



**TO:** P-12 Education Committee

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

**SUBJECT:** Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings

**DATE:** May 1, 2024

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

## SUMMARY

### Issue for Discussion

Should the Board of Regents adopt the proposed amendment of section 200.5 of the Regulations of the Commissioner of Education relating to special education due process hearings?

### Reason(s) for Consideration

Review of policy.

### Proposed Handling

The revised proposed amendment is presented to the P-12 Education Committee for discussion at the May 2024 Regents meeting. A copy of the proposed rule (Attachment A) is included.

### Procedural History

A Notice of Proposed Rule Making will be published in the State Register on May 22, 2024 for a 60-day public comment period. Supporting materials are available upon request to the Secretary of the Board of Regents.

### Background Information

The Individuals with Disabilities Education Act (IDEA) requires that states, as a condition of funding, provide parents with an opportunity to request an administrative hearing concerning their child's right to special education. As State regulations currently indicate, "[a] parent or school district may file a due process complaint with respect to

any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education (FAPE) to such student” (8 NYCRR 200.5 [i] [1]; see 20 USC § 1415 [b] [6] [A]).

Parentally placed nonpublic school students do not have “an individual right to receive some or all of the special education and related services that the[y] ... would receive if enrolled in a public school” or the right to a due process hearing (34 CFR 300.137 [a]).<sup>1</sup> Instead, the IDEA requires that an “equitable” share of each school district’s IDEA funds be used to provide services to students with disabilities attending nonpublic schools (34 CFR 300.138). School districts must locate, evaluate, and provide nonpublic school students with a “services plan that describes the specific special education and related services that the [district] will provide to the child in light of the services that [it] has determined ... it will make available to parentally placed private school children with disabilities” (34 CFR 300.138 [b] [1]). In New York, this document is called an Individualized Education Services Plan (IESP) (Education Law § 3602-c [2] [b] [1]).

New York State exceeds federal requirements by providing the parents of parentally placed nonpublic school students with disabilities the ability to file due process complaints in certain instances. Education Law § 3602-c [2] (b) (1) authorizes a due process hearing for the “[r]eview [of] the recommendation of [IESP services made by a] committee on special education” and Education Law § 3602-c (2) (c) authorizes a due process complaint “relating to compliance of the school district of location with child find requirements, including evaluation requirements.”<sup>2</sup>

In the City of New York, many parents who parentally place their child with a disability in a nonpublic school file due process complaints each year seeking payment for IESP services that the New York City Department of Education (NYCDOE) has not delivered. In these complaints, parents seek payment for services that they unilaterally obtained. Typically, the district does not contest that it recommended the services at issue.

Parents can, and should, expect implementation of the services identified on their children’s IESPs. As such, the Department has repeatedly informed the NYCDOE that parents should not be required to file a due process complaint to obtain payment for IESP services that the district did not provide directly. For example, in a May 27, 2020 letter to the NYCDOE, the Department’s Senior Deputy Commissioner for P-20 Education wrote: “In addition to the administrative burdens, a request to proceed to due process after a parent finally obtains a provider is a [unnecessary] burden placed on the parents of students with disabilities.”

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<sup>1</sup> See *also* Education Law § 3602-c [b] [1] [“committee[s] on special education shall assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district”]; *Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K.*, 14 NY3d 289, 293 [2010].

<sup>2</sup> Federal and State law authorize the filing of a due process complaint notice concerning the provision of “a free appropriate public education (FAPE) to such student.” As indicated above, both federal and State law indicate that parentally-placed students with disabilities only have a right to “equitable” services.

However, a due process hearing is not the appropriate forum for an implementation dispute. As stated above, Education Law § 3602-c does not grant a parent the right to file a due process complaint to dispute the implementation of an IESP, including payment for IESP services obtained by the parent. Parents deserve to be made whole if a school district did not implement IESP services through direct and timely reimbursement from their school district. If this does not occur, parents are entitled to pursue administrative or judicial remedies—but not a due process hearing.

School districts that provide payment for IESP services obtained by parents, however, are entitled to impose internal controls to ensure that requests for services were requested by the student's family, that payments are only made to providers who possess appropriate certification, and that rates accurately represent the cost of the service provided (i.e., fair market value). These controls are essential to prevent fraud, waste, abuse, and mismanagement.

A review of recent hearing transcripts from the past year has revealed instances of questionable practices. For example,

- A nonpublic school “hired a private financial consultant and changed the cost of their services from a tuition-based model to an hourly fee service model” for the school year at issue. This, according to the hearing officer, “increased the cost of the student’s placement from \$150,000 per year to approximately \$425,000 for the requested school year.”
- An agency requested a reimbursement rate of \$250 per hour, even though the provider only charged \$120 per hour. A “case manager” for the provider “appeared at the ... hearing and in response to questions from the [NYC]DOE, could not provide any detailed or credible testimony regarding the provider’s training and experience, the amount, type and form (if any) of supervision provided, when [the] [s]tudent began receiving services and in what frequency, nor ... explain in detail how the remainder of the \$250 rate [wa]s allocated ...”
- A parent sought reimbursement for a related service where the contract between the parent and the provider: (1) did not identify the relevant service to be provided; (2) contained no information regarding duration and frequency; and (3) was signed over four months after services initially began.
- A parent of a child with a disability, who also owned the agency that allegedly provided services to her child, was unable to prove that the agency provided any services to her child whatsoever.

In each case, the hearing officers found these concerns sufficiently compelling that they reduced or denied the requested payment for the services involved.

### **Proposed Amendment**

The Department proposes to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an

IESP. Further, it is the Department's position that going to a due process hearing for payment for IESP services obtained by the parent unfairly imposes administrative and financial burdens on parents. The Department seeks to ensure that parents whose IESP services were not implemented receive prompt reimbursement at the local level. The Department will continue to work with the NYCDOE to ensure that it meets its obligations under the IDEA to provide equitable services to students with disabilities who are so entitled, including those parentally placed in nonpublic schools.

### **Related Regents Items**

January 2012: [Proposed Amendment of Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings](https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/January2012/112p12d3.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/January2012/112p12d3.pdf>).

June 2012: [Proposed Amendment of Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings](https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/June2012/612p12d1.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/June2012/612p12d1.pdf>)

March 2020: [Proposed Amendments to Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearing Officers and the Special Education Due Process System Procedures](https://www.regents.nysed.gov/common/regents/files/320p12d4.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/320p12d4.pdf>)

July 2020: [Proposed Amendments to Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearing Officers and the Special Education Due Process System Procedures](https://www.regents.nysed.gov/common/regents/files/720brd4revised.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/720brd4revised.pdf>)

October 2020: [Proposed Amendments to Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearing Officers and the Special Education Due Process System Procedures](http://www.regents.nysed.gov/common/regents/files/1020p12d1revised.pdf)  
(<http://www.regents.nysed.gov/common/regents/files/1020p12d1revised.pdf>)

March 2021: [Proposed Amendments to Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearing Officers and the Special Education Due Process System Procedures](https://www.regents.nysed.gov/common/regents/files/321p12a4.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/321p12a4.pdf>).

February 2023: [Proposed Amendments of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings](https://www.regents.nysed.gov/sites/regents/files/223p12d1.pdf)  
(<https://www.regents.nysed.gov/sites/regents/files/223p12d1.pdf>).

### **Recommendation**

Not applicable.

## **Timetable for Implementation**

It is anticipated that the proposed amendment will be presented for permanent adoption at the September 2024 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. If adopted at the September 2024 meeting, the proposed amendment will become effective on September 25, 2024.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, 305, 3602-c, 4404, and 4410 of the Education Law.

1. Paragraph (1) of subdivision (i) of section 200.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(1) A parent or school district may file a due process complaint with respect to any matter relating to the identification, evaluation, or educational placement of a student with a disability, a student suspected of having a disability, or the provision of free appropriate public education to such student. This does not include disputes over the implementation of services in an individualized education services plan, such as the payment of services by a school district that was obtained by the parents of a student with a disability. The party presenting the complaint, or the attorney representing such party shall provide a written due process complaint notice to the party, which shall include:

(i) ...

(ii) ...

(iii) ...

(iv) ...

(v) ...