matters, which is required by the statute. The Department agrees and recommends that Section 82-3.7(c)(2) of the proposed regulations be amended to conform with Education Law §3020-b(3)(c)(iv) by clarifying that the five days' notice by statute applies to applications on other preliminary matters.
- Also, proposed §82-3.5(h) and proposed §82-3.6(b)(6) have been revised to clarify the procedures relating to replacement of a hearing officer. Under the revised regulations, when a hearing officer who has been appointed and such appointment has been confirmed but is unable to complete the hearing and needs to be replaced, the hearing officer must immediately notify the Commissioner. If the hearing officer is incapacitated and unable to provide such notice, upon learning of such incapacity, the parties are required to notify the Commissioner. The Commissioner then notifies the parties that they need to mutually select a new hearing officer within 2 business days of receipt of notice from the Commissioner, or the Commissioner will appoint a new hearing officer from the list.

### **Recommendation**

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

VOTED: that subdivision (d) of Section 30-1.3, the title of Subpart 82-1, and Section 82-1.1 of the Regulations of the Commissioner of Education be amended, and that a new Subpart 82-3 of the Regulations of the Commissioner of Education be added, as submitted, effective September 21, 2015, as an emergency action upon a finding of the Board of Regents that such action is necessary for the preservation of the general welfare in order to revise the regulation to timely implement the provisions of Subparts D and G of Chapter 56 of the Laws of 2015 and to ensure that the rule remains continuously in effect until it can be adopted as a permanent rule.

### **Timetable for Implementation**

If adopted at the September 2015 meeting, the emergency rule will take effect on September 21, 2015. It is anticipated that the proposed amendment will be presented to the Board of Regents for permanent adoption at the November 2015 Regents meeting, after publication of the proposed amendment in the State Register for the 30-day public comment period required under the State Administrative Procedure Act for revised rulemakings. If the proposed amendment is adopted at the November meeting, the proposed amendment will become effective on December 2, 2015.

AMENDMENT TO THE RULES OF THE BOARD OF REGENTS AND THE  
REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 215, 305, 3001, 3003, 3009, 3020, 3020-a and 3020-b of the Education Law and Chapter 56 of the Laws of 2015.

1. Subdivision (d) of section 30-1.3 of the Rules of the Board of Regents is amended, effective September 21, 2015, to read as follows:

(d) the expiration date of the appointment, if made on a probationary basis; provided that for appointments of classroom teachers and building principals made on or after July 1, 2015, the resolution must reflect that , except to the extent required by the applicable provisions of Education Law §§2509, 2573, 3212 and 3014, in order to be granted tenure the classroom teacher or building principal shall have received composite or overall annual professional performance review ratings pursuant to Education Law §3012-c and/or 3012-dof either effective or highly effective in at least three (3) of the four (4) preceding years and if the classroom teacher or building principal receives an ineffective composite or overall rating in the final year of the probationary period he or she shall not be eligible for tenure at that time. For purposes of this subdivision, “classroom teacher” and “building principal” means a classroom teacher or building principal as such terms are defined in sections 30-2.2 and 30-3.2 of this Part.

2. The title of Subpart 82-1 shall be amended, effective September 21, 2015, to read as follows:

PROCEDURES FOR HEARINGS COMMENCED BY THE FILING OF  
CHARGES ON OR AFTER AUGUST 25, 1994 AND PRIOR TO JULY 1, 2015

3. Section 82-1.1 shall be amended, effective September 21, 2015, to read as follows:

§82-1.1 Application of Subpart.

This Subpart applies to hearings on charges against tenured school employees pursuant to section 3020-a of the Education Law that are commenced by the filing of charges on or after August 25, 1994 and prior to July 1, 2015.

4. A new Subpart 82-3 shall be added, effective September 21, 2015 to read as follows:

Subpart 82-3

PROCEDURES FOR HEARINGS COMMENCED BY THE FILING OF  
CHARGES ON OR AFTER JULY 1, 2015

§82-3.1. Application of this Subpart. This Subpart applies to hearings on charges against tenured school employees pursuant to sections 3020-a and 3020-b of the Education Law that are commenced by the filing of charges on or after July 1, 2015.

§82-3.2. Definitions. As used in this Subpart:

(a) Employee means any person or persons against whom charges may be filed pursuant to section 3020-a or section 3020-b of the Education Law, or, except where the context indicates a contrary intent, the attorney designated to represent such person or persons in a hearing pursuant to this Part.

(b) Chief school administrator means the district superintendent of schools of the board of cooperative educational services employing a person against whom

charges are made; or the superintendent of schools, the Chancellor of a city school district in a city with a population of one million or more or his or her designee, or other chief school officer of the school district employing a person against whom charges are made.

(c) Board means the employing trustee, board of trustees, board of education, or board of cooperative educational services.

(d) Clerk means the clerk or secretary of the school district or employing board.

(e) Commissioner means Commissioner of Education.

(f) Association means the American Arbitration Association.

(g) Hearing officer means a single hearing officer selected to conduct a hearing pursuant to section 3020-a or 3020-b of the Education Law.

(h) Communication means any written, electronic or oral notification of any type.

(i) Day means calendar day, unless otherwise prescribed herein.

(j) Party means the board or the employee.

### §82-3.3. Charges.

(a) Except as provided in Education Law §§2573(8) or 2590-j(7), no charges under this Subpart shall be brought more than three (3) years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

(b) Charges filed under Education Law §3020-a shall be in writing and shall be filed by the chief school administrator with the clerk during the period between the

actual opening and closing of the school year for which the employed is normally required to serve.

(c) Upon receipt of the charges, the clerk or secretary of the school district shall immediately notify the board of the receipt of charges. After receipt of the charges, the board shall in executive session, and determine by a vote of a majority of all of the members of the board, whether probable cause exists to bring a disciplinary proceeding against the employee. In the case of charges brought pursuant to Education Law §3020-a, such executive session shall be held within five (5) days of the board's receipt of the charges, except with permission of the board.

(d) Where the vote of the board is affirmative, a written statement specifying the following information shall be immediately forwarded to the employee by certified or registered mail, return receipt requested, or by personal delivery:

(1) a description of the charges specifying in detail each charge to which the board finds probable cause exists;

(2) the maximum penalty which will be imposed by the board if the employee does not request a hearing or that will be sought by the board if the employee is found guilty of the charges after a hearing; and

(3) a copy of the employee's rights under section 3020-a or 3020-b as applicable, including the right to request a hearing.

(e) Charges against an employee must be made separately from charges against any other employee.

(f) A copy of the charges shall be filed with the Commissioner in a timeframe and manner prescribed by the Commissioner.

§82-3.4. Request for a hearing.

(a) Where the employee desires a hearing, he or she may file a written request for a hearing with the clerk within ten (10) days of receipt of the charges.

(b) In the request for a hearing, the employee may designate an attorney who will represent the employee at the hearing and who shall be authorized to receive any and all communications pertaining to the Education Law §§3020-a or 3020-b proceeding, as applicable, on his or her behalf.

(c) The unexcused failure of the employee to request a hearing shall be deemed a waiver of the right to a hearing.

(d) Within three (3) business days of receipt of the employee's request for a hearing, the clerk shall notify the Commissioner of the need for a hearing in the manner prescribed by the Commissioner, with a copy to the employee, or the employee's designated attorney. Such notice shall include the following:

(1) an affidavit of service of the charges upon the employee;

(2) a copy of the employee's request for hearing;

(3) a place within the district or the county seat of a county in which the board is located which will be made available by the board at school district expense for the holding of the prehearing conference and hearing;

(4) the name and contact information for the attorney, if any, who will represent the board at the hearing;

(5) the type of hearing sought:

(i) standard Education Law §3020-a hearing;

(ii) expedited hearing due to revocation of the employee's certification;

(iii) expedited hearing due to misconduct constituting physical or sexual abuse of a student;

(iv) expedited hearing pursuant to Education Law §3020-b for two (2) consecutive ineffective composite or overall annual professional performance review (APPR) ratings;

(v) mandatory expedited hearing pursuant to Education Law §3020-b for three (3) consecutive ineffective composite or overall annual professional performance review (APPR) ratings ;

(vi) probable cause hearing pursuant to Education Law §3020-a(2)(c) for misconduct constituting physical or sexual abuse of a student;

(6) an estimate of the number of days needed for the hearing;

(7) where the board has received written notice that the employee will be represented by an attorney at the hearing, the name and contact information of such attorney.

(e) Separate notification of the need for a hearing shall be given with respect to each employee against whom charges have been filed.

(f) Whenever an employee shall be deemed to have waived his/her right to a hearing, the board shall proceed, within 15 days, by a majority vote of all members of such board to determine the case and fix the penalty imposed and the clerk shall immediately notify the Commissioner of such waiver in a manner prescribed by the Commissioner.

(g) Where the matter is resolved prior to the decision of the hearing officer, or prior to the assignment of a hearing officer, whether by settlement or default or other final disposition, the board shall notify the Commissioner and provide a copy of the

board resolution resolving the matter to the Commissioner in a manner prescribed by the Commissioner within ten (10) days of the resolution.

§82-3.5. Appointment of hearing officer in standard and expedited §3020-a proceedings.

(a) Upon receipt of notification of the need for a hearing, the Commissioner shall obtain a list of potential hearing officers, together with relevant biographical information from the association. Such list shall consist of individuals selected by the association who are qualified to serve as hearing officers. To be qualified to serve as a hearing officer, an individual shall:

(1) be on the association's panel of labor arbitrators;

(2) be a resident of New York or an adjoining state;

(3) be willing to serve under the conditions imposed by Education Law §3020-a and this Subpart; and

(4) not be otherwise ineligible to serve pursuant to Education Law, section 3020-a(3)(c)(i).

(b) Within 15 days after receiving the list of potential hearing officers from the Commissioner, the parties shall by agreement select a hearing officer and notify the Commissioner of their selection.

(c) If the parties fail to notify the Commissioner of a selection within the 15 day-time period prescribed by subdivision (b) of this section, the Commissioner shall appoint a hearing officer from the list. The provisions of this subdivision shall not apply to city school districts in cities with a population of one million or more with alternative procedures adopted pursuant to section 3020 of the Education Law.

(d) The Commissioner shall notify the hearing officer selected pursuant to subdivision (b) or (c) of this section, and confirm his or her acceptance of such selection.

(e) The failure of the hearing officer to confirm his or her acceptance of the selection within three (3) days shall be deemed a waiver of such selection.

(f) If the hearing officer declines or fails to confirm his or her selection, the parties shall select the name of a second hearing officer in the manner provided for in this section, within two (2) days of being notified of the hearing officer's declination or failure to confirm, or within 15 days of the parties' receipt of the list of potential hearing officers, whichever is later.

(g) If the parties fail to notify the Commissioner of their agreed-upon selection or the second hearing officer declines or fails to confirm his or her selection, within the time periods prescribed in this section, the Commissioner shall appoint a hearing officer from the list. The provisions of this subdivision shall not apply in to city school districts in cities with a population of one million or more with alternative procedures adopted pursuant to Education Law §3020.

(h) If at any time the hearing officer after confirming his or her selection as a hearing officer, cannot complete the hearing and needs to be replaced, he or she shall immediately notify the Commissioner of the need for a replacement and the reasons therefor; provided that if the hearing officer is incapacitated and unable to notify the Commissioner, upon learning of the incapacity of the hearing officer the parties shall provide such notice to the Commissioner. If the Commissioner determines that the hearing officer needs to be replaced, the Commissioner shall notify the parties of their need to select a replacement and if the parties fail to notify the commissioner of their

mutually agreed upon replacement within two (2) business days of receipt of such notice from the Commissioner, the Commissioner shall select the replacement. The provisions of this subdivision shall not apply in to city school districts in cities with a population of one million or more with alternative procedures adopted pursuant to section 3020 of the Education Law.

§82-3.6. Appointment of hearing officer in expedited §3020-b proceedings.

(a) Upon receipt of notification of the need for a hearing, the Commissioner shall obtain a list of potential hearing officers, together with relevant biographical information from the association. Such list shall consist of individuals selected by the association who are qualified to serve as hearing officers. To be qualified to serve as a hearing officer, an individual shall:

- (1) be on the association's panel of labor arbitrators;
- (2) be a resident of New York or an adjoining state;
- (3) be willing to serve under the conditions imposed by section 3020-b of the Education Law and this Subpart; and

(4) not be otherwise ineligible to serve pursuant to Education Law, section 3020-b(3)(c)(ii).

(b) Selection of hearing officer in an expedited hearing pursuant to Education Law §3020-b for two (2) consecutive ineffective composite or overall APPR ratings.

(1) Within seven (7) days after receiving the list of potential hearing officers from the Commissioner, the parties shall by agreement select a hearing officer and notify the Commissioner of their selection. If the hearing officer declines or fails to confirm his or her selection, the parties may select the name of a second hearing officer in the manner

provided in this section within seven (7) days of the parties' receipt of the list of potential hearing officers.

(2) If the parties fail to notify the Commissioner of a selection within the seven (7) day time period prescribed by paragraph (1) of this subdivision, the Commissioner shall appoint a hearing officer from the list. The provisions of this paragraph shall not apply to city school districts in cities with a population of one million or more with alternative procedures adopted pursuant to section 3020 of the Education Law.

(3) The Commissioner shall notify the hearing officer selected pursuant to paragraph (1) or (2) of this subdivision, and confirm his or her acceptance of such selection.

(4) The failure of the hearing officer to confirm his or her acceptance of the selection within three (3) days shall be deemed a waiver of such selection.

(5) If the parties fail to notify the commissioner of their agreed-upon selection or the hearing officer declines or fails to confirm his or her selection, within the time periods prescribed in this subdivision, the Commissioner shall appoint a hearing officer from the list. The provisions of this paragraph shall not apply to city school districts in cities with a population of one million or more with alternative procedures adopted pursuant to section 3020 of the Education Law.

(6) If at any time the hearing officer after confirming his or her selection as a hearing officer, cannot complete the hearing and needs to be replaced, he or she shall immediately notify the Commissioner of the need for a replacement and the reasons therefor; provided that if the hearing officer is incapacitated and unable to notify the Commissioner, upon learning of the incapacity of the hearing officer the parties shall provide such notice to the Commissioner. If the Commissioner determines that the

hearing officer needs to be replaced, the Commissioner shall notify the parties and if the parties fail to notify the commissioner of their mutually agreed upon replacement within two (2) business days of receipt of such notice from the Commissioner, the Commissioner shall select the replacement.

(c) Appointment of hearing officer in mandatory expedited hearing pursuant to Education Law §3020-b for three (3) consecutive ineffective composite or overall APPR ratings. Upon receipt of the list of potential hearing officers pursuant to subdivision (a) of this section, the Commissioner shall appoint the hearing officer in the case of a mandatory expedited hearing for an employee who has received three (3) consecutive ineffective composite or overall APPR ratings.

#### §82-3.7. Pre-Hearing Conference

(a) The hearing officer shall contact the parties and in the case of a standard or expedited §3020-a hearing, shall hold a pre-hearing conference within 10 to 15 days of receipt of notice from the Commissioner confirming his or her acceptance of a selection to serve as a hearing officer. In the case of expedited hearing pursuant to Education Law §3020-b for two (2) consecutive ineffective composite or overall APPR ratings, the hearing officer shall hold a pre-hearing conference within seven (7) days of receipt of notice from the Commissioner confirming his or her acceptance of a selection to serve as a hearing officer. In the case of an expedited hearing pursuant to Education Law §3020-b for three (3) consecutive ineffective composite or overall annual professional performance review ratings, the hearing officer shall hold a pre-hearing conference no later than five (5) days of receipt of notice from the Commissioner confirming his or her acceptance of a selection to serve as a hearing officer.

(b) The pre-hearing conference shall be private and shall be limited to one day except the hearing officer, in his or her discretion, may allow one additional day for good cause shown.

(c) At the pre-hearing conference, the hearing officer shall have the power to:

(1) issue subpoenas for both parties;

(2) hear and decide motions and applications made by either party, provided that any motion or application to dismiss the charges or to amend or consolidate the charges ,or an application on other preliminary matters, is made on written notice to the adverse party no later than five (5) days before the pre-hearing conference; except for expedited hearings conducted pursuant to Education Law §§3020-a and 3020-b, written notice to the adverse party shall be made no later than two (2) days before the pre-hearing conference; and

(3) set a schedule for full and fair disclosure of witnesses and evidence for both parties; including but not limited to bills of particular and requests for production of relevant and material evidence and information, including, witness statements, investigatory statements or notes, exculpatory evidence, or any other evidence, including district or student records, relevant and material to the employee's defense.

(4) At the pre-hearing conference, the hearing officer shall set a schedule for the hearing, including the location, time(s) and date(s) for the final hearing to ensure that:

(i) where the hearing is anticipated to last more than one day, the days scheduled for the hearing are consecutive to the extent practical;

(ii) the hearing is completed within the applicable timelines specified in section 3020-a or 3020-b of the Education Law; and

(iii) there is an equitable distribution of hearing days between the board and the employee.

### §82-3.8. General hearing procedures

(a) Except as otherwise provided in section 80-3.9 of this Subpart, within 60 days of the pre-hearing conference, the final hearing shall be completed, unless the hearing officer determines that extraordinary circumstances warrant a limited and time specific extension.

(b) Except in the case of an expedited hearing pursuant to Education Law §3020-b, all evidence shall be submitted by the parties within no later than 125 days of the filing of charges and no additional evidence shall be accepted after such time, absent extraordinary circumstances beyond the control of the parties.

(c) Hearing officer powers. The hearing officer shall have the power to administer, the hearing process including, but not limited to:

(1) regulate the course of the hearing;

(2) set the time and place for continued hearing dates;

(3) administer oaths;

(4) direct the parties to appear; and

(5) decide such additional applications and motions, as may occur during the course of the hearing.

(d) Parties rights.

(1) At the hearing, the parties have the right to::

(i) to be represented by an attorney;

(ii) confront and cross-examine witnesses;

(iii) subpoena witnesses; and  
(iv) make such additional motions and applications as may be needed in order to effectively defend or prosecute the case; provided that such motions and applications do not delay the case.

(e) The employee shall:

(1) have a reasonable opportunity to defend his or her self at the hearing and have a right to testify in his or her own behalf; and

(2) not be required to testify at the hearing; and

(3) have the right to a public hearing, provided that the employee notifies the hearing officer at least 24 hours before the first day of the hearing that he or she demands a public hearing rather than a private hearing.

(f) The technical rules of evidence do not apply to hearings held under section 3020-a or 3020-b of the Education Law.

(g) The Commissioner shall arrange for the preparation of an accurate record of the proceedings. Upon request, a copy of the record shall be provided by the Commissioner to the hearing officer and/or the parties at the department's expense. Any incremental cost incurred for preparing a daily copy for a party and the hearing officer that is in addition to the base amount payable by the Commissioner for preparation of the final record shall be paid by the party requesting daily copy, or shall be shared equally by the parties where both parties request daily copy.

(h) No photos, audio or video recordings may be taken at hearings, except with the permission of the hearing officer where the hearing officer determines that the hearing is a public hearing and the prohibition in Civil Rights Law §52 against televising, broadcasting or taking of motion pictures of the testimony of witnesses does not apply.

Such determination shall be upon written notice to the parties, who shall be afforded an opportunity to be heard, and the hearing officer shall ensure that the privacy rights of any student under the age of 18 are protected. The provisions of this subdivision shall not apply to the use of live, two-way closed circuit television in accordance with to Education Law §3020-a(3)(c)(i)(C) .

(i) Public hearings shall be open to members of the public and to representatives of the news media, except that the hearing officer may, in his or her discretion, exclude any persons other than parties, witnesses, and their attorneys from all or any portion of the hearing where such exclusion is warranted for the protection of the privacy or reputation of any person under the age of 18 years.

(j) At the conclusion of the testimony, the hearing officer may allow the parties to submit memoranda of law, provided that it does not delay the date that the hearing officer is required to render the final decision in the matter.

(k) Decision.

(1) Except in an expedited hearing, the hearing officer shall render a written decision within 30 days of the last hearing date, and shall submit a copy to the Commissioner who shall make such copy available to the parties.

(2) The written decision shall include the hearing officer's findings of fact on each charge, his or her conclusions with regard to each charge based on such findings and shall state the penalty or other action, if any, which shall be taken by the board, provided that such findings, conclusions and penalty determination shall be based solely upon the record in the proceedings before the hearing officer or panel, and shall set forth the reasons and the factual basis for the determination. The hearing officer, in exercising his or her discretion in determining the penalty, shall give serious

consideration to the penalty recommended by the board and if the hearing officer rejects such recommended penalty, such rejection must be based on reasons based upon the record as expressed in the written decision.

(3) The decisions shall not contain any student or minor names or initials. Students and minors shall be referred to with a pseudonym. An index page shall be attached to provide the actual name for each student or minor referred to with a pseudonym.

#### §82-3.9. Special Hearing Procedures for expedited hearings

(a) The general hearing procedures specified in §82-3.8 of this Subpart shall apply to expedited §3020-a and §3020-b proceedings, except as modified by the provisions of this section.

(b) Special hearing procedures for expedited §3020-a proceedings based on revocation of certification.

(1) Where the proceeding is expedited due to revocation of the employee's certification;

(i) the hearing shall be commenced not more than seven (7) days after the pre-hearing conference and shall not be postponed except on the request of a party and only for good cause shown;

(ii) the hearing shall be limited to one (1) day and each party shall have equal time to present its case; and

(iii) the written decision shall be rendered within ten (10) days of the last hearing date and shall otherwise comply with the requirements of §82-3.8 of this Subpart.

(c) Special hearing procedures for expedited §3020-a hearing based on charges constituting physical or sexual abuse of a student. Where the proceeding is expedited due to charges of misconduct constituting physical or sexual abuse of a student:

(1) The hearing shall commence within seven (7) days after the pre-hearing conference and shall be completed within 60 days after the pre-hearing conference;

(2) The hearing officer shall establish a hearing schedule at the pre-hearing conference to ensure that the required timeframes are met and to ensure an equitable distribution of days between the employing board and the charged employee;

(3) No adjournments may be granted that would extend the hearing beyond 60 days, except the hearing officer may grant a limited and time specific adjournment if the hearing officer determines that the delay is attributable to a circumstance or occurrence that is:

(i) substantially beyond control of the requesting party; and

(ii) an injustice would result if the adjournment were not granted

(4) The written decision shall be rendered within ten (10) days of the last hearing date and shall otherwise comply with the requirements of §82-3.8 of this Subpart.

(d) Special hearing procedures for expedited §3020-b hearing based on two (2) consecutive ineffective APPR ratings. Where an Education Law §3020-b proceeding is expedited due to a removal proceeding for charges of incompetence based two (2) consecutive ineffective composite or overall APPR ratings:

(1) a school district or employing board may bring charges of incompetence for any classroom teacher or principal who receives two (2) such consecutive ineffective ratings, but is not required to do so.

(2) the charges must allege that the employing board has developed and substantially implemented a teacher or principal improvement plan for the employee following the first evaluation in which the employee was rated ineffective and the immediately preceding evaluation if the employee was rated developing;

(3) the pre-hearing conference shall be held within seven (7) days after appointment of the hearing officer.

(4) At the pre-hearing conference, the hearing officer shall establish a hearing schedule to ensure that the required timeframes are met and to ensure an equitable distribution of days between the employing board and the charged employee;

(5) The hearing shall commence within seven (7) days of the pre-hearing conference.

(6) The final hearing date shall be no longer than 90 days following the date the employee requested a hearing;

(7) No adjournments shall be granted that would extend the hearing beyond such 90 day period, except that the hearing officer may grant a limited and time-specific adjournment, that would extend the hearing beyond 90 days if the hearing officer determines that the delay is attributable to a circumstance or occurrence substantially beyond the control of the requesting party and an injustice would result if the adjournment is not granted;

(8) The written decision shall be rendered within ten (10) days of the last hearing date and shall otherwise comply with the requirements of §82-3.8 of this Subpart.

(e) Special hearing procedures for expedited §3020-b hearing based on three (3) consecutive ineffective APPR ratings. Where the proceeding is expedited due to a removal proceeding for charges of incompetence based three (3) consecutive ineffective composite or overall APPR ratings:

(1) A school district or employing board shall bring charges of incompetence for any classroom teacher or principal who receives three (3) such consecutive ineffective ratings.

(2) The Commissioner shall appoint a hearing officer from the list of potential hearing officers obtained in accordance with the procedures described in 82-2.5(a).

(3) The pre-hearing conference shall be held no later than five (5) days after the appointment of the hearing officer;

(4) The hearing officer shall establish a hearing schedule to ensure that the required timeframes are met and to ensure an equitable distribution of days between the employing board and the charged employee

(5) The hearing shall commence within five (5) days of the pre-hearing conference.

(6) The final hearing date shall be no longer than 30 days following the date the employee requested a hearing; and

(7) No adjournments shall be granted that would extend the hearing beyond such 30 day period, except that the hearing officer may grant a limited and time-specific adjournment, that would extend the hearing beyond 30 days if the hearing officer

determines that the delay is attributable to a circumstance or occurrence substantially beyond the control of the requesting party and an injustice would result if the adjournment is not granted; and

(8) The written decision shall be rendered within ten (10) days of the last hearing date and shall otherwise comply with the requirements of §82-3.8 of this Subpart.

§82-3.10 Probable cause hearing for certain suspensions without pay.

(a) In accordance with Education Law §3020-a(2)(c), where a board suspends an employee without pay pending a determination in an expedited hearing based on charges of misconduct constituting physical or sexual abuse of a student, a probable cause hearing shall be conducted pursuant to this section within ten (10) days of the decision to suspend without pay. Such unpaid suspension shall not exceed 120 days from the decision of the board of education to suspend the employee without pay

(b) Probable cause hearing procedures

(1) A school district shall notify the Commissioner of a request for a probable cause hearing within one (1) business day of suspending an employee without pay based on charges of misconduct constituting physical or sexual abuse of a student.

(2) The Commissioner shall maintain a rotational list or lists of individuals who have agreed to serve as impartial hearing officers in accordance with the timeframes and conditions set forth in Education Law §3020-a(2)(c) . The Commissioner, in his discretion, may remove a hearing officer from the rotational list, if he or she engages in a pattern of declinations or is unable to perform his/her duties in the timelines prescribed in Education Law §3020-a(2)(c) or this Subpart. A pattern of declinations is

defined as two (2) or more declinations within one year. If a hearing officer is removed, he or she may make an application to be reinstated after one year, which may be granted in the Commissioner's discretion.

(3) Upon receipt of request for a need for a probable cause hearing, the Commissioner shall appoint the next available hearing officer from the rotational list. The failure of the hearing officer to accept the case within 24 hours of being notified that he or she has been selected shall be deemed a declination.

(4) At the conclusion of the probable cause hearing, the impartial hearing officer may make an oral ruling or issue a written decision on the record as to whether the decision to suspend an employee without pay should be continued or reversed.

(5) The impartial hearing officer shall reverse the decision of the board to suspend without pay and reinstate the pay:

- (i) upon a finding that probable cause does not support the charges; or
- (ii) upon a written determination that suspension without pay is grossly disproportionate in light of all surrounding circumstances.

(6) The employee shall be eligible for reimbursement of the withheld pay and accrued interest at the rate of six percent compounded annually if the hearing officer finds in the employee's favor, at either in the probable cause hearing or in a final determination at the conclusion of the expedited hearing.

#### §82-3.11. Monitoring and enforcement of timelines.

(a) The department will monitor and investigate a hearing officer's compliance with the timelines prescribed in Education Law §§3020-a and 3020-b.

(b) A record of continued failure to commence and complete hearings within the time periods prescribed in Education Law §3020-a and 3020-b this section shall be considered grounds for the Commissioner to exclude such individual from the list of potential hearing officers for these hearings. If a hearing officer is excluded, he or she may make an application to be reinstated to list after one year, which may be granted at the Commissioner's discretion.

§82-3.12. Reimbursable hearing expenses.

(a) The commissioner shall compensate the hearing officer with the customary fee paid for service as an arbitrator for each day of actual service plus necessary travel and other reasonable expenses incurred in the performance of his her duties. Actual service shall be reimbursed in accordance with the maximum rates of compensation of hearing officers as set forth in a schedule prescribed by the Commissioner. Necessary travel and other related reasonable expenses shall be reimbursed in accordance with the rules and limits on travel applicable to State employees.

(b) Any late cancellation fee charged by the hearing officer shall be paid by the party or parties responsible for the cancellation.

(c) A day of actual service is defined as seven (7) hours of hearing time or study, time exclusive of meal breaks, prorated to the nearest 1/10th of an hour.

(d) Charges for hearing time will be reimbursed only for the actual time spent in hearing.

(e) A hearing officer shall not be reimbursed for more than a certain amount of study hours, as prescribed by the Commissioner. Study time is defined as all other administrative tasks, such as hearing preparation, phone calls, correspondence,

evidence review and decision writing. Except as provided for herein, charges for study time shall not be in excess of actual time spent on the hearing, prorated to the nearest 1/10th of an hour up to a maximum established by the Commissioner. If a hearing officer requires more than the maximum study time for a particularly complex matter, the hearing officer can make an application to the Commissioner for additional reimbursement. In situations where good cause substantiates additional study time, as determined by the Commissioner, such applications will be granted.

(f) Additional hearing costs, other than facilities costs, incurred to make a reasonable accommodation to an employee or a witness based on such individual's disability, including but not limited to the retention of a qualified interpreter for the deaf or hearing impaired, shall be paid by the Commissioner. Except as otherwise provided in this Subpart, any other additional hearing costs shall be paid by the board.

(g) No payments shall be made by the Department if they are on a claim submitted later than one year after the final disposition of the hearing by any means, including settlement; provided that no payment shall be barred or reduced where such payment is required as a result of a court order or judgement or a final audit.

**8 NYCRR §30-1.3 and Part 82**

STATEMENT OF FACTS AND CIRCUMSTANCES

WHICH NECESSITATE EMERGENCY ACTION

The proposed rule is necessary to conform the Commissioner's Regulations to changes in the Education Law enacted in Subparts D and G of Part EE of Chapter 56 of the Laws of 2015, relating to probationary appointments and tenured teacher hearings.

The proposed amendment was adopted by emergency action at the June 15-16, 2015 Regents meeting, effective July 1, 2015. The Department recommends that the proposed rule be amended to address public comment received. A Notice of Revised Rule Making will be published in the State Register on October 7, 2015. Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for regular (non-emergency) adoption, after expiration of the required 30-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the November 16-17, 2015 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the November meeting, would be December 2, 2015, the date a Notice of Adoption would be published in the State Register.

The June emergency rule will expire on September 21, 2015, 90 days after its filing with the Department of State on June 23, 2015. Emergency action is therefore necessary for the preservation of the general welfare to ensure that the proposed amendment adopted by emergency action at the June 2015 Regents meeting and revised at the September 2015 Regents meeting, remains continuously in effect until the effective date of its permanent adoption in order to timely implement Subparts D and

G of Part EE of Chapter 56 of the Laws of 2015, relating to probationary appointments and tenured teacher hearings.

**8 NYCRR §30-1.3, 82-1 and 82-2**

**ASSESSMENT OF PUBLIC COMMENT**

Since publication of a Notice of Proposed Rule Making in the State Register on July 8, 2015, the State Education Department (SED) received the following comments:

**1. COMMENT:**

The emergency regulations could be read to allow charges brought under Education Law §3020-b to be initiated at any time, even when school is not in session. Because 3020-a(1) was not amended and 3020-b(1) does not authorize charges to be brought during the summer vacation period, the commenter, a teacher's collective bargaining representative, proposes that the regulations be clarified to reflect that no charges can be brought between the closing and opening of school.

**DEPARTMENT RESPONSE:** The language in Education Law §3020-a(1) requires that charges be filed during the period between the actual opening and closing of the school year for which the employed is normally required to serve. This language is not contained in Education Law §3020-b(1), which otherwise repeats the language from §3020-a(1) relating to the filing of charges. By omitting the limitation on the filing of charges during the period between the actual opening and closing of the school year, the regulation is conforming to the language of Education Law §3020-b(1). Absent any evidence in the legislative history to the contrary, the Department concludes that this language was intentionally omitted from Education Law §3020-b(1) and that the regulatory language allowing charges to be brought when school is not in session is consistent with Education Law §3020-b.

**2. COMMENT:**

The emergency regulations provide that the unpaid suspension begins from the time of the employing board of education's decision to suspend without pay. The commenter, a teacher's collective bargaining representative, has proposed and continues to propose that the suspension without pay should commence upon the hearing officer's finding of probable cause and not before. The new law does not state that school districts can take the teacher off the payroll prior to the probable cause hearing. Under the New York City DOE/UFT contract, the teacher stays on the payroll until a probable cause determination is made.

DEPARTMENT RESPONSE:

Education Law §3020-a(2)(c) specifically provides that, where charges of misconduct constituting physical or sexual abuse of a student are brought on or before July 1, 2015, the board of education may suspend the employee without pay pending an expedited hearing. It also requires the Commissioner to establish a process in regulations for a probable cause hearing before an impartial hearing officer within 10 days to determine whether the decision to suspend an employee without pay should be continued or reversed. The reference in the statute to the hearing officer determining at the probable cause hearing whether a suspension without pay should be continued, is a clear and unequivocal indicator that a board of education may suspend without pay prior to the hearing officer's determination of probable cause. The Department believes that regulation is consistent with the statutory language which authorizes the employee to be suspended without pay pending an expedited hearing. The fact that the language of Education Law §3020-a(2)(c) differs from a collectively bargained alternative probable cause hearing process in this regard is not controlling. The plain language of the

statute indicates that a board of education may suspend without pay in this instance unless and until a probable cause determination reversing the suspension is made.

3. COMMENT:

The emergency regulations provide that for all cases in which the parties select a hearing officer (3020-a and 3020-b expedited hearings based on two consecutive ineffective ratings), if the hearing officer selected by the parties fails to respond within three days it will be treated as a declination, and the parties have two days to select another, and that if that second hearing officer declines or fails to confirm within three days, SED can select the hearing officer. The commenter proposes that this provision be modified to conform with SED's current practice of allowing two business days or fifteen days from receipt of the hearing officer list, whichever is later, for the parties to select another hearing officer if the first selection declines or fails to respond, before SED may make the selection.

DEPARTMENT RESPONSE: The Department agrees that the parties in a regular or expedited hearing under Education Law §3020-a should have the opportunity to select another hearing officer within the 15 day period set forth in statute, and did not intend to change that practice. Accordingly, we have amended proposed §82-3.5(f) to allow the selection of another hearing officer within either two business days from the first declination or failure to confirm or 15 days from the parties' receipt of the hearing officer list, whichever is later. For expedited hearings under Education Law §3020-b, however, the 15 day period from Education Law §3020-a does not apply, and the proposed regulation as revised instead requires that the parties select a hearing officer within 7 days. A similar change has been made to proposed §82-3.6(b)(1) to clarify that

following a declination or failure to confirm, the parties may select another hearing officer within the 7 day period.

4. COMMENT:

For expedited cases based on two consecutive ineffective ratings under 3020-b, the commenter believes that five-day period for initial selection of a hearing officer in the emergency regulations is unrealistic and proposes that it be changed to five business days.

DEPARTMENT RESPONSE:

The Department is not persuaded that a five day period is unrealistic, but has agreed to amend proposed §82-3.6(b)(1) and (2) to give the parties seven calendar days. This provides equivalent relief to five business days and is easier for the Department to track administratively. The Department believes that seven calendar days provides a sufficient amount of time to make a selection and that it is the appropriate amount of time for these types of expedited hearings, where a decision needs to be made in 90 days from when the employee requested a hearing. Moreover, under §25-a of the General Construction Law, if a deadline falls on a weekend or holiday, the actual deadline can be pushed to the next succeeding business day, so the actual period available to the parties can be longer.

5. COMMENT:

The emergency regulations also provide that in all cases (3020-a and 3020-b), if a hearing officer needs to be replaced after he or she has agreed to serve, the parties have two business days to select another or the Department will make the selection. The commenter proposes that this provision be deleted for all cases as it is not authorized by either 3020-a or 3020-b, which have very specific language governing the

Department's involvement in the initial selection of a hearing officer, and no such language relating to replacement after selection and confirmation.

DEPARTMENT RESPONSE:

The Department disagrees with this comment. Education Law 3020-a(3)(i)(A) and (B) provides the Commissioner with the power to establish necessary rules and procedures for the conduct of hearings under that section, and to enforce timelines in regulations to ensure that the duration of a tenured teacher removal proceeding is conducted within the statutory timelines. Education Law §3020-a(3)(b)(iii) explicitly gives the Commissioner the authority to appoint a hearing officer from the list if the parties fail to agree on an arbitrator or fail to notify the Commissioner of the selection within 15 days of the parties receipt of the list. It is true that the statute doesn't specifically address what happens when the selected hearing officer needs to be replaced after he or she has agreed to serve, but it is also true that the clear intent is for the parties to complete the submission of evidence in 125 days after the filing of the charges (see, Education Law §3020-a[c][vii]), thus the need for very tightly controlled timelines. A hearing officer may need to be replaced at any point in the hearing, making it imperative that a replacement be appointed expeditiously. We believe that the Commissioner has the authority to adopt a regulation, proposed §82-3.5(h), that provides an expedited procedure for selection of a new hearing officer to replace a previously appointed hearing officer in order to assure that the hearing is not unduly delayed, and will be conducted within the statutory timeline.

Similarly, Education Law §3020-b(3)(c)(i) provides the Commissioner with the power to establish necessary rules and procedures for the conduct of hearings in expedited removal proceedings under that section, and to establish timelines in

regulations to ensure that the duration of a tenured teacher removal proceeding will be within the statutory timeline. As with §3020-a hearings, Education Law §3020-b(3)(a) explicitly gives the Commissioner the authority to appoint a hearing officer from the list if the parties fail to agree on an arbitrator or fail to notify the Commissioner of their selection. We believe that the Commissioner is fully authorized to adopt regulations to ensure that the expedited hearings will be completed within the 90 day period by requiring in §82-3.6(b)(6) that the parties must mutually select a new hearing officer within 2 business days, or the Commissioner will appoint a new hearing officer from the list.

However, both proposed §82-3.5(h) and proposed §82-3.6(b)(6) have been revised to clarify that a hearing officer who previously has been appointed but cannot complete the hearing must immediately notify the Commissioner, and if the hearing officer is incapacitated and unable to provide such notice, the parties shall provide the notice upon learning of his/her incapacity. The regulation is further revised to provide that the Commissioner shall notify the parties when a hearing officer needs to be replaced, and the parties must mutually select a new hearing officer within 2 business days of receipt of notice from the Commissioner, or the Commissioner will appoint a new hearing officer from the list. This establishes a fixed point in time from which the two business days will be measured.

#### 6. COMMENT:

One commenter expressed concern that the regulations go beyond what the statute allows by allowing hearing officers to entertain motions by the employer for additional discovery of the employee's case including issuance of subpoenas, bills of particular, witness statements and investigatory materials. The commenter suggested

that the regulations be limited to pre-hearing disclosure of the teacher's witnesses and evidence that the teacher will offer at the hearing, the only material authorized by the statute.

**DEPARTMENT RESPONSE:**

The Department has revised 82-3.7(c)(3)(ii) to conform to the literal language of Education Law §3020-b (3)(c)(iii)(C), to clarify that a schedule shall be set at the prehearing conference for the full and fair disclosure of witnesses and evidence for both witnesses, including but not limited to bills of particular and requests for production of relevant and material evidence and information including witness statements, investigatory statements or notes, exculpatory evidence or any other evidence, including district or student records, "relevant and material to the employee's defense". This phrase was inadvertently omitted from the proposed regulation.

**7. COMMENT:**

One commenter expressed concern that the emergency regulations on pre-hearing motions, includes a provision for five days' notice for motions to discuss, amend or consolidate, but omits such provision for other preliminary matters, which is required by the statute.

**DEPARTMENT RESPONSE:** The Department agrees and section 82-3.7(c)(2) of the proposed regulations has been amended to conform with Education Law §3020-b(3)(c)(iv) by clarifying that the five days' notice by statute applies to applications on other preliminary matters.

**8. COMMENT:**

The emergency regulations add a requirement that the seven hour hearing day must exclude any time taken for meal breaks. The commenter requests that this should

be deleted as unnecessary absent evidence that such breaks are excessive in length under current regulations.

DEPARTMENT RESPONSE: The Department believes that this policy is reasonable and that pursuant to Education Law §3020-a and 3020-b, hearing officers should only be reimbursed for their actual service and that this is consistent with customary employment practice.

9. COMMENT:

Education Law §3020-b(2)(d) requires that any charges brought for two ineffective ratings shall allege that the employing board has developed and substantially implemented a teacher improvement plan (TIP)/principal improvement plan (PIP) for the employee following the first evaluation in which the employee was rated ineffective, and the immediately preceding evaluation if the employee was rated developing. However, the regulations contain this requirement for charges brought for two or three consecutive ineffective ratings (82-3.9[d][2]; 82-3.9[e][2]). One commenter indicated that the requirement for a TIP/PIP for charges relating to three ineffective ratings is inconsistent with the statute and has requested a technical amendment to remove this requirement for charges brought for three consecutive ineffective ratings.

DEPARTMENT RESPONSE: In an effort to conform the regulatory language with the statute, this requirement has been eliminated from §82-3.9(e)(2) of the proposed regulations.