


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, 200.5 and 200.16 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings
DATE: October 11, 2013

AUTHORIZATION(S):


SUMMARY

Issue for Discussion

Should the Board of Regents adopt the proposed amendment to sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education relating to special education impartial hearings?

Reason for Consideration

Review of policy governing the State's special education due process system to align the State timelines for rendering a decision with federal regulations, address certain deficiencies in the process and to ensure that impartial hearings are carried out in the most effective and efficient manner for the benefit of both parties.

Proposed Handling

The proposed amendment is before the P-12 Education Committee for discussion at the October 2013 meeting.

Procedural History

In January 2012, the New York State Education Department (NYSED) proposed certain amendments to the existing regulations relating to special education impartial hearings in response to some recognizable delays in the issuance of hearing decisions

and other such deficiencies, in order to streamline and create a more efficient and effective impartial hearing process for the benefit of both parties. These proposed amendments to the regulations were first discussed before the P-12 Education Committee in January 2012. A Notice of Proposed Rule Making was published in the State Register on February 1, 2012. Three public hearings were conducted. Public comment was accepted for 45 days.

In response to public comment, the proposed amendment was revised. These revisions to the proposed amendment were discussed before the P-12 Education Committee in June 2012. A Notice of Revised Rule Making was published in the State Register on July 11, 2012. Public comment was accepted for 30 days.

In response to public comment, the proposed amendment was further revised. A Notice of Revised Rule Making was published in the State Register on September 19, 2012. Public comment was accepted for 30 days. The revised rule and public comment were discussed at the November 2012 Regents Meeting.

Following the November 2012 Regents meeting, NYSED staff met with several advocacy organizations to further discuss the proposed amendment. Recommendations from these groups were received and considered in the development of the proposed amendment and additional revisions were made.

In summary, NYSED received and considered extensive public comment on the prior proposed amendment through public hearings, meetings, and written public comment from a variety of stakeholders, including but not limited to parents, advocacy organizations, Impartial Hearing Officers (IHO), individual attorneys and attorney organizations, school districts, professional organizations, disability organizations and national consultants. As a result, the proposed amendment was substantially revised four times to address the applicable issues or concerns.

Under the rules of the State Administrative Procedure Act (SAPA), the Notice of Proposed Rulemaking expired on February 22, 2013. Therefore, a new notice of proposed rulemaking must be published in the State Register to provide another 45-day public comment period before the proposed amendment may be adopted. A copy of the proposed amendment is attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

NYSED is responsible for monitoring and enforcing compliance with the hearing procedures prescribed in the federal regulations (34 CFR Part 300) and 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, NYSED may investigate an IHO's failure to issue a decision in a timely manner pursuant to regulatory authority.

For four consecutive years, the U.S. Department of Education, Office of Special Education Programs (OSEP), notified the State that it determined that New York State (NYS) “Needs Assistance”, in part because New York’s data reflects less than 90 percent compliance with the timeliness of impartial due process hearing decisions. As a result, OSEP required NYS to review and, as appropriate, revise its policies and procedures and improvement activities to address this noncompliance issue. In response, NYSED has improved the frequency (from one full day on-site training session every two years, to one full day on-site training session and three webinars annually) and quality of professional development and technical assistance provided to IHOs by contracting with national consultants experienced in special education law. The Office of Special Education has also increased its monitoring oversight of timely decisions. NYSED is responsible to ensure that IHOs adequately possess knowledge of the Individuals with Disabilities Education Act (IDEA) and the ability to conduct hearings and write decisions in accordance with standard legal practice. Therefore, NYSED will also be initiating a new system of evaluation of individual IHOs. The primary purpose of the evaluation process will be to improve the State’s hearing system and to inform professional development to improve individual IHO performance.

However, in addition to the above actions, NYSED finds it is necessary to propose amendments to State regulations to establish more consistency in the manner in which certain matters are addressed by NYS IHOs, thereby creating greater efficiencies in the impartial hearing process.

The proposed regulations were developed in consideration of findings that have been identified by NYSED over the past few years through the State’s monitoring of the special education process, including review of IHO decisions, investigations and findings in complaints against IHOs and review of appeal decisions. In developing and revising these regulations, NYSED staff considered extensive public comment, reviewed its proposed regulations in comparison with other states and engaged nationally-recognized experts in the field of special education hearings to ensure the proposed amendment is consistent with best practices used in other states for special education impartial hearings.

The proposed rule addresses the following procedural issues relating to impartial hearings:

1. Certification and appointment of IHOs
2. Consolidation of multiple due process complaint notices for the same student
3. Decision of the IHO
4. Timeline to render a hearing decision
5. Extensions to the timelines for an impartial hearing decision
6. Impartial Hearing Record
7. Withdrawals of due process complaints

Following is a summary of the proposed rule.

Certification and appointment of IHOs

To ensure NYSED has a sufficient number of IHOs certified and available to conduct impartial hearings, the proposed rule adds a new §200.1(x)(4)(vi) to provide that an IHO must be willing and available to accept appointment to conduct impartial hearings and, except for good cause, an IHO's certification will be rescinded if he/she is not willing or available to conduct an impartial hearing within a two-year period of time. When IHOs are on the State's list, but not available to serve, it may cause delays in the appointment process and provide misleading data necessary to ensure sufficient numbers of IHOs. We have found that many individuals hold certification as an IHO so that they can participate in the State's training of IHOs but, in fact, have never accepted appointment as an IHO. It is costly and inappropriate for the State to provide training and resources to individuals who will not provide this public service.

To further ensure that an IHO does not have a personal or professional interest that would conflict with his or her objectivity in the hearing, the proposed rule adds a new §200.5(j)(3)(i)(c) which provides that an IHO may not accept appointment if he or she is serving as the attorney regarding a due process complaint hearing in the same school district, or has served as the attorney regarding a due process complaint hearing in the same school district within a two-year period of time preceding the offer of appointment, or if the IHO is an individual with special knowledge or training with respect to the problems of children with disabilities who has accompanied and advised a party from the same school district regarding a due process complaint hearing within a two-year period. As attorneys, most IHOs have other employment responsibilities, often serving as school districts' or parents' representatives in impartial hearings or appeals. There is an inherent perception of conflict of interest when an attorney is representing a parent or school district in an impartial hearing and also serving as the IHO to resolve a due process complaint on another case involving the same school district. This concern has been raised frequently with NYSED and the proposed amendment to further ensure impartiality was widely supported through public comment.

Consolidation and multiple due process complaint notices for the same student

The proposed amendment adds a new §200.5(j)(3)(ii)(a) to establish procedures for the consolidation of multiple pending due process complaint notices that are filed while an impartial hearing is pending before an IHO involving the same parties and the same student with a disability. Because the procedures for consolidation and the factors that must be considered in deciding whether to consolidate are not explicitly addressed in current NYS regulations, some IHOs are unclear of their authority to consolidate cases, when consolidation is appropriate, the procedures for consolidation and how such consolidation would affect the timelines for rendering a decision. This rule is necessary to provide such clarity.

Decisions of the IHO

The proposed amendment to §200.5(j)(4) would preclude an IHO from issuing a so-

ordered decision on the terms of a settlement agreement reached by the parties in other matters not before the IHO in the due process complaint notice or amended complaint. An IHO's authority to render a decision is limited under federal and State law to those matters in a due process complaint notice or amended due process complaint notice. A frequent practice by NYS IHOs has been to "so-order" entire settlement agreements, even when those agreements addressed other matters in which the IHO had no authority to decide (e.g., the settlement agreement includes reimbursement of attorney's fees). In addition, the State must ensure that the orders of IHOs are implemented. Settlement agreements, on the other hand, are only enforceable in court.

Timeline to render a decision

The proposed amendment to §200.5(j)(5) would conform the timeline for an IHO to render a decision consistent with the federal timeline in 34 CFR Part 300.

Transmittal of the Hearing Decision

The proposed amendment to §200.5(j)(5) also would provide IHOs with additional time to provide a copy of the redacted decision to NYSED (i.e., within 15 days of mailing the decision to the parties). Currently the IHO must provide NYSED with a copy of a redacted decision at the same time he/she issues the decision to the parties. The proposed rule would ensure that the IHO renders the decision to the parties within 45 days from the date of the commencement of the hearing (or within 14 days from the date the IHO closes the record in cases when an extension to the 45 day timeline has been granted), but would provide an additional 15 days to the IHOs to ensure that the decision is properly redacted for submission to NYSED.

Extensions to the due date for rendering the impartial hearing decision

The proposed amendment to §200.5(j)(5)(i)-(iv) addresses the grounds for a legitimate extension of the hearing to allow an IHO to grant an extension for settlement discussions between the parties upon a finding of good cause based on the likelihood that a settlement may be reached; clarifies that an IHO may not solicit extension requests or grant extensions on his or her own behalf or unilaterally issue extensions for any reason; and specifies the information regarding extensions that must be entered into the record and provided to the parties. The proposed rule further limits the IHO from granting an extension after the record close date. Public comment widely supported more flexibility in the IHOs authority to grant an extension for purposes of settlement discussions. The proposed rule does so, while still providing appropriate parameters for the factors to be considered to ensure that the matter is resolved in a timely manner.

Impartial Hearing Record

The proposed amendment to §200.5(j)(5)(vi) identifies information that must be included in the record and adds that after the IHO issues the decision, he/she must promptly

transmit the record to the school district together with a certification of the materials included in the record. This rule is necessary to address many questions raised by IHOs and school districts and to ensure the record is complete in the event there is an appeal of the IHO decision.

Withdrawals of requests for due process hearings

The proposed amendment adds a new §200.5(j)(6) to provide that under certain limited circumstances a withdrawal after the commencement of the due process hearing may result in a dismissal with prejudice (meaning that the party loses their right to request another impartial hearing on the same matter); and provide that a withdrawal shall be presumed to be without prejudice except that the IHO may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice. The proposed amendment further provides that the IHO's decision that the withdrawal is with prejudice is binding on the parties unless appealed to the State Review Officer. The proposed rule is necessary to address issues of IHO "shopping" (i.e., withdrawals and resubmissions of due process complaint notices in order to have a new IHO from the rotational list be appointed) and to provide clarity to the IHO and to the parties on the procedures for withdrawals once the hearing has commenced, and will further ensure that withdrawals and resubmissions of due process complaint notices do not result in a prejudice to one of the parties (which could occur, for example, when the withdrawal is made after the hearing has been conducted, but before the decision is rendered).

Recommendation

It is recommended that the P-12 Education Committee reach consensus on the proposed amendment prior to its publication for public comment and its submission in January for adoption.

Timetable for Implementation

The proposed amendment is before the P-12 Education Committee for discussion in October 2013. Following discussion at the October Regents meeting, a Notice of Proposed Rule Making will be published in the State Register. Public comment on the proposed rule will be accepted for 45 days after the date it is published in the State Register. It is anticipated that the proposed amendment will be presented for permanent adoption at the January 2014 Regents meeting, with an effective date of February 1, 2014.

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 February 1, 2014, 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[.];

(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 period of two consecutive years.

2. Paragraph (3) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended, effective January 1, 2014, 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 paragraph (6) of this subdivision, appointment 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 regarding a due process complaint in the same school district or has served as the attorney regarding a due process complaint in the same school district within a two-year period of time preceding the offer of appointment; or if he or she is an individual with special knowledge or training with respect to the problems of children with disabilities who has accompanied and advised a party from the same school district regarding a due process complaint 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 complaint notices. For a subsequent due process complaint notice filed while a different due process complaint notice is pending before an impartial hearing officer involving the same parties and student with a disability:

(1) Once appointed to a case in accordance with the rotational selection process established in section 200.2(e)(1) of this Part, the impartial hearing officer with the pending due process complaint shall be appointed to a subsequent due process

complaint involving the same parties and student with a disability, unless that impartial hearing officer is unavailable.

(b) The impartial hearing officer may consolidate the new complaint with the pending complaint or provide that the new complaint proceed separately as an individual complaint before the same impartial hearing officer.

(c) Consolidation of such complaints or the denial of such consolidation shall be by written order.

(2) When considering whether to consolidate one or more separate requests for due process, in the interests of the student and judicial economy, the impartial hearing officer shall consider relevant factors that include, but are not limited to:

(i) the potential negative effects on the child's educational interests or well-being which may result from the consolidation;

(ii) any adverse financial or other detrimental consequence that may result from the consolidation of the due process complaint notices; and

(iii) whether consolidation would:

(a) impede a party's right to participate in the resolution process prescribed in paragraph (2) of this subdivision;

(b) prevent a party from receiving a reasonable opportunity to present its case in accordance with subparagraph (xiii) of this paragraph; or

(c) prevent the impartial hearing officer from timely rendering a decision pursuant to paragraph (5) of this subdivision.

(3) If the due process complaint notices are consolidated, the timeline for issuance of a decision in the earliest pending due process complaint notice shall apply.

(4) Nothing in this section shall be construed to preclude a parent from filing a

due process complaint notice on an issue separate from a due process complaint notice already filed.

(iii)

(iv)

(v)

(vi)

(vii)

(viii)

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(xii)

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(xvi)

(xvii)

(xviii)

(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 February 1, 2014, 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 in the due process complaint notice or amended due process complaint notice. Nothing in this subdivision shall preclude a party from seeking to admit a settlement agreement or administrative decision into evidence at a due process hearing.

4. Paragraph (5) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended, effective February 1, 2014, 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 notice, 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 notice is received by the other party and the State Education Department. Except as provided in section 200.16(h)(9) of this Part and section 201.11 of this Title, if the parent files the due process complaint notice, the impartial hearing officer's decision is due not later than 45 days from the day after one of the following events, whichever shall occur first: (a) both

parties agree in writing to waive the resolution meeting; (b) after either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; (c) if both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process; or (d) the expiration of the 30-day resolution period. In cases where extensions of time have been granted beyond the applicable required timelines, the decision must be rendered and mailed no later than 14 days from the date the impartial hearing officer closes the record. The date the record is closed shall be indicated in the decision. After a final decision has been rendered, the impartial hearing officer shall promptly transmit the record to the school district together with a certification of the materials included in the record. The record of the hearing and the findings of fact and the decision shall be provided at no cost to the parents. Within 15 days of mailing the decision to the parties, the impartial hearing officer shall submit the decision to the Office of Special Education of the State Education Department. All personally identifiable information, in accordance with the guidelines provided by the commissioner, shall be deleted from the copy forwarded to the Office of Special Education.

(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 positively contribute to, or adversely affect, 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] 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.

(iii) Absent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of 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. Upon a finding of good cause based on the likelihood that a settlement may be reached, an extension may be granted for settlement discussions between the parties. [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.

(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 to ensure that the impartial hearing officer's decision is issued by the revised decision due date.

(v)

(vi) For purposes of this section, the record shall include copies of:

(a) the due process complaint notice and any response to the complaint pursuant to paragraphs (4) and (5) of subdivision (i) of this Part;

(b) all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer;

(c) all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order and an order granting or denying an extension of the time in which to issue a final decision in the matter;

(d) any subpoenas issued by the impartial hearing officer in the case;

(e) all written and electronic transcripts of the hearing;

(f) any and all exhibits admitted into evidence at the hearing, including documentary, photographic, audio, video, and physical exhibits;

(g) any other documentation deemed relevant and material by the impartial hearing officer; and

(h) any other documentation as may be otherwise required by this section.

5. Section 200.5(j) of the Regulations of the Commissioner of Education is amended by adding a new paragraph (6), effective February 1, 2014, 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, a voluntary withdrawal in writing by the party requesting the hearing shall be without prejudice unless the parties otherwise agree. For purposes of this paragraph, the commencement of the hearing shall not mean the initial prehearing conference if one is conducted, but shall mean the first date the hearing is held after such conference.

(ii) Except for withdrawals in accordance with subparagraph (i) of this paragraph, a party seeking to withdraw a due process complaint shall immediately notify the impartial hearing officer and the other party in writing. The impartial hearing officer shall issue a written order of termination. A withdrawal shall be presumed to be without prejudice except that the impartial hearing officer may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice. The decision of an impartial hearing officer that a withdrawal shall be with or without prejudice is binding upon the parties unless appealed to the State review officer.

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

(iv) If the party subsequently files a due process complaint notice within one year of the withdrawal of a complaint that is based on or includes the same or substantially similar claims as made in a prior due process complaint notice that was previously withdrawn by the party, the school district shall appoint the same impartial hearing officer appointed to the prior complaint unless that impartial hearing officer is no longer available to hear the re-filed due process complaint notice.

(v) Nothing in this section 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 February 1 , 2014, 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].