



TO: The Honorable Members of the Board of Regents

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

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

DATE: May 4, 2023

AUTHORIZATION(S): *Tom M. G. Bellotti*

SUMMARY

Issue for Decision (Consent)

Should the Board of Regents adopt the proposed amendment of 200.1(x) and 200.5 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 submitted to the Full Board for adoption as a permanent rule at the May 2023 Regents meeting. A copy of the proposed rule is included (Attachment A).

Procedural History

The proposed amendment was 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, effective January 17, 2023. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on February 1, 2023. Because the January emergency action was set to expire on April 9, 2023, a second emergency action was necessary at the March 2023 Regents meeting, effective April 10, 2023, to ensure that the emergency rule remained continuously in effect until it could be permanently adopted.

Following publication in the State Register and Public Hearings, the Department received comments on the proposed amendment. An Assessment of Public Comment is included (Attachment B). The Department has made non-substantial revisions to the proposed rule as outlined below. A Notice of Adoption will be published in the State Register on May 31, 2023. Supporting materials are available upon request to the Secretary of the Board of Regents.

Background Information

On December 1, 2021, the Department and New York City Public Schools (NYCPS) 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 NYCPS'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) would conduct impartial hearings. The transition period is ongoing. To date, OATH has hired 60 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.

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.

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.

Non-Substantial Revisions to the Proposed Amendment

Following the 60-day public comment period the Department proposes to make non-substantial revisions to the proposed amendment as follows:

- Section 200.1(x) has been revised to clarify and reduce confusion regarding the definition of IHO. The definition in the original proposal stated that an IHO also includes “individuals who are assigned to a permanent, standing administrative tribunal employing impartial hearing officers” in NYC. Since OATH IHOs are either employed by or contract with OATH, the definition has been revised to include employees and/or contractors of a permanent, standing administrative tribunal.
- Section 200.5 has been revised to clarify that regulations promulgated by a standing administrative tribunal employing impartial hearing officers in NYC may expand upon, but may not conflict with, the requirements outlined in section 200.5(j) of the Commissioner’s regulations.

Related Regent’s 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)

(<https://www.regents.nysed.gov/common/regents/files/922brca12.pdf>)

March 2023: [Proposed Amendment of Sections 200.1\(x\) and 200.5 of the Regulations of the Commissioner of Education Due Process System Procedures](https://www.regents.nysed.gov/sites/regents/files/323brca7.pdf)

(<https://www.regents.nysed.gov/sites/regents/files/323brca7.pdf>)

Recommendation

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

VOTED: That section 200.1(x) and 200.5 of the Regulations of the Commissioner of Education be amended, as submitted, effective May 31, 2023.

Timetable for Implementation

If adopted at the May 2023 meeting, the proposed amendment will become effective as a permanent rule on May 31, 2023.

Attachment A

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 may also be employees and/or contractors of a permanent, standing administrative tribunal. 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 expand upon, but may not conflict with, subdivision (j) of this section, provided such regulations are consistent with all other applicable state and federal laws and regulations.

ASSESSMENT OF PUBLIC COMMENT

Following publication of the Notice of Proposed Rule Making in the State Register on January 25, 2023, the Department received the following comments on the proposed amendment:

1. COMMENT: Commenters stated that the Department does not have the authority to delegate its rulemaking authority, regardless of whether practice rules promulgated by the Office of Administrative Trials and Hearings (OATH) must be consistent with all other applicable state and federal laws and regulations. Other commenters maintained that the proposed amendment to 8 NYCRR §200.5(p) abdicates the Department's oversight responsibility with respect to the integrity and management of the impartial hearing process under State and Federal law. Another commenter said the Department cannot delegate hearing functions to an entity that does not directly provide educational services.

DEPARTMENT RESPONSE: The Department disagrees that the proposed rule delegates or abdicates the Department's rule-making authority or oversight responsibilities. The Department is not delegating its rule-making authority to OATH but is merely recognizing OATH's ability to promulgate rules of procedure that expound upon or fill gaps between, applicable state and federal laws and regulations.

With respect to oversight, the Department remains the State Education Agency (SEA) responsible for ensuring that the requirements of the Individuals with Disabilities Education Act (IDEA) are met by monitoring compliance with regulations implementing IDEA. Consistent with Education Law §§4404 and 200.1(x) of the Regulations of the Commissioner of Education, the Department remains responsible for training

requirements, certification, and oversight of impartial hearing officers (IHO). Therefore, no changes to the proposed rule are needed with respect to those comments noted above.

To the extent that references to 8 NYCRR §200.5(j) in the proposed regulation are unclear regarding OATH's limited ability to expand upon those provisions in §200.5(j), the Department proposes a non-substantial revision to clarify 8 NYCRR §200.5(p).

2. COMMENT: One commenter stated that OATH, as a municipal agency, is not under the supervision or control of either the SEA or the Local Educational Agency (LEA). As a result, the commenter argued, neither the NYCPS nor SED can modify or override regulations promulgated by OATH, thus, the Department and NYCPS are precluded from enforcing regulations promulgated by OATH that are consistent with IDEA or preventing the enforcement of regulations that are inconsistent with IDEA.

DEPARTMENT RESPONSE: The Department disagrees with the commenter's characterization of its ability to modify or override regulations. To the extent the commenter suggests that the Department would have no recourse if OATH promulgated a regulation(s) that violated IDEA or State law, the Department, NYCPS, and OATH are parties to a December 1, 2021, Memorandum of Agreement (MOA). In this agreement, OATH agreed to "conduct hearings that are consistent with applicable federal and state laws and regulations, and in accordance with applicable administrative rules promulgated by the [Department's] Commissioner." If OATH refused to withdraw or amend a practice rule that was inconsistent with State or federal law, this would violate the terms of the MOA and could result in annulment of the MOA. Therefore, no changes to the proposed rule are needed.

3. COMMENT: Some commenters indicated that providing separate hearing procedures in New York City is incompatible with State and federal law. One commenter also noted that no other SEA in the United States has different special education procedures based on the school district of residence of the child.

DEPARTMENT RESPONSE: The Department disagrees with the commenters' arguments that the proposed regulation violates State or federal law. All LEAs must follow IDEA, which identifies the fundamental features of due process hearings. Those requirements apply to all hearings conducted in New York State, including hearings heard before an administrative tribunal such as OATH.

With respect to local differences in special education hearing procedures, the commenter does not explain how differences in practice rules across districts would impede due process protections for students in those districts. Indeed, LEAs and IHOs may currently adopt local policies or procedures as to how to manage or run due process hearings. Nevertheless, as stated above, all hearings in New York State must be consistent with the IDEA, the Education Law, and their implementing regulations. Therefore, no changes to the proposed rule are needed.

4. COMMENT: One commenter opined that the Department has an obligation under 34 CFR §300.199(a)(1)(3) to minimize applicable rules and regulations for LEAs and that authorizing OATH to promulgate rules is inconsistent with this obligation.

DEPARTMENT RESPONSE: The Department disagrees with the commenter that the proposed amendment to 8 NYCRR §200.5(p) is inconsistent with the Department's obligation to minimize applicable regulations in the federal regulations. In May 2019, the Department issued a Compliance Assurance Plan (CAP) to NYCPS that cited it for, among other things, failing to operate a functional due process system or

provide parents with access thereto. A contributing factor to NYCPS's failure was the tremendous number of due process complaints filed in New York City. In the past several years, NYCPS has been overwhelmed with an unprecedented, and steadily increasing, number of due process complaints. In the 2021-2022 school year alone, more than 98% of New York State's 18,000 due process complaints were filed in New York City. Despite numerous attempts to bring NYCPS into compliance, NYCPS made insufficient progress under the CAP. As a result, in December 2021, NYCPS, OATH, and the Department agreed to the MOA, which required OATH to establish a separate special education unit to adjudicate impartial due process hearings. The parties determined that, due to the exceptionally large number of due process complaints filed annually, a system of full-time IHOs was necessary to effectively manage this caseload. To meet this goal, the Department believes that OATH should have the flexibility to promulgate its own rules, consistent with federal and State law, to effectively manage this caseload. While the Department acknowledges its obligations under 34 CFR §300.199(a)(1)(3), ensuring access to due process procedures in New York City substantially outweighs the obligation to "[m]inimize the number of rules, regulations, and policies" to which LEAs are subjected. Therefore, no changes to the proposed rule are needed.

5. COMMENT: One commenter stated that the proposed regulation 8 NYCRR §200.5(p) will not provide them with notice or an opportunity to comment on any regulations proposed by OATH.

DEPARTMENT RESPONSE: The City Administrative Procedures Act (CAPA), Chapter 45 of the New York City Charter, outlines the process by which city agencies promulgate rules, including notice and an opportunity for comment. OATH follows the

procedures of CAPA in promulgating rules, and the public will receive both notice and an opportunity to comment prior to the enactment of any regulation by OATH.

Therefore, no changes to the proposed rule are needed.

6. COMMENT: Some commenters objected to the fact that the terms “procedure” and “efficiency” were not defined in the regulation.² Other commenters expressed concerns that focusing on speed (i.e., efficiency) “sabotages [the] integrity of the system,” ignores the essence of due process, will increase litigation, and ignores the central purpose of due process hearings: to ensure that special education and related services are delivered to students with disabilities.

DEPARTMENT RESPONSE: The Department disagrees that “procedure” and “efficiency” are improper justifications for a standing administrative tribunal to promulgate regulations. The IDEA requires that an IHO render a final decision within 75 days of receipt of a due process complaint.³ In that vein, courts have held that IDEA was “intended to ensure prompt resolution of disputes regarding appropriate education for handicapped children” and that “[o]f all the procedural rights provided by Congress in the IDEA, ‘[t]he due process hearing is the Act’s primary procedural protection’ in effectuating this purpose” (*Blackman v. District of Columbia*, 277 F.Supp. 2d 71, 78 [D.C. Cir. 2003], quoting *Kroot v. District of Columbia*, 800 F.Supp. 976, 982 [D.C. Cir. 1992]). While the Department acknowledges that valid reasons may exist for parties to exceed the 75-day timeline, ensuring that students and parents receive a final determination quickly is one of the primary purposes of the due process hearing system.

² Proposed regulation 8 NYCRR §200.5(p) allows OATH to promulgate regulations “related to the procedure and efficiency of impartial due process hearings.”

³ Specifically, an IHO has 45 days after receipt of a request for a hearing to issue a decision following the 30 day period for parties to engage in resolution prior to the commencement of the hearing.

It is disingenuous to suggest that adherence to IDEA's timelines sabotages the integrity of this system.

The Department does not believe that the terms "efficiency" and "procedure" require further definition. The Department seeks to utilize the common meaning of these words.⁴ Therefore, no change to the proposed rule is needed.

7. COMMENT: One commenter opined that OATH does not have a sufficient understanding of special education or IDEA. Moreover, the commenter argued that existing regulation 8 NYCRR §200.5(j)(3)(c)(xii) contains sufficient latitude for IHOs.

DEPARTMENT RESPONSE: The Department disagrees with the commenters' characterization of OATH's ability to handle special education due process hearings. As noted on its website, OATH has existed for approximately 40 years and is one of the busiest tribunals in the country. It has separate trial and hearing divisions, the latter of which conducts hearings for 25 different city enforcement agencies alleging violations of the laws or rules of the City. Moreover, OATH currently requires candidates for the special education hearings division to possess four years of recent, relevant, and satisfactory legal experience, including a minimum of two years of practice and/or experience in the areas of education, special education, disability rights, or civil rights. These qualifications exceed those outlined in 8 NYCRR §200.1(x)(1) for current IHOs, which require "a minimum of one year of practice and/or experience in the areas of education, special education, disability rights, civil rights or administrative law." The commenter has provided no other explanation as to why OATH would be unqualified to

⁴ Merriam-Webster's Dictionary defines "efficiency" as the quality of being efficient, meaning "capable of producing desired results with little or no waste (as of time or materials)". It defines "procedure" as "a usually fixed or ordered series of actions or events leading to a result."

handle matters related to special education. Therefore, no change to the proposed rule is needed.

8. COMMENT: Two commenters objected to the proposed definition of IHO as ambiguous and flawed. The commenter opined that the definition is circular in that 8 NYCRR §200.1(x) defines IHOs as a tribunal employing impartial hearing officers. Moreover, one commenter indicates that IHOs are not “assigned to a permanent, standing administrative tribunal,” but are “employed” by that tribunal, and the use of the word “assigned” may suggest that the proposed amendment permits the assignment of cases to the tribunal itself rather than to individual IHOs, which would violate Education Law §4404.

DEPARTMENT RESPONSE: Upon review, the Department agrees that it would be beneficial to clarify that IHOs, whether working as per diem hearing officers or employees of a permanent standing, administrative tribunal, are *individuals* assigned by a board of education to conduct a hearing and render a decision. Therefore, the Department proposes a non-substantial revision to clarify 8 NYCRR §200.1(x).

9. COMMENT: Several commenters raised general objections related to OATH, NYCPS, and special education due process. Some commenters, for example, objected to OATH IHOs requiring testimony by affidavit.

DEPARTMENT RESPONSE: These concerns are outside the scope of the proposed amendments and, as such, need not be addressed. The Department has considered the objections raised and does not believe that they have merit. For example, State regulations currently permit IHOs to “take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination” (8 NYCRR §200.5[j][3][xii][f]).

MEMORANDUM OF AGREEMENT

This memorandum of agreement ("Agreement") is entered into this 15th day of December, 2021, by the Office of Administrative Trials and Hearings of the City of New York ("OATH"), the New York City Department of Education ("DOE"), and the New York State Education Department ("SED") (collectively, the "Parties").

WHEREAS, under 20 U.S.C. §§ 1415(b)(6) and (k)(3), and N.Y. Education Law §4404(1), an impartial due process complaint ("DPC") may be filed by a parent/guardian of student with a disability or by the public agency responsible for offering to provide education to such a student on any matter relating to identification, evaluation, or educational placement of such a student with a disability, or the provision of a free appropriate public education ("FAPE") to such a student;

WHEREAS, the filing of a due process complaint initiates the impartial hearing process set forth in 20 U.S.C. § 1415 and N.Y. Education Law § 4404;

WHEREAS, DOE operates the New York City Impartial Hearing Office which performs various functions to administer the system for conducting the special education impartial hearing process in the City School District for the City of New York (the "District"), including recording, tracking, and processing case assignments within the Impartial Hearing System and collecting data required by the SED, the State Educational Agency;

WHEREAS, the Parties agree that the number of due process complaints filed annually in the District has significantly increased, requiring an administrative system of full-time impartial hearing officers to effectively manage the caseload; and

WHEREAS, the Parties agree that the transfer of the handling of the impartial hearing system to OATH is appropriate and will facilitate the effective management of current and future filings;

NOW, THEREFORE, the Parties hereby agree as follows:

1. OATH shall establish a separate Special Education Unit ("Unit") to adjudicate impartial due process hearings heretofore commenced by the filing of due process complaints in the City of New York.
2. The Unit will be modelled on OATH's Trial Division.
 - a. The Unit will be staffed by full-time impartial hearing officers, recruited and hired by OATH. OATH currently anticipates that it will hire 40-50 full-time impartial hearing officers within the transition period (see paragraph 3 below).
 - b. The transition to OATH will begin upon the hiring and certification of 5 IHOs employed by OATH.
 - c. If necessary, OATH will supplement the full-time impartial hearing officers with part-time impartial hearing officers, hired by OATH.
 - d. All impartial hearing officers hired by OATH (full-time and part-time; collectively, "OATH IHOs") will have the authority of impartial hearing officers acting under

sections 4404 and 4410 of the N.Y. Education Law, applicable State regulations, and in accordance with 20 U.S.C. § 1415. However, terms of employment and compensation will be set by OATH.

3. The establishment of the Unit will include a transition period. It is the intent of DOE, SED, and OATH to terminate the transition period 6 months after the staffing of 40 full-time OATH IHOs eligible to hear cases and the establishment of an associated secretariat or similar office whose functions include the maintenance and operation of an electronic filing system. DOE, SED and OATH may collectively agree that a different termination date is appropriate.
4. Any DPC already assigned by the New York City Impartial Hearing Office to one of the existing cadre of impartial hearing officers (“independent impartial hearing officer”) will not be transferred to OATH, provided, however, that in the event that a new hearing officer must be assigned to a case for any reason including recusal, retirement, decertification, etc., of an independent hearing officer, such case may be assigned to OATH.
5. During the transition period,
 - a. Due process complaints will continue to be filed with the New York City Impartial Hearing Office and assigned to independent impartial hearing officers using the priority system set forth in Exhibit A.
 - b. Newly-filed and unassigned due process complaints may be assigned to OATH impartial hearing officers, upon OATH giving notice, in writing, to the Parties that it is able to accept such cases. OATH will specify to the assigning Party the number of cases it projects it will be able to accept that week. Assignment will be made using the priority system set forth in Exhibit A.
6. An electronic filing system will be established for the filing of due process complaints at OATH, including a coversheet that sets forth the primary issues to be resolved, including but not limited to the relief sought, pendency funding, and/or costs and attorneys’ fees. The electronic filing system will comply with all applicable State and Federal laws (i.e., FERPA and the IDEA) governing confidentiality and electronic transactions to ensure the safety, integrity, and confidentiality of student records. The development or expansion of this electronic filing system will be coordinated with SED with regard to potential compatibility with SED’s Impartial Hearing Reporting System (IHRS).
7. At the conclusion of the transition period, DOE will delegate to OATH the function of appointing OATH IHOs to conduct all special education impartial hearings.
8. After the transition period, OATH will hire additional full and part-time OATH IHOs as may be needed, both to maintain compliance with the regulatory time frames for assigning and hearing new cases and to clear out, within the ensuing 24 months, any existing unassigned cases.

9. After the transition period, when a due process complaint is received by OATH, OATH will do the following:
 - a. Within one day of filing, electronically transmit the complaint to the New York City Impartial Hearing Office or successor office;
 - b. Confirm receipt of the complaint via an email sent electronically to all litigants in the impartial hearing, or their counsel/advocate;
 - c. Advise parents/guardians of the availability of mediation pursuant to N.Y. Education Law § 4404-a as an alternative to an impartial hearing;
 - d. Provide the parent with a copy of the procedural safeguards notice required by the SED Commissioner; and
 - e. Upon request of the parent, provide the documents listed in subparagraphs (b) to (d) herein translated into the parent's preferred language, if the preferred language is one of the nine languages other than English most commonly spoken in the District (electronic links are acceptable), or offer the parent interpretation services.
10. OATH shall appoint an OATH IHO to preside over an impartial hearing no later than two business days after receipt of the due process complaint. OATH IHOs will render final decisions thereon in accordance with the timelines set out in 34 C.F.R. §300.515(a) and 8 NYCRR § 200.5(j)(5).
11. To the extent necessary, OATH will promulgate rules for special education due process hearings that will be presided over by OATH IHOs and will incorporate the procedural requirements in 8 NYCRR §§ 200.5(j)(1), (j)(3)(i)(c), (j)(3)(ii) to (j)(3)(xvii), 200.16(h)(9), and 201.11.
12. SED is responsible for training IHOs that OATH has hired contingent on being certified by SED. When OATH has hired (contingent on being certified by SED) several IHOs, SED will arrange for training and certification of those candidates who successfully meet the requirements set forth in 8 NYCRR § 200.1(x) and are not yet certified. SED agrees to ensure that training will be provided on a timetable that allows OATH IHOs to commence working shortly after being hired by OATH, and in no case more than two weeks after an OATH IHO's effective employment date. SED remains responsible for the de-certification of OATH IHOs and OATH understands that any IHO decertified by SED cannot work in the Unit.
13. In accordance with 34 C.F.R. § 300.511(c)(3), after certification, OATH will establish a list of OATH IHOs, including their respective names and qualifications. Appointment by OATH to sit in the Unit and preside over impartial hearings in the District shall be restricted to only those OATH IHOs on said list.
14. SED 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. The City of New York will be responsible for the compensation of OATH impartial hearing officers; Full-time OATH IHOs will not be compensated at an hourly rate. To the extent that part-time OATH IHOs are hired,

the amount paid to them will not exceed the applicable maximum rate set by the Commissioner as approved by the director of the division of the budget.

15. Following the resolution period described in 20 U.S.C. § 1415(f)(1)(B), the Unit may hold an initial pre-hearing conference, which may also be conducted as a settlement conference, provided that any OATH IHO or other officer, as designated by the Chief Administrative Law Judge of OATH, presiding over such settlement conference is not the OATH IHO appointed to preside over the underlying impartial hearing.
16. Furthermore, OATH will be responsible for:
 - a. Supervision of the Unit's management of caseloads and the Unit's professionalism, including appropriate conduct, communication, and responsiveness;
 - b. Rulemaking to establish procedures for the efficient administration of the Unit;
 - c. Oversight of the handling of cases and issuance of decisions, including extensions, recusals, discovery, timelines for case completion and issuance of decisions, and formatting of decisions and orders;
 - d. Ensuring sufficient and acceptable hearing rooms;
 - e. Discipline of OATH IHOs as New York City employees, up to and including the termination of OATH IHOs, with IHO decertification authority remaining with SED; and
 - f. In collaboration with DOE as necessary, collecting, maintaining and providing the data required by SED regarding due process complaints (see 8 NYCRR § 200.5(j)(3)(xvi)).
17. OATH agrees to record, through transcription or otherwise, each impartial hearing and to provide a written, or at the option of the parent, electronic verbatim record of the proceedings before the IHO in accordance with 34 C.F.R. § 300.512(a)(4) and 8 NYCRR § 200.5(j)(3)(v).
18. OATH agrees that all impartial hearings will be presumptively closed to the public, unless the parent(s) involved in the impartial hearing exercises their right to open the hearing to the public in accordance with 34 C.F.R. § 300.512(c)(2) and 8 NYCRR § 200.5(j)(3)(x).
19. OATH will hold expedited hearings as needed under 8 NYCRR § 201.11 and under OATH's procedures.
20. Following the conclusion of any impartial hearing, all files and records generated by the Unit in that proceeding will become the files and records of the DOE and will be sent to DOE within a reasonable time—but no later than thirty days—following the expiration of any controlling appeal period. DOE shall be responsible for assembling the record for appellate review in cases handled by an independent IHO that are appealed by one of the parties and providing a copy to the Office of State Review. See 8 NYCRR § 200.5(j)(5). OATH shall be responsible for assembling the record on appeal for cases handled by OATH IHOs.

21. OATH agrees that the Unit will conduct hearings that are consistent with applicable federal and state laws and regulations, and in accordance with applicable administrative rules promulgated by the SED Commissioner as outlined herein and by OATH.
22. Nothing in this MOA shall be construed to interfere with SED's role as the state educational agency with respect to its supervisory and monitoring obligations of the local educational agency (LEA).
23. This MOA may be amended or supplemented only upon the written agreement of the Parties.

AGREED:



New York State Education Department
By: Daniel Martin Bentley
Title: Counsel & Deputy Commissioner
Date: 12/1/21



New York City Department of Education
By: Liz Vladdock
Title: General Counsel
Date: 12/1/2021



New York City Office of Administrative Trials and Hearings
By: Joni Kletter
Title: Commissioner and Chief ALJ
Date: 12/1/2021

EXHIBIT A
PRIORITY CATEGORIZATION FOR IMPARTIAL HEARING CASE ASSIGNMENT

- (1) Student is not currently receiving any special education programs or services (public or private).
- (2) Student is attending the program or school recommended on their DOE IEP (including charter school or placement by DOE in a state-approved non-public school) but is not receiving all the services on the DOE IEP.
- (3) Student attends a public school (or charter school or state-approved non-public school) but parent disagrees with the DOE IEP; OR student attends a private school or receives private services, but is not currently receiving all additional services requested by the parent as relief. (Either of these events may be coupled with a request for an independent educational evaluation.)
- (4) Student is currently attending (public or private) school and/or receiving services, but does not have pendency in that school program or services and seeks it as relief.
- (5) Student is currently receiving a special education program or services and is seeking compensatory education or services for prior deprivation of a free appropriate public education.
- (6) Student is currently unilaterally placed in a private school by the parent without DOE consent or is receiving private services, and has pendency in the private school placement or special education program/services being sought, and seeks that private school placement or special education program/services as relief for deprivation of a free appropriate public education.