TO: P-12 Education Committee

FROM: Ken Slentz

SUBJECT: Proposed Amendment to Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education Relating Special Education Impartial Hearings

DATE: January 6, 2014

AUTHORIZATION(S):

SUMMARY

Issue for Decision

Should the Board of Regents adopt the 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?

Reason(s) 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 will be submitted to the P-12 Education Committee and Full Board for adoption at the January 2014 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 amendments. Recommendations from these groups were received and considered in the development of the proposed amendments and additional revisions were made.

In October 2013, the Regents discussed revised proposed regulations. A Notice of Proposed Rule Making was published in the State Register on November 6, 2013. Public comment on the proposed amendment was accepted for 45 days from the date of publication in the State Register. The Department received comments from 24 individuals. No revisions have been made to the proposed amendment upon review of the public comments.

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. NYSED finds that 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 from the State Review Officer. 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 there are sufficient numbers of IHOs for the large and ever-increasing volume of impartial hearings in NYS. 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 a 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 by an IHO 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 to the State Review Officer.

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 provides 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).

Since publication of a Notice of Proposed Rule Making in the State Register on November 6, 2013, NYSED received comments from 24 individuals on the proposed amendment. Attached is the full text of the proposed terms of the rule (Attachment 1) and the Assessment of Public Comment (Attachment 2). Supporting materials for the

proposed amendment are available upon request from the Secretary to the Board of Regents.

Recommendation

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

VOTED: That subdivision (x) of section 200.1, paragraphs (3), (4) and (5) of subdivision (j) of section 200.5, and paragraph (9) of subdivision (h) of section 200.16 of the Regulations of the Commissioner of Education be amended as submitted and a new paragraph (6) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education be added as submitted, effective February 1, 2014.

Attachments

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 two-year period of time.

2. Paragraph (3) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended, effective February 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 in a due process complaint in the same school district or has served as the attorney in a due process complaint in the same school district within a two-year period of time preceding the offer of appointment; or if he or she is an individual with special knowledge or training with respect to the problems of children with disabilities who has accompanied and advised a party from the same school district in a due process complaint within a two-year period.

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

(a) Consolidation and multiple due process hearing requests. For a subsequent due process complaint notice filed while a due process complaint 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 judicial economy and the interests of the student, 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 which may result from the consolidation of the due process complaints; 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 complaints are consolidated, the timeline for issuance of a decision in the earliest pending due process complaint shall apply.

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

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

(iii) . . . .

(iv) . . . .

(v) . . . .

(vi) . . . .

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(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 or amended due process complaint. Nothing in this subdivision shall preclude a party from seeking to admit a settlement agreement or administrative decision into evidence.

4. Paragraph (5) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended, effective 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, the impartial hearing officer shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents[,] and to the board of education[, and to the Office of Special Education of the State Education Department,] not later than 45 days from the [date required for commencement of the impartial hearing in accordance with subparagraph (3)(iii) of this subdivision] day after the public agency's due process complaint is received by the other party and the State Education Department. Except as provided in section 200.16(h)(9) of this Part and section 201.11 of this Title, if the parent files the due process complaint notice, the 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 set forth in

the written prehearing order issued pursuant to clause (xi)(b) of paragraph (3) of this subdivision 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 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. The impartial hearing officer shall issue an 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 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 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.

(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. Paragraph (9) of subdivision (h) of section 200.16 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].

8 NYCRR §§200.1, 200.5 & 200.16

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Proposed Rule Making in the State Register on November 6, 2013, the State Education Department (SED) received the following comments on the proposed amendment.

Section 200.1(x) – Impartial Hearing Officer (IHO) Availability to Accept Appointment

COMMENT:

When a parent takes a district to a due process hearing, time is of the essence as we are talking about a child's education. Therefore, the State must have a sufficient number of IHOs duly certified and ready to serve. Impartiality is an absolute necessity for all concerned parties. The amendment that an IHO's certification may be rescinded if he or she is not available for appointment within a two-year period will discourage continued unwillingness of IHOs to accept an appointment without good cause.

DEPARTMENT RESPONSE:

Comments are supportive; no response is necessary.

COMMENT:

There is no reason to revoke an IHO's certification because he or she has not served within two years; there are a variety of reasons why an IHO may be unable to serve, which may include personal illnesses, family illnesses, family issues, and work related issues. The proposed good cause exception invites litigation and is unnecessary. SED will now have to enforce this unnecessary requirement. If the concern is "free training," this can be resolved by not requiring inactive IHOs to attend the training; there is no cost or delay in keeping such an IHO on the list; there is no

additional cost in requiring inactive IHO's to continue with training; it is in everyone's best interest to have a fully trained IHO and continue with mandatory training, since it does not cost SED anything. If SED limits the list to active IHOs, then the same can be accomplished by placing inactive IHOs on an inactive IHO list. Inactive IHOs should be able to become active if their mandatory training is up-to-date and they continue to meet statutory and regulatory requirements to serve.

The proposed language continues to be too susceptible to misinterpretation, and is too fraught with ambiguity, to do more good than harm. Non-availability should not be equated with conflicting appointments or active IHOs who cannot take on additional cases. The definitions of the terms need to be clarified before it can be adopted, and the default should require an affirmative objectively-measurable and clearly defined finding of non-availability rather than create a presumption of decertification as the current proposal does. There should be a mechanism for IHOs to be dormant on the list when their other commitments or current case load make them unavailable for appointment. Some IHO's may be very busy at work; or may have obtained new employment with a firm that would present a conflict of interest. SED may not consider it to be a "legal conflict," but the firm may not want their employee doing this type of work. An IHO, who may be fully trained and experienced, may take a job with that law firm for a few years with the intent of becoming an active IHO in the future; SED should want to encourage such IHO's not to accept cases because often whether or not a legal conflict exists is a grey area; If IHO's run the risk of losing their certification, some may take such cases. All IHOs either have a full-time job or are retired. They are not highly paid and receive no benefits. All IHO's have to have other means of support. An IHO's

other job has to come first. This proposal appears ineffective in addressing the real issues related to appointment of IHOs.

DEPARTMENT RESPONSE:

In order to provide timely due process hearings to parents and school districts, SED must ensure an adequate number of IHOs are available to hear cases within the specified timelines. It is the expectation of the Department that all certified IHOs will be available to hear cases as needed unless extenuating circumstances prevent such service for a temporary amount of time. The amendment will promote efficiency by discouraging continued unwillingness of IHOs to accept appointment without good cause, and eliminate delays in the appointment of IHOs. The amendment allows good cause to be established as to why an IHO had not accepted an appointment within a two-year period. The determination of whether an IHO has been unwilling or unavailable to accept appointments within a two-year time period will be made on a case-by-case basis. The Department will grant requests for temporary inactive status to IHO's that provide reasonable requests for such status. Because IHOs who have been granted temporary inactive status by SED may return to active status at varied times, such inactive IHOs must participate in all required IHO training. There is substantial cost for SED to provide annual training and resources to its certified IHOs including providing national trainers to instruct IHOs in the provisions of Federal and State law and regulations pertaining to the Individuals with Disabilities Education Act (IDEA) and legal interpretations of such law and regulations by Federal and State courts; providing IHOs with access to LRP's Special Education Connection; and providing continuing legal education credits (CLE) for mandatory trainings attended by active certified attorney IHOs.

The State certifies and provides annual update training to IHOs with the expectation that they are available to serve in this capacity. Unless an IHO has good cause for declining appointments over an extended period of time, it is not in the best interests of the State or the parties to retain the individual on the rotational list of IHOs. Guidance to be provided by the Department regarding the regulation will clarify the amendment as well as the terms to be used in the application of the amendment.

COMMENT:

This provision does not adequately address the inadequate compensation to IHOs and the difficulties often encountered by a district when attempting to appoint an IHO. There needs an increase in compensation to IHOs, especially in NYC, so that the compensation is reasonable and to some degree compete with their other commitments in the non-IHO realm. Much of the IHO conduct in a NYC case is uncompensated. Perhaps compensating IHOs at a reasonable level would allow more IHOs to devote their time to exclusively serving as IHO.

DEPARTMENT RESPONSE:

Compensation of IHOs is beyond the scope of the proposed rulemaking. State law requires that the State establish a maximum compensation rate for IHOs, approved by the Division of the Budget. Each district must develop an IHO compensation policy that does not exceed that maximum rate. An IHO is entitled to compensation for pre-hearing, hearing, and post-hearing activities, and reimbursed for travel and other hearing-related expenses. Each district must have a policy regarding the compensation of IHOs that provides a rate to ensure that a sufficient number of IHOs are available to serve in the district.

<u>Section 200.5 (j)(3)(i)– IHO Impartiality</u>

COMMENT:

Several individuals, including individual IHOs, school districts and advocates, indicated support or no position for this proposed amendment without further comment. Other supportive comments included the following: When a parent takes a district to a due process hearing, time is of the essence because of the child's education. Therefore the State must have a sufficient number of IHOs duly certified and ready to service. Impartiality is an absolute necessity for all concerned parties. The proposal that would prohibit an IHO from accepting appointment if he or she is an attorney or representative in an impartial hearing addresses the inherent conflict between acting as an advocate for parents and students and maintaining the required neutrality at a hearing and situations in which a conflict may exist even if an IHO's actions did not constitute formal "representation" of parents in special education matters. This amendment will relieve school districts of having to challenge an IHO's impartiality in the circumstances covered and will reduce the time spent canvassing IHOs by removing them from the rotational list. There can be an appearance of impropriety for someone who is known as a parent attorney or a school district attorney to serve as an IHO. It also places the attorney who appears before the IHO in an awkward position, and the attorney and IHO may actually be opposing counsel in another case in a different district.

DEPARTMENT RESPONSE:

Comments are supportive; no response is necessary.

COMMENT:

Support the proposed amendment to section 200.5(j)(3)(i) and recommend it be expanded to prohibit IHOs from serving when they have represented parents anywhere in the State during the past two years, when they have represented parents in special

education matters, and/or when they have submitted written or oral testimony in any action against the school district. The conflict is not limited to the school district in which the case is pending.

DEPARTMENT RESPONSE:

It would be inappropriate to further restrict an IHO's appointment based on his/her representation of the parties in other matters or in other districts. Many IHOs have other employment responsibilities and the purpose of the rule is only to further ensure that the IHO does not have a professional conflict of interest with the school district in which he/she presides as an IHO. A party retains the right to challenge the appointment of an IHO based on concerns of impartiality. An IHO also has a professional responsibility to decline appointment or recuse him/herself if the IHO has a personal or professional interest that would conflict with his or her objectivity in the hearing.

Section 200.5 (j)(3)(ii) - Consolidation of multiple due process requests for the same student

COMMENT:

Some indicated support of this proposed amendment without providing comment. Others indicated support with the following comments: It would appear to be redundant to go over the same or similar testimony in separate hearings. This amendment will save time and money; offer clarity to IHOs as to how and when consolidation can occur; allows for an appropriate exercise of discretion on the part of the IHO; serves to prevent forum shopping and duplication. When a hearing is underway, a party should not be permitted to request a new hearing and secure a different IHO when another case involving the same parties is ongoing.

DEPARTMENT RESPONSE:

Comments are supportive; no response is necessary.

COMMENT:

Consolidation should be prohibited if the subsequent due process complaint is filed within five days of the commencement of the hearing, unless the other party consents in writing; without this exception a party could circumvent section 200.5(i)(7)(i)(b) of the regulations governing amendments of hearing requests.

DEPARTMENT RESPONSE:

The proposed rule does not include a prohibition to the consolidation of subsequent complaints filed within five days of the commencement of the hearing as such a limit may not be in the interests of judicial economy or the student's educational interests. The IHO has the discretion to determine the appropriateness of the consolidation. Section 200.5(i)(7)(i) allows a party to amend its due process complaint notice only if: (a) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a resolution meeting; or (b) the IHO grants permission, except that the IHO may only grant such permission at any time not later than five days before an impartial due process hearing commences. Allowing consolidation of multiple due process requests does not circumvent the limits imposed by regulation on the IHO's authority to grant permission for an amended due process complaint notice.

COMMENT:

If the parties jointly oppose assignment to the same IHO or consolidation of the two complaints, the matters should be assigned to different IHOs and/or should not be consolidated. This provision may cause the parties to be on an endless carousel of

consolidation; there needs to be some limitation to the consolidation of hearings. Consolidation should only be allowed as it relates to issues of the school year(s) identified in the initial hearing request. If the hearing from the prior school year is still underway, it would only slow the result for the first school year(s), as the new school year issues become consolidated.

DEPARTMENT RESPONSE:

The determination of consolidation would be at the discretion of the IHO based on the considerations outlined in proposed section 200.5(j)(3)(ii)(a)(2).

COMMENT:

The new proposal will allow for a 'forum shopping' strategy; parent's attorneys, who initiate a majority of hearings will be able to initiate a hearing on a less substantive issue, learn who is appointed, then choose to initiate on the major substantive issue if they like the IHO appointed. If they do not like the IHO appointed on the minor substantive issue, they may opt to withdraw the first hearing request and start anew with the IHO appointment process, or alternatively, hold the hearing request on the major substantive issue until the minor issue is resolved before the undesirable IHO. This forum shopping strategy, which, no doubt will be employed by the parent bar, will not lend to judicial economy.

DEPARTMENT RESPONSE:

If a due process proceeding is pending and another due process complaint notice is received for the same student involving the same parties, the school district would be required, without further discretion, to appoint the same IHO (unless that IHO is unavailable to take the case). The IHO would then determine whether to consolidate the cases. There is nothing in the proposed rule that would require that, once a hearing

decision has been rendered by an IHO, the same IHO be appointed for additional due process requests for the same student. The IHO would determine whether to consolidate one or more separate requests for due process in consideration of the proposed factors. If a subsequent due process complaint is filed on a student while a hearing is already pending before an IHO on the same student, the new due process complaint would be forwarded to said IHO for him or her to determine whether to consolidate the cases. Thus, only if a hearing is pending would a new subsequent complaint be forwarded to the same IHO. Otherwise, an IHO would be selected from the rotational list. Therefore, there is nothing in the proposed amendment that would encourage "forum shopping."

COMMENT:

The factors to be considered should not be regulations but should be in a guidance document.

DEPARTMENT RESPONSE:

In order to ensure statewide consistency in the practice of independent IHOs across the State, the proposed regulations provide a list of considerations.

Section 200.5(j)(4)(iii) – So-ordered decisions on the terms of settlement agreements.

COMMENT:

Several individuals either indicated 'no position' or supported this proposed amendment without further comment. One individual commented that an IHO should not be allowed to render a decision on a matter that the IHO has no knowledge of.

DEPARTMENT RESPONSE:

Comment is supportive; no response is necessary.

COMMENT:

Clarify that “matters not before the IHO in a due process complaint” should not be read to contradict the flexibility with regard to proposed relief in a due process complaint contained in §200.5(i)(1)(v), which requires a Petitioner only to include “a proposed resolution of the problem to the extent known and available at the time”. Although an IHO’s authority to decide issues is limited to the language of the complaint, an IHO may order an appropriate remedy, especially when jointly requested to do so by the parties.

DEPARTMENT RESPONSE:

The proposed amendment relating to “so-ordered settlement agreements” would not limit the IHO from so-ordering an appropriate remedy related to the issues in the due process complaint notice or amended notice.

COMMENT:

The language of the proposed regulation would divide the settlement into enforceable terms and unenforceable terms. This proposal does not foster the desired efficient outcome of settlement. The language for a so-ordered settlement agreement does not go far enough. Not only should these so-ordered settlements be allowed, they should be mandated. As in any court process involving the interests of a child, there is judicial oversight of the settlement. So too should there be judicial sanction of these settlements – to ensure the child’s rights are fully protected.

DEPARTMENT RESPONSE:

Federal and State law stipulate that the terms of mediation and settlement agreements are enforceable in court. This refers to all terms of such agreements, not just those “so-ordered” by an IHO.

COMMENT:

The proposed amendment disfavors settlement and negotiated outcomes. It is simply not correct that the law prohibits or even disfavors so-ordering a remedy not sought in the IH Complaint; the remedial power is broadly defined, derivative from the equitable powers of the federal courts, and is not cabined by the ad damnum clause of the Complaint. As a result, an IHO may order, especially when jointly requested to do so by the parties involved, any remedy that appears to be appropriately tailored to resolve the dispute and assist the parties in working together. So-ordered decisions serve two very important purposes: they make it possible to assure peace between the parties over a longer period of time or a broader swath of issues than fall within the four corners of the due process complaint (thereby increasing the likelihood of settlement); and they render less formal or costly enforcement proceedings available in case the agreement is not implemented (in particular by rendering the agreement to be susceptible to review under the special education law and not merely as a contract dispute). This latter, like the former, also increases the incentive for settlement and negotiated outcomes, both of which are favored by the IDEA and by public policy. IHOs should clearly have the authority to enter so-ordered settlement, as these cases involve children and judicial sanction should be involved in any settlement involving the interest of a child. Settlements are remedies, not issues, and there is nothing in the law to limit the scope of remedy available to IHOs. This should not be an absolute prohibition. Latitude should be provided to the IHO based on the specifics of the case and agreement of the parties. The need for this amendment is unclear. In those cases where both parties agree to the terms of settlement, there seems no reason that a regulation should limit an IHO's authority to order it particularly where in the absence of

mutually agreeable terms of settlement, additional and otherwise unnecessary litigation may ensue.

DEPARTMENT RESPONSE:

There is nothing in the proposed amendment that "disfavors or discourages" settlement between the parties. While the parties may and often do reach agreement on issues others than those raised in the due process complaint, the IHO is limited in his/her jurisdiction to the issues raised in the due process complaint and cannot use his/her appointment as the IHO in a due process complaint to order remedies on other issues not raised in the due process complaint notice or amended due process complaint notice. There are certain types of jurisdiction that cannot be conferred upon an IHO by agreement of the parties. If an issue in a settlement agreement is within an IHO's jurisdiction, the due process complaint notice could be amended with the agreement of the parties or by submission of a separate due process complaint. The agreement of the parties must be documented (e.g., discussion on the record, in the stipulation of settlement, or a letter to the IHO).

COMMENT:

The proposed amendment will make settlement a much more cumbersome process, involving the IHO reviewing the terms in unnecessary specific detail at a level that approaches holding the hearing.

DEPARTMENT RESPONSE:

An IHO should be clear regarding the terms of any decision he or she renders. The proposed amendment does not require the taking of testimony or the production of evidence by either party, as would be required at an impartial hearing.

COMMENT:

Limiting terms to only those raised in the due process complaint and restricting parties from reaching an agreed upon so-ordered settlement with all available information at the time of the settlement hamstrings settlement possibilities significantly. When a parent initiates a due process hearing, he/she does so in the context of information available at the time. There is no formal discovery available in the hearing process. Should parties become aware of information subsequent to the initiation of the hearing, that information may have an impact on the appropriate outcome. The proposed language undermines one of the goals of the IDEA of cooperative decision-making between parents and districts, and forces the parties to remain in the adversarial confines of the hearing request.

DEPARTMENT RESPONSE:

We do not agree that the limits on an IHO's authority to render a so-ordered decision will have an impact on parties reaching a settlement agreement. Settlement agreements are routinely reached through resolution and mediation sessions that are never 'so-ordered' by an IHO. Moreover, should parties become aware of information subsequent to the initiation of the hearing, they may amend their due process complaint to reflect such information pursuant to federal and State law and regulations,

COMMENT:

Some discretion must still be available to the IHO. If there is a limitation on IHOs signing consent orders or so-ordering settlement agreements, it should be limited to prohibiting IHOs from issuing orders on issues outside the scope of their subject matter jurisdiction (such as attorney fees); there shouldn't be a limitation on consent orders or so ordered stipulations that globally address a student's special education issues (evaluation, program, placement, reimbursement, etc.).

DEPARTMENT RESPONSE:

In determining whether to so-order a settlement agreement, the IHO must use appropriate discretion to determine if the settlement would remedy the issues in the due process complaint notice which are under the IHO's jurisdiction. However, "stipulations that globally address a student's special education issues" may or may not be related to the due process complaint notice or amended notice. While the parties may reach agreement on issues others than those raised in the due process complaint, the IHO is limited in his/her jurisdiction to the issues raised in the due process complaint and cannot use his/her appointment as the IHO in a due process complaint to order remedies on other issues not raised in the due process complaint notice or amended due process complaint notice. The IHO can use discretion so long as the settlement remedies the issue(s) in the due process complaint notice or amended notice.

Section 200.5(j)(5) - Timeline to render a decision

COMMENT:

Several supported this proposed amendment without comment. A student's education is at stake thus rendering time is of the essence. This amendment adheres to the federal timelines and promotes the timely resolution of due process complaints.

DEPARTMENT RESPONSE:

Comment is supportive; no response is necessary.

COMMENT:

It would be better to allow more time, to avoid rushed decisions.

DEPARTMENT RESPONSE:

The proposed timeline is consistent with the timelines to render a decision set forth in federal statute and regulation and cannot be amended to allow more time.

Section 200.5(j)(5) – Submission of a redacted decision to SED

COMMENT

Several indicated support or 'no position' for the proposed amendment without further comment. One questioned, given the technology that exists, why an IHO would need an additional 15 days to mail a properly redacted decision to NYSED.

DEPARTMENT RESPONSE:

An IHO must transmit the hearing decision to the parties within 14 days from the date the IHO closes the record. Current regulations require that the IHO also transmit a redacted copy of the decision to SED within that same timeframe. The proposed regulation provides the IHO with additional time to complete the redactions and transmit to SED after the decision has been mailed to the parties.

COMMENT:

Present redaction requirements render this unduly burdensome and diminish access to impartial hearing decisions; until less burdensome redaction standards are adopted, this question should not be addressed. The suggestion that decisions be redacted according to SED guidelines allows too much abuse by the SED. Currently, school district names are being redacted from decisions under these guidelines along with other information that should not be redacted, which impairs the flow of public information. Although the State and school districts have an obligation to protect the disclosure of the personally identifiable information related to a student, SED has taken this a step further by redacting school district information, at the expense of the public, that should be able to be used track decisions to school districts. With the present redaction guidelines, a decision is virtually unreadable after all redactions have been made. Major aspects of the factual and legal discussion must be redacted. Moreover,

material is redacted that is routinely included in SRO decisions and federal court decisions (e.g., a student's classification, discussion of evaluation results, etc.). To the extent it would result in greater cost to districts to prepare a redacted copy of the decision to satisfy this obligation, clarification should be provided that the time and cost of them will not transfer to local school boards.

DEPARTMENT RESPONSE:

The requirement that IHOs submit a redacted copy of the IHO decision to the State is a long-standing requirement and is based on federal regulations that require the findings and decision, after deleting any personally identifiable information, be made available to the public. The State's redaction guidelines are consistent with the standards for release of documents under Freedom of Information Law (FOIL) and ensure protection of student confidentiality.

Section 200.5(j)(5)(i)-(iv) - Extensions to the due date for rendering the impartial hearing decision

COMMENT:

Most strongly supported the proposed amendment that IHOs are prohibited from soliciting extensions or unilaterally issuing extensions for any reason; and supported the proposed additional flexibility to grant an extension for settlement purposes, without further comment. Others supported the amendment with the following comments: If the parties can settle the matter among themselves, then an IHO should have the authority to grant an extension for settlement decisions. This proposal ensures that the matter is resolved in a timely manner while providing the IHO flexibility to grant an extension for the purposes of settlement discussions; allows time for the parties to collect and review documents to facilitate the negotiation of fair agreements to the satisfaction of both

parties; will accelerate the hearing process, but will also give the parties a fair opportunity for settlement and meeting the child's needs as soon as possible; and may help resolve more cases without a hearing. In the absence of this provision, parties have been forced into adversarial proceedings against the will of both parties. As a law that supports early resolution of complaints and the realities of the time involved in the settlement process, we applaud the provision that recognizes settlement as a reason to grant adjournments.

DEPARTMENT RESPONSE:

Under current regulations, an IHO is not prohibited from granting an extension for settlement discussions. However, the current regulatory legal standard requires that the IHO find a *compelling reason* or *specific showing of substantial hardship* before doing so. Under the proposed amendment, the IHO must find *good cause* based on the likelihood that a settlement agreement may be reached before granting an extension for this reason. Therefore, while the legal standard has been relaxed, IHOs may not grant such extensions without first making a finding of good cause based on information, for example, that the parties have scheduled meetings to discuss settlement or have a date by which they are reasonably likely to finalize the settlement discussions, and the IHO may only grant an extension after fully considering the factors provided in section 200.5(j)(5)(ii).

COMMENT:

The language: *The impartial hearing officer shall not rely on the agreement of the parties [is not a sufficient] as a basis for granting an extension"* undermines cooperative efforts between the parties, for no reason whatsoever, and sends a message to the

parties that, working together, they cannot shape a hearing in a manner that affects only themselves.

DEPARTMENT RESPONSE:

While the parties may agree on a request for an extension, the IHO may not use this reason as the basis for granting the extension without first fully considering the factors provided in section 200.5(j)(5)(ii). It is the IHO's responsibility to manage the hearing in the best interests of the child and to consider, among other things, the effects of any delay on the educational interest or well-being of the child; the parties' fair opportunity to present its case; and any financial implications of delay.

COMMENT:

School holidays frequently render witnesses unavailable for long periods of time; particularly in the summer and winter. What purpose does a prohibition on consideration of school vacations serve? Limiting extensions to 30 days often necessitates successive extensions, putting IHO's in the position of spending extra time to document these successive extensions. There is no justification for preventing the parties jointly, in concert with an IHO who agrees, to shape the timing of the hearing, after taking into account relevant factors detailed in the regulations. IHO's should be permitted to grant 60 day extensions.

DEPARTMENT RESPONSE:

The proposed amendment to the current regulation does not include a change in the existing requirement that each extension shall be for no more than 30 days, nor does it propose to change the existing language providing that absent a compelling reason or a specific showing of substantial hardship, extensions shall not be granted because of vacations. The State's restrictions regarding the granting of extensions

were enacted several years ago resulting from a federal court case, Engwiller v. Mills et al., 00 CV 2436, that included a claim against the Department based on a systemic lack of timeliness of IHO decisions. In settlement of that case, the Department was required to develop stringent time line requirements for special education hearings in resolution of the matter. The proposed changes would be counter to the Department's commitments in settlement of that court case as well as to the intent of the proposed regulation, which is to provide for more timely and efficient impartial hearings.

COMMENT:

Regulations should be changed to eliminate prohibition on consideration of schedules of the parties and their representatives. This does not address reality – there should be no absolutes here. Limiting the IHO's discretion is not appropriate. The change that permits settlement discussions to be a basis for granting an extension should not be needed. This is the number 1 reason for the exponential increase in recusals in NYC cases in the present school year; IHOs are wary of running afoul of regulations demanding adherence to unrealistic timelines that do not respect the needs of parties to present their cases in a competent manner. IHOs need greater flexibility to schedule cases and to extend timelines. The current regulations have the effect and the proposed regulations would increasingly have the effect of encouraging recusals by IHOs due to lack of availability, which only worsens the situation, having the unintended effect of delaying rather than accelerating hearings.

DEPARTMENT RESPONSE:

The proposed amendment to the current regulation does not include a change in the existing restriction that absent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of a lack

of availability of resulting from the parties' and/or representatives' scheduling conflicts. The State's restrictions regarding the granting of extensions were enacted several years ago resulting from a federal court case, Engwiller v. Mills et al., 00 CV 2436, that included a claim against the Department based on a systemic lack of timeliness of IHO decisions. In settlement of that case, the Department was required to develop stringent time line requirements for special education hearings in resolution of the matter. Complete elimination of that restriction would be counter to the Department's commitments in settlement of that court case as well as to the intent of the proposed regulation, which is to provide for more timely and efficient impartial hearings.

The current rule, moreover, does not prohibit an IHO from granting an extension for this reason. However, the IHO may only grant an extension for such reasons after fully considering the factors provided in section 200.5(j)(5)(ii) and making a determination that there is a compelling reason or a specific showing of substantial hardship requiring the extension. Current and proposed regulations should have no effect on whether an IHO recuses him/herself from a case. IHOs are required to accept appointment in consideration of the timelines under which decisions must be rendered. When an IHO accepts appointment, only to later recuse him or herself due to an overextension of cases, the IHO is adding to the delay in timely decisions because a new IHO must be appointed. These delays often have an adverse effect on the educational interests of the child who is the subject of the due process complaint.

COMMENT:

IHOs should not be required to create a written decision on an extension, where the discussions and decision on an extension request are already part of the record.

DEPARTMENT RESPONSE:

The proposed amendment does not require a written decision on an extension request. Rather the IHO is required to respond in writing to the parties on each request for an extension and set forth the facts relied upon for each extension granted.

Section 200.5(j)(5); Section 200.5(j)(5)(vi) - Impartial hearing record

COMMENT:

Many indicated support or 'no position' on the above proposed amendment. Others in support commented that an IHO should promptly transmit the record and decision to the school district. If the decision is in favor of the parent(s), this will ensure that any changes/additions to a student's program and placement occur in a timely fashion. This amendment addresses an obvious omission in the existing regulations that did not include a provision requiring hearing officers to transfer the record to the district following a hearing, even though that record is required in the event of an appeal.

DEPARTMENT RESPONSE:

Comments are supportive; no response is necessary.

COMMENT:

Include a specific timeline for the submission of the record, i.e., five days from the date of the decision.

DEPARTMENT RESPONSE:

The proposed amendment requires that the IHO promptly transmit the record to the school district together with a certification of the materials in the record. The Department does not believe it is necessary to require a specific number of days for the IHO to do so.

COMMENT:

The proposed definition of the record is vague and considerably broader than accepted legal practice in civil and administrative litigation. Specifically, including 'all briefs [and] arguments' goes beyond what would routinely be included in the record of civil litigation and is, in addition, ambiguous. Items such as this may always be made exhibits by any party or by the IHO, if and when deemed appropriate. "Any other documentation deemed relevant and material by the impartial hearing officer" is "surplusage" as IHOs may enter anything they wish as an IHO exhibit. All material included in the record is already required in the list of exhibits, listed with the decision. Many of the items that the IHO is required to transmit to the district are documents that are already in the district's possession (e.g., transcripts). The proposed regulation would increase the district's cost in terms of IHO fees to require IHOs to submit the record in the form listed in the regulation. IHOs would likely not be compensated for the work related to the record and would be available to accept fewer cases due to the increased workload per case, and may be unwilling to accept appointments for increased non-compensated services.

DEPARTMENT RESPONSE:

An IHO is entitled to compensation for pre-hearing, hearing, and post-hearing activities. The proposed amendment further ensures that the record includes all information considered by the IHO in rendering the decision in order to ensure an accurate and complete record should the IHO's decision be appealed. The Department disagrees with the contention that the definition of the record is vague or ambiguous.

<u>Section 200.5(j)(6) - Withdrawals of requests for due process hearings</u>

COMMENT:

Some supported the proposed amendment without further comment. Others supported the amendment with comments that: due process hearings are expensive and contentious for all parties involved and should not be entered into without thorough deliberation of all aspects and after exhausting every other means of resolving the issues; this amendment should preclude the filing of a complaint without merit; and parents should not have the ability to IHO "shop" and this may limit "judge shopping".

DEPARTMENT RESPONSE:

Comments are supportive; no response is necessary.

COMMENT:

The proposed requirement to appoint the same IHO when a party subsequently files a due process complaint notice is unworkable as it requires someone at the school district, at the time of the second hearing request being received, to analyze that request to determine if it truly is "based on or includes the same or substantially similar claims." Typically, hearing requests are received by Board Clerks, or the IHO Office in NYC, and handled by non-attorneys, who have no idea how to conduct this analysis. Errors and delay will likely occur.

DEPARTMENT RESPONSE:

Each district maintains information on due process requests. Staff who perform the IHO appointment functions may and should consult with school district special education personnel when clarity on the subject and issues in a due process complaint notices are in question.

COMMENT:

The term "order of termination" is vague and should be clarified.

DEPARTMENT RESPONSE:

The term will be clarified in guidance from the Department. Briefly, the term refers to a written order that notifies the parties the hearing has been terminated because of voluntary withdrawal by the party requesting the hearing and indicates whether the withdrawal is with or without prejudice and the reasons for that determination.

COMMENT:

Language should be added affording a party a reasonable opportunity to respond to the notice of withdrawal prior to the IHO issuance of an order of termination. The regulation should incorporate a specific timeline by which the order of termination may be issued and by which the parties are required to respond to the IHO notice.

DEPARTMENT RESPONSE:

The proposed amendment provides that the party seeking to withdraw the request notify the IHO and the other party in writing. The IHO must issue an order of termination, and only at the request of the other party and upon notice and an opportunity for the parties to be heard, would the IHO issue a decision that the withdrawal be with prejudice. While no timeline is established for the rendering of the order of termination, the IHO must act in a timely manner while still providing the parties with a reasonable opportunity to be heard on the issue.

COMMENT:

The language regarding withdrawal v. termination of hearings may be confused. Clarification should be provided that the termination of a hearing, once commenced, would preclude the party from filing another complaint on the same or similar claims once terminated.

DEPARTMENT RESPONSE:

The proposed regulation does not preclude a party from filing another complaint on the same or similar claims if the party withdraws the due process complaint notice, unless the IHO issues a written order of termination indicating that the withdrawal is with prejudice.

COMMENT:

Why is added work (i.e., a written order of termination) needed on withdrawals? The regulation requiring a refiled complaint to be assigned to the same IHO doesn't require the writing.

DEPARTMENT RESPONSE:

A written order of termination is necessary to ensure the parties are properly informed as to the withdrawal, the reasons therefor, and whether the hearing if terminated with or without prejudice.

COMMENT:

NYC should be required to compensate IHOs for issuing written orders of termination.

DEPARTMENT RESPONSE:

An IHO is entitled to compensation for pre-hearing, hearing, and post-hearing activities. An order of termination is a written order by the IHO that the case has been withdrawn by the party, either with or without prejudice; therefore it would be included in the activities for which an IHO receives compensation.

COMMENT:

This process favors the school districts.

DEPARTMENT RESPONSE:

The Department does not agree that the proposed amendment favors one party over the other. The procedures surrounding withdrawals provides safeguards against IHO shopping, ensures statewide consistency as to how withdrawals are handled, and provides clear authority to the IHOs to make determinations to ensure that the interests of the parties are not prejudiced by the withdrawal.

COMMENT:

There is concern that in a situation where the petitioner (usually a parent) seeks to withdraw a due process complaint without prejudice, and the IHO, upon a motion from the other party, decides that the withdrawal will be with prejudice; the proposed regulation only allows the petitioner to appeal that IHO's dismissal to the State Review Officer. It would be fairer and more efficient for the petitioner also to be given the right to go forward with the due process hearing in the alternative rather than risk losing his or her right to have a hearing simply for asking to be able to withdraw without prejudice.

DEPARTMENT RESPONSE:

Nothing in the proposed amendment would preclude the party who was withdrawing the case to decide to proceed with the hearing with the currently appointed IHO.

COMMENT:

Does the provision about a subsequently filed complaint going to the same IHO apply also to complaints withdrawn before the hearing has commenced?

DEPARTMENT RESPONSE:

Yes.

COMMENT:

When is ‘commencement of the hearing’ triggered? Is it after there has been a prehearing conference, or after opening and evidence entered on the record?

DEPARTMENT RESPONSE:

“Commencement of the hearing” refers to the first date a hearing is held, excluding a prehearing conference if one was conducted.