



TO: The P-12 Education Committee

FROM: Angelique Johnson-Dingle *Angelique Johnson-Dingle*

SUBJECT: Proposed Amendment of Sections 200.1(x) and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process System Procedures

DATE: January 8, 2022

AUTHORIZATION(S): *Dom [Signature]* *Betty [Signature]*

SUMMARY

Issue for Decision

Should the Board of Regents adopt the proposed amendment of sections 200.5 and 200.1(x) of the Regulations of the Commissioner of Education relating to special education due process system procedures?

Reason(s) for Consideration

Review of policy.

Proposed Handling

The proposed amendment is presented to the P-12 Education Committee for discussion and recommendation to the Full Board for adoption as an emergency rule at its January 2023 meeting. A copy of the proposed rule (Attachment A) and a Statement of Facts and Circumstances justifying emergency action (Attachment B) are attached.

Background Information

On December 1, 2021, the Department and the New York City Department of Education (NYCDOE) entered into a Memorandum of Agreement (MOA) (Attachment C) with New York City's Office of Administrative Trials and Hearings (OATH) to establish an administrative team of full-time impartial hearing officers (IHOs) to effectively manage NYCDOE's current caseload. The parties agreed that handling of the special education impartial hearing system would be transferred to OATH in order to

facilitate the effective management of current and future due process complaint filings.¹ The parties recognized the need to establish an appropriate transition period during which both current IHOs (per-diem independent contractors) and OATH IHOs (after hiring staff) will conduct impartial hearings. The transition period is ongoing. To date, OATH has hired 43 attorneys who are certified and trained by the Department to be IHOs, in addition to settlement officers and administrative staff.

In addition, the MOA indicates that “[the Department] will take steps to propose amendments to regulations to support the use of hearing officers hired by OATH and the ability of OATH to assign cases to its impartial hearing officers as OATH deems appropriate” (MOA at paragraph 14). Consistent with the MOA, at the September 2022 Board meeting, the Board of Regents adopted amendments to sections 200.2(e) of the Commissioner’s regulations to address the rotational selection process for assignment of IHOs to due process complaints in New York City.

The MOA also states that “[t]o the extent necessary, OATH will promulgate rules for special education due process hearings that will be presided over by OATH IHOs” and that OATH is responsible for “[r]ulemaking to establish procedures for the efficient administration of the Unit” (MOA at paragraphs 11, 16[b]).

In furtherance of the Department’s obligations under the MOA, the Department now proposes to add a new subdivision (p) to section 200.5 of the Commissioner’s regulations to allow a permanent standing administrative tribunal that employs IHOs, or to which IHOs report, to promulgate regulations related to special education due process hearings. Amending the regulations to allow for OATH to promulgate its own special education due process hearing regulations is consistent with the MOA and will promote the efficient resolution of due process complaints. As indicated in the proposed amendment, OATH must ensure that all proposed regulations are consistent with state and federal laws and regulations.

Additionally, the Department proposes to amend the definition of “impartial hearing officer” in section 200.1(x) of the Commissioner’s regulations to contemplate IHOs employed by OATH.

Related Regents Items

September 2022: [Proposed Amendment of Sections 200.2\(e\) and 200.5\(j\) of the Regulations of the Commissioner of Education Relating to Special Education Due Process System Procedures](https://www.regents.nysed.gov/common/regents/files/922brca12.pdf)

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Recommendation

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

¹ As stated in the Department’s [September 2022 item](#) adopting regulatory amendments relating to due process procedures, New York City has experienced an unprecedented volume of special education due process complaints and cases in the past several years that shows no signs of abating.

VOTED: That sections 200.5 and 200.1(x) of the Regulations of the Commissioner of Education be amended, as submitted, effective January 10, 2023, as an emergency rule upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare to immediately permit OATH to promulgate regulations related to special education due process hearings to promote the efficient resolution of due process complaints

Timetable for Implementation

If adopted as an emergency rule at the January 2023 Regents meeting, the emergency rule will become effective on January 25, 2023. It is anticipated that the proposed amendments will be presented for permanent adoption at the May 2023 Regents meeting, after publication of the proposed amendments in the State Register, holding of public hearings as required by the Individuals with Disabilities Education Act (IDEA)², and expiration of the public comment period required under the State Administrative Procedure Act. Because the emergency action will expire before May 2023 Regents meeting, it is anticipated that an additional emergency action will be presented for adoption at the March 2023 meeting. If adopted at the May 2023 meeting, the proposed rule will become effective as a permanent rule on May 31, 2023.

² The public hearing notice will be published as part of the Notice of Emergency Adoption and Proposed Rule Making in the January 25, 2023 State Register Publication.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 107, 207, 305, 3214, 4403, 4404, and 4410 of the Education Law.

1. Subdivision (X) of section 200.1 of the Regulations of the Commissioner of Education is amended to read 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. In a city school district having a population of one million or more inhabitants, impartial hearing officer also means individuals who are assigned to a permanent, standing administrative tribunal employing impartial hearing officers. 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)...

2. Section 200.5 of the Regulations of the Commissioner of Education is amended by adding a new subdivision (p) to read as follows:

(p) Authority of standing administrative tribunals. Notwithstanding any other provision of this Part, in a city school district having a population of one million or more, a standing administrative tribunal employing impartial hearing officers is authorized to promulgate regulations, in consultation with the Department, related to the procedure and efficiency of impartial due process hearings, which provisions may differ from subdivision (j) of this section, provided such regulations are consistent with all other applicable state and federal laws and regulations.

STATEMENT OF FACTS AND CIRCUMSTANCES
JUSTIFYING EMERGENCY ACTION

On December 1, 2021, the Department and the New York City Department of Education (NYCDOE) entered into a Memorandum of Agreement (MOA) (Attachment C) with New York City's Office of Administrative Trials and Hearings (OATH) to establish an administrative team of full-time impartial hearing officers (IHOs) to effectively manage NYCDOE's current caseload. The parties agreed that handling of the special education impartial hearing system would be transferred to OATH in order to facilitate the effective management of current and future due process complaint filings.³ The parties recognized the need to establish an appropriate transition period during which both current IHOs (per-diem independent contractors) and OATH IHOs (after hiring staff) will conduct impartial hearings. The transition period is ongoing. To date, OATH has hired 43 attorneys who are certified and trained by the Department to be IHOs, in addition to settlement officers and administrative staff.

In addition, the MOA indicates that “[the Department] will take steps to propose amendments to regulations to support the use of hearing officers hired by OATH and the ability of OATH to assign cases to its impartial hearing officers as OATH deems appropriate” (MOA at ¶ 14). Consistent with the MOA, at the September 2022 Board meeting, the Board of Regents adopted amendments to sections 200.2(e) of the Commissioner's regulations to address the rotational selection process for assignment of IHOs to due process complaints in New York City.

³ As stated in the Department's [September 2022 item](#) adopting regulatory amendments relating to due process procedures, New York City has experienced an unprecedented volume of special education due process complaints and cases in the past several years that shows no signs of abating.

The MOA also states that “[t]o the extent necessary, OATH will promulgate rules for special education due process hearings that will be presided over by OATH IHOs” and that OATH is responsible for “[r]ulemaking to establish procedures for the efficient administration of the Unit” (MOA at ¶¶ 11, 16[b]).

In furtherance of the Department’s obligations under the MOA, the Department now proposes to add a new subdivision (p) to section 200.5 of the Commissioner’s regulations to allow a permanent standing administrative tribunal that employs IHOs, or to which IHOs report, to promulgate regulations related to special education due process hearings. Amending the regulations to allow for OATH to promulgate its own special education due process hearing regulations is consistent with the MOA and will promote the efficient resolution of due process complaints. As indicated in the proposed amendment, OATH must ensure that all proposed regulations are consistent with state and federal laws and regulations.

Additionally, the Department proposes to amend the definition of “impartial hearing officer” in section 200.1(x) of the Commissioner’s regulations to contemplate IHOs employees by OATH.

Since the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be adopted by regular (nonemergency) action after the department holds public hearings as required by the Individuals with Disabilities Education Act (IDEA) and expiration of the public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5) would be the May 2023 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earliest effective date of the proposed rule, if adopted at the May meeting, would be May 31, 2023, the date the Notice of Adoption would be published in the State Register.

Therefore, emergency action is necessary at the January 2023 Regents meeting, effective January 10, 2023, for the preservation of the general welfare to immediately permit OATH to promulgate regulations and to limit excessive extensions of due process cases to ensure the timely and efficient resolution of due process complaints for students and families in New York State.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at the May 2023 meeting, which is the first scheduled meeting after expiration of the public comment period mandated by SAPA for state agency rulemaking. However, since the emergency action will expire before the May Regents meeting, it is anticipated that an additional emergency action will be presented for adoption at the March 2023 Regents meeting.