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: June 8, 2023

AUTHORIZATION(S):

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 June 2023 Regents meeting. A copy of the proposed rule is included as (Attachment A).

Procedural History

The proposed amendment was presented to the P-12 Education Committee for discussion at the February 2023 meeting of the Board of Regents. A Notice of Proposed Rule Making was published in the State Register on March 1, 2023, for a 60-day public comment period. Following publication in the State Register, the Department received comments on the proposed amendment. An Assessment of Public Comment is included (Attachment B). The proposed amendment has been revised in response to public comment. A Notice of Revised Rule Making will be published in the State Register on June 28, 2023. Supporting materials are available upon request to the Secretary of the Board of Regents.

Background Information

Extensions:

State and federal law generally requires that a special education impartial hearing decision be rendered within 75 days of receipt of a due process complaint.[1] Impartial hearing officers (IHOs) may grant extensions to this timeframe if requested by the parties provided certain requirements are met. Despite the existing requirements in the regulation, IHOs in New York City grant an inordinate number of extensions, resulting in delays in dispute resolution. This is contrary to the purpose of the special education due process hearing system, which is to timely resolve disputes between parents and school districts.

During the 2021-2022 school year, IHOs granted over 80,000 extensions in New York State, 79,203 (99 percent) of which originated from New York City. This has resulted in exceptionally lengthy hearings. Many such extensions are granted where, despite an agreement between the parties, the parties await final approval of a settlement by the New York City Department of Education. Cases can be extended for months or even years after the original 75-day period has passed[2] and yet still be considered timely as a result of extensions.

Therefore, the Department proposes to amend section 200.5(j)(5) of the Commissioner's regulations related to the issuance of extensions. Specifically, the proposed amendment:

- Includes additional reasons for an IHO to consider in determining whether good cause exists to grant an extension;

- Permits no more than a single extension unless there is a showing of exceptional circumstances by the parties. Exceptional circumstances may include the need to present additional witness testimony that could not reasonably be completed within the length of an ordinary hearing day. The parties must file a sworn statement of an actual conflicting engagement when seeking an additional extension on this basis; and

- Creates a process by which parents or guardians who have settled with a school district may withdraw their complaints and remain in their then-current education placement until final execution of a settlement.

The Department anticipates that the proposed amendments will ameliorate overreliance on extensions by the parties and the IHOs in New York City and ensure more efficient and timely decisions.

[1] IHOs have 45 days to render a decision following the end of the 30-day resolution period.
[2] Some of New York State's oldest cases have been open for over 1,000 days.

Mediation and Resolution:

Mediation and resolution are viable but underutilized due process hearing dispute resolution mechanisms in New York State. In the 2021-2022 school year, there were 18,200 due process complaints filed in New York State, and only 355 requested special education mediation. Of the 355 requests, only 202 mediation agreements were reached. Concerning resolution, the regulations require that a resolution meeting be held in the vast majority of cases prior to proceeding to the hearing (*see* 8 NYCRR 200.5(j)(2)).[3] Nevertheless, of the 18,200 due process complaints filed, only 983 resolution meetings were held, and only 345 written settlement agreements were reached through resolution.

If a district fails to implement an agreed-upon mediation or resolution agreement, such agreements are enforceable "in any State court of competent jurisdiction or in a district court of the United States" (8 NYCRR 200.5(h)(1)(vi), 200.5(j)(2)(iv)). This is likely to be an expensive and lengthy process that may further discourage parents from engaging in mediation and/or resolution. However, the state complaint procedures available in section 200.5(l) of the Commissioner's regulations is an alternative process that parents may find more accessible, and preferable, than judicial enforcement. Moreover, while federal regulations only address the use of judicial enforcement of mediation and resolution agreements, nothing in the federal regulations prohibits the use of nonjudicial mechanisms to resolve allegations that the public agency did not implement a mediation agreement, provided the State's mechanism is not mandatory and does not otherwise delay or deny a parties' right to seek enforcement of the agreement through the judicial enforcement mechanisms (*see* 34 CFR 300.506(b)(7), 300.510(d)(2); https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf).

Given the overwhelming number of due process complaints filed in New York State, the Department intends to make mediation more readily available and accessible to families and to further encourage family participation in resolution sessions, consistent with regulatory requirements. Therefore, the Department proposes to amend sections 200.5(h) and 200.5(j)(2) of the Commissioner's regulations to allow for enforcement of mediation and resolution agreements through the state complaint process outlined in section 200.5(l) of the Commissioner's regulations. Additionally, to promote the use of mediation, the Department proposes to amend section 200.5(h)(1) of the Commissioner's regulations to encourage the use of mediation, consistent with Education Law §4404-a(2).

Rules of Conduct:

The Department has received several complaints from school districts concerning the conduct of non-attorney advocates during impartial due process hearings. Therefore, on September 13, 2022, the Department communicated to all certified IHOs that they must accord all parties a meaningful opportunity to exercise their rights during the impartial hearing and if a party, witness, or advocate engages in abusive or harassing conduct despite warning or admonishment, an IHO should take remedial measures.

[3] In cases where the due process complaint is brought by a school district, districts are not required to hold resolution meetings.

It is imperative that all individuals appearing before an IHO, attorneys and non-attorney representatives alike, remain respectful and courteous throughout the hearing process. Therefore, the Department proposes to amend section 200.5(j)(3) of the Commissioner's regulations to provide that attorneys and representatives must be familiar with, and comply with, all applicable laws, rules, orders, and directions of an IHO. This regulation provides that all attorneys and representatives must conduct themselves at all times in a dignified, orderly, and decorous manner; they are specifically prohibited from engaging in abusive or disorderly behavior. Additionally, they may not disregard the IHO's authority, including refusing to comply with the directions of an IHO during proceedings.

The Department expects that these amendments will ensure a more efficient hearing process and reduce the time in which it takes IHOs to complete hearings.

Use of In-Person, Teleconference, and Videoconference:

The Department proposes to amend section 200.5(j)(3)(xii)(*h*) and (*i*) of the Commissioner's regulations, regarding the use of teleconference and videoconference hearings and whether such hearings are permissible, to simplify the requirements and provide additional flexibility to parents and IHOs. The Department proposes to amend such provisions to provide that IHOs may determine, with the consent of the parent, whether a hearing should be conducted in person, by teleconference, or videoconference. The Department anticipates that this will reduce inefficiencies and confusion related to the use of teleconference and videoconference for such hearings.

Revisions to the Proposed Amendment Following the First Comment Period

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

- Section 200.5(j)(3)(xii) has been revised to provide that the IHO may conduct the hearing either in person, by video conference, or teleconference upon consent of both parties, rather than just the parent.

- Section 200.5(j)(3)(xviii) has been revised to clarify that IHOs may take remedial measures, including taking a break, adjourning the hearing, or declining to allow an attorney or representative to be present during a hearing if he or she will not participate respectfully.

- Section 200.5(j)(5)(iii) has been revised to provide that:

    - No extension longer than 30 days may be granted except upon a showing of substantial hardship, and that no proceeding or deadline may be extended more than once, except upon a showing of exceptional circumstances.

    - Converting a hearing date to a conference date is an extension.

- If a party selects a hearing or pre-hearing settlement conference date without consulting or obtaining the consent of the other party, an application by the other party to extend that date will be decided with due regard to the *ex parte* nature of the scheduling.

- An attorney must submit to the IHO a sworn statement of an actual conflicting engagement when seeking an extension on that basis. Additionally, if a parent is accompanied by a non-attorney representative who requests an extension based upon time constraints imposed by other advocacy work, the non-attorney representative must submit a sworn statement to the IHO.

- If the parties are making substantial progress toward settlement, they may jointly apply for an extension of time. The impartial hearing officer may grant the extension if he or she is satisfied that settlement negotiations are proceeding expeditiously and in good faith.

- Section 200.5(h) has been revised to clarify that a student's right to remain in their then-current educational placement during mediation begins as of the date the parties agree to engage in mediation.

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).

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)

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)

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)

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)

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).

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).

Recommendation

Not applicable.

Timetable for Implementation

It is anticipated that the revised proposed amendment will be presented for permanent adoption at the October 2023 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 45-day public comment period required under the State Administrative Procedure Act for revised rulemakings. If adopted at the October meeting, the proposed amendment will become effective on November 1, 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. Paragraph (5) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(5) …

(i) …

(ii) [The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors] The initial request for an extension may be granted only for good cause shown and only for the minimum necessary length of time. Although the party's consent to an extension request weighs in favor of granting the request, their consent does not, by itself, constitute good cause for an extension. The impartial hearing officer shall consider the following in deciding whether there is good cause for an extension:

(*a*) …

(*b*) …

(*c*) …

(*d*) whether there has already been a delay in the proceeding through the actions of one of the parties[.];

(e) the amount of time the proceedings have been pending;

(*f*) whether the extension will inconvenience any witnesses;

(*g*) whether the extension is requested due to facts beyond the requesting party's control; and

(*h*) any other fact or consideration that the impartial hearing officer considers relevant.

(iii) [Absent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties and/or representatives' scheduling conflicts, 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. The impartial hearing officer shall not rely on the agreement of the parties as a basis for granting an extension.] If a party selects a hearing or pre-hearing settlement conference date without consulting or obtaining the consent of the other party, an application by the other party to extend that date will be decided with due regard to the *ex parte* nature of the scheduling.

(iv) An attorney must submit to the impartial hearing officer a sworn statement of an actual conflicting engagement when seeking an extension on that basis. The sworn statement must state the name and nature of the conflicting matter, the court or tribunal hearing the matter, the judge before whom the matter is scheduled, the date that the conflicting engagement became known to the attorney and the date, time, place, and approximate duration of the engagement. If the parent is accompanied by a non-attorney representative who requests an extension based upon time constraints imposed by other advocacy work, the non-attorney representative must submit a sworn statement to the impartial hearing officer that states the nature of the conflicting matter, the court or tribunal hearing the matter, the impartial hearing officer before whom the matter is scheduled, and the date, time, place and approximate duration of the engagement.

(v) No extension longer than 30 days shall be granted, [after the record close date] except upon a showing of substantial hardship. No proceeding or deadline may be extended more than once, except upon a showing of exceptional circumstances. For the purposes of this paragraph, converting a hearing date to a conference date is an extension.

(vi) Notwithstanding subparagraph (v) of this paragraph, if the parties are making substantial progress toward settlement, they may jointly apply for an extension of time. The impartial hearing officer may grant the extension if he or she is satisfied that settlement negotiations are proceeding expeditiously and in good faith.

(vii) A party may not withdraw and refile or amend a due process complaint for the primary purpose of obtaining additional extensions of time. If an impartial hearing officer determines that a party refiled or amended such a complaint primarily for such reason, he or she shall dismiss the complaint for abuse of process.

[(iv)](viii) 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, 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 (3)(xi)(b) of this subdivision to ensure that the impartial hearing officer's decision is issued by the revised decision due date.

[(v)](ix) The impartial hearing officer shall determine when the record is closed and notify the parties of the date the record is closed. The decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact. The impartial hearing officer shall attach to the decision a list identifying each exhibit admitted into evidence. Such list shall identify each exhibit by date, number of pages, and exhibit number or letter. In addition, the decision shall include an identification of all other items the impartial hearing officer has entered into the record. The decision shall also include a statement advising the parents and the board of education of the right of any party involved in the hearing to obtain a review of such a decision by the State review officer in accordance with subdivision (k) of this section. The decision of the impartial hearing officer shall be binding upon both parties unless appealed to the State review officer. Impartial hearing officers must sign and date their decisions as of the date the decision is being distributed and shall distribute the decision to the parties on that same day. This date shall also constitute the case closure date reported by a district to the Office of Special Education in the New York State Education Department.

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

(*a*) …

(*b*) …

(*c*) …

(*d*) …

(*e*) …

(*f*) …

(*g*)…

(*h*) …

2. Subdivision (h) of section 200.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(h) *Mediation.*

(1) During the resolution period pursuant to paragraph (2) of subdivision (j) of this section, the parties may agree to engage in mediation for any matter for which an impartial due process hearing may be brought. Parties may also agree to engage in mediation at any time, including prior to the filing of a due process complaint notice, for any matter in which an impartial due process hearing may be brought. Where parties agree to engage in mediation prior to the filing of a due process complaint, the student has the right to remain in his or her then-current educational placement as of the date the parties agreed to engage in mediation, consistent with subdivision (m) of this section. If the parties determine that they are unable to resolve the complaint in mediation, the parent must file a due process complaint concerning the matter that is the subject of mediation within 14 days of such determination to continue their current placement, unless the parties otherwise agree. Each school district must ensure that procedures are established and implemented to allow parties to resolve disputes [involving any matter for which an impartial due process hearing may be brought, including matters arising prior to the filing of a due process complaint notice] through a mediation process. Such procedures must ensure that:

(i) …

(ii) …

(iii) …

(iv) …

(v) …

(vi) In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding written agreement that sets forth the resolution and that states that all discussions that occurred during the mediation process shall remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any federal or State court. The agreement shall be signed by both the parent and a representative of the school district who has the authority to bind the school district. The written, signed agreement is enforceable in any State court of competent jurisdiction, [or] in a district court of the United States, or, with respect to matters concerning Part B of the Individuals with Disabilities Education Act, through the state complaint procedures outlined in subdivision (l) of this section.

(2) …

(3) …

(4) …

(5) ...

3. Paragraph (3) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended by adding a new subparagraph (xviii) to read as follows:

(xviii) At all times throughout an impartial hearing, representatives of the parties, including attorneys and non-attorney representatives must:

(*a*) Be familiar with and comply with all applicable laws and rules, and the orders and directions of the impartial hearing officer. Attorneys and representatives shall not disregard the authority of the impartial hearing officer.

(*b*) Conduct themselves at in a dignified, orderly, and decorous manner. At the hearing, attorneys or representatives must address themselves to the impartial hearing officer at all times and cooperate with the orderly conduct of the proceedings. Attorneys and representatives shall not engage in abusive behavior or any disturbance that directly or indirectly disrupts, obstructs, or interrupts the proceedings. An impartial hearing officer may take remedial measures, including taking a break, adjourning the hearing, or declining to allow an attorney or representative to be present during a hearing if he or she will not participate respectfully.

4. Clauses (*h*) and (*i*) of subparagraph (xii) of paragraph (3) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education are amended to read as follows:

(*h*) [The impartial hearing officer may conduct the impartial hearing by video conference during a declared State of emergency issued by the Governor pursuant to an Executive Order,] The impartial hearing officer, upon consent of the parties, may conduct the hearing in person, by video conference or teleconference, provided that all personally identifiable data, information or records pertaining to students with disabilities during such hearing shall be subject to the requirements of paragraph (e)(2) of this section.

[(*i*) The impartial hearing officer may conduct the impartial hearing by video conference or teleconference with the consent of the parent which may be obtained at a pre-hearing conference, or a minimum of 10 days before the scheduled hearing date,

provided that all personally identifiable data, information or records pertaining to students with disabilities during such hearing shall be subject to the requirements of section 200.5(e)(2) of this Part.]

5. Subparagraph (iv) of paragraph (2) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(iv) Written settlement agreement. If during the resolution process, the parent and school district reach an agreement to resolve the complaint, the parties shall execute a legally binding agreement that is signed by both the parent and a representative of the school district who has the authority to bind the school district. Such agreement shall be enforceable in any State court of competent jurisdiction, [or] in a district court of the United States, or, with respect to matters concerning Part B of the Individuals with Disabilities Education Act, through the state complaint procedures outlined in subdivision (l) of this section. A party may void such agreement within three business days of the agreement's execution.

ATTACHMENT B

ASSESSMENT OF PUBLIC COMMENT

Following publication of the Notice of Proposed Rule Making in the State Register on March 1, 2023, the Department received the following comments on the proposed amendment:

1.COMMENT: Multiple commenters stated that allowing for only one (1) extension barring exceptional circumstances imposes unrealistic deadlines and an undue burden on parents, parent attorneys, and parent advocates. Commentors indicated that the proposed extension requirement would not allow for enough time to adequately prepare as, prior to a hearing, they need to gather information, request/complete Independent Educational Evaluations (IEEs), and secure witnesses.

DEPARTMENT RESPONSE: State and federal law generally require that a special education impartial hearing decision be rendered within 75 days of receipt of a due process complaint (i.e., an impartial hearing officer [IHO]) has 45 days to issue a decision, following the 30-day resolution period) (35 CFR 300.515[a]). A key purpose of the Individuals with Disabilities Education Act (IDEA) is that hearings, and the decisions based upon those hearings, be completed expediently.

This reflects that special education hearings should not be characterized by the endless extensions and delays associated with civil litigation. It is imperative to resolve disputes about the education of students with disabilities expeditiously as their needs typically change from year to year.

The proposed regulations provide ample room for parties to request and receive extensions. For example, contrary to one objection, the proposed regulation explicitly

identifies the “need to present additional witness testimony that could not reasonably be completed within the length of an ordinary hearing day” as a reasonable ground for an extension. Indeed, the purpose of holding a hearing is to provide parties the opportunity to present testimony, subject to cross-examination, before an IHO.

With respect to other hypotheticals as to what does or does not constitute an extraordinary circumstance, it is within the discretion of an IHO to make such a determination, based on the illustrative examples identified in the regulation. No changes to the proposed rule are needed.

2.COMMENT: Multiple commenters stated that allowing for only one (1) extension barring exceptional circumstances will adversely impact participation in hearings due to scheduling conflicts for parents, attorneys, witnesses, and districts. These commenters state that this denies parents the flexibility to seek extensions of hearings to accommodate work, childcare schedules, school vacations and personal leave as well as the needs of attorneys and witnesses. Other commenters expressed concern that limiting extension would have a disparate impact on less wealthy families because it is easier for families with two parents with professional jobs and childcare for their children to appear at a hearing date. Commenters also noted that IDEA requires that hearings be conducted at a time and place that is reasonably convenient to the parents and child involved. Commenters further observed that because complaints in NYC are filed at the same time of the year, the inability to obtain extensions will further overwhelm the system.

DEPARTMENT RESPONSE: With respect to the definition of extraordinary circumstances and the IHO’s role in making such, see the Department’s response to

comment 1 above. It is the Department's position that an unrepresented parent's unavailability due to work constitutes an extraordinary circumstance.

With respect to school vacations and personal leave (or the schedules of attorneys and witnesses), SED regulations currently state that "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Thus, comments objecting to these portions of current regulations are outside the scope of the present regulation.

With respect to the filing of due process complaints at a specific time of year, the Department has no control over when due process complaints are filed. However, the Department notes that parents are not required to file due process complaints at any specific time of the year. Indeed, the IDEA's statute of limitations is two years from the date parents knew or should have known of the alleged violation (34 CFR 300.511[e]; Education Law § 4404[1]). Thus, no changes to the proposed rule are needed.

3.COMMENT: Several commenters stated that permitting no more than a single extension unless there is a showing of exceptional circumstances by the parties will increase the backlog of due process complaints. One commenter predicted that IHOs will not accept cases that cannot be adjudicated within the compliance period and, therefore, accept appointment to less cases. Another commenter predicted that many families will withdraw their due process complaints and refile them to receive additional extensions of time, which, in turn, will result in a backlog of new cases. Commentors also predicted that the proposed regulations will lead to more appeals from hearings that were rushed or incomplete, thus burdening the Office of State Review/courts.

DEPARTMENT RESPONSE: With respect to the definition of extraordinary circumstances and the IHO's role in making that determination, see the Department's response to comment 1 above.

With respect to IHOs taking fewer cases, this is entirely speculative and unsupported by evidence. The Department notes that, currently, IHOs are required to accept at least one case every two years in order to maintain their certification (8 NYCRR 200.1[x][4][ii]).

With respect to parties withdrawing and subsequently refiling cases, the proposed regulation has been further amended to ensure that a party may not withdraw and refile or amend a due process complaint for the primary purpose of obtaining additional extensions of time. If an IHO determines that a party has refiled or amended such a complaint for the purposes of extending the timeline, he or she shall dismiss the complaint for abuse of process.

To the extent commenters maintain that the regulation will generate additional appeals to the Office of State Review or courts, this is entirely speculative and unsupported by evidence. Thus, no further changes to the proposed regulation are needed at this time.

4.COMMENT: Multiple commenters stated that the proposed amendments limiting extensions will make it more difficult for parents to find legal representation. Commentors stated that because cases are filed within the same time periods, it will cause cases to have the same compliance dates and hearing periods. Other commentors maintained that, given the complexity of the cases and the limited availability of affordable legal services, there will be too much demand and not enough attorneys/advocates. This will, in turn, allegedly deprive families of representation.

DEPARTMENT RESPONSE: Parents have a right to timely resolution of due process complaints. To the extent that attorneys or advocates have accepted a volume of clients based on the assumption that their due process complaints will or will likely be extended indefinitely, the Department's priority is the rights of children and families, not a particular business model.

With respect to cases being filed at the same time, as noted above, the statute of limitations is two years from the date parents knew or should have known of the alleged violation (34 CFR 300.511[e]; NYS Education Law § 4404[1]). No changes to the proposed rule are needed.

5.COMMENT: Multiple commenters stated that allowing for only one extension conflicts with the IDEA. These commenters opine that this would undermine parental rights and IHOs' authority to grant extensions.

DEPARTMENT RESPONSE: The proposed regulation does not allow for a single extension. It permits, as amended, a single exception for good cause shown, and subsequent exceptions "upon a showing of exceptional circumstances." As noted above, one of the key purposes of the IDEA is to ensure that due process hearings are completed expeditiously. The proposed regulation does not undermine an IHO's authority to grant or deny requests for extensions or a parent's right to request an extension; the proposed changes ensure that extensions are granted for valid reasons, not as a matter of course. Thus, no changes to the proposed regulation are necessary.

6.COMMENT: Some commenters stated that the proposed regulation will prohibit parents from extending or resetting timelines for cases by prohibiting the withdrawal and refiling of a due process complaint for the primary purpose of obtaining additional extensions of time. Commenters opined that the proposed limiting extension negatively

impacts parents' due process rights by putting parents in the position of proceeding to hearing when they, their attorney, or witnesses are unavailable—or forfeiting their right to a hearing entirely.

DEPARTMENT RESPONSE: State Education Agencies have the authority to set reasonable limitations on the conditions under which extensions of time may be granted; parties do not have the right to obtain as many extensions as they would like for any reason. The commenters are correct that the proposed regulations bar parties from withdrawing and refiling due process complaints for the purposes of obtaining additional extensions of time. This would constitute an end-run around the regulations.

With respect to proceeding to a hearing when parents or their attorneys are unavailable, IHOs retain the discretion to consider such circumstances and determine whether a request for an extension should be granted. Limiting extensions will not result in parents having to "forfeit" their right to a hearing—extensions should be the exception, not the rule, in a due process hearing. As a result, no changes to the proposed rule are needed.

7.COMMENT: Several commenters opined that allowing for only one (1) extension barring exceptional circumstances will adversely impact case timelines because IHOs are often only appointed as the compliance date is ready to expire.

DEPARTMENT RESPONSE: The Department recognizes that the New York City Public Schools (NYCPS) has struggled to timely assign cases to IHOs in the face of tens of thousands of due process complaint notices filed per year. Nevertheless, the granting of copious—and in many instances needless—extensions is an unacceptable remedy. That is why, on December 1, 2021, the Department, NYCPS and Office of Administrative Hearings and Tribunals (OATH) agreed to establish an administrative

team of full-time IHOs within OATH to manage NYCPS's current caseload. As the transition to OATH continues, the problems noted by the commenters have become less frequent, and the Department expects that these issues will no longer be a concern in the near future. Therefore, no changes to the proposed rule are needed.

8.COMMENT: Commenters argued that constraining an IHO's ability to grant extensions requested by both parties for settlement will only waste time and money. Multiple commentors stated that the six month tolling of the statute of limitations following dismissal in furtherance of settlement would encourage disingenuous settlement discussions in an attempt to extend a favorable pendency placement. Other commentors expressed concerns that during the allowable six-months for settlement negotiations the two-year statute of limitations will be tolled, and it is impossible for parents to know how long will be needed for settlement.

DEPARTMENT RESPONSE: As noted above, a key purpose of the IDEA is to ensure the expeditious resolution of due process complaints. The due process system cannot be used as a holding tank for cases that may settle months or years down the line (even if such cases are technically "timely" as a result of copious extensions).

Nevertheless, in response to public comment, the Department has decided to withdraw the six-month tolling procedure described in the earlier proposal.

9.COMMENT: Several commentors stated that the requirement of an attorney affirmation as to their availability interferes with an attorney's ability to appropriately represent their clients. The commentors stated that attorneys are juggling busy work and life schedules. Several commentors also noted that, in addition to submitting an affirmation, school districts attorneys should be afforded the opportunity to support the extension. Several commentors also felt that the requirement to obtain an affirmation of

unavailability creates an additional burden for pro se parents and non-attorney advocates. One commentor stated that the consequences for submitting an insufficient affirmation were unclear. An additional commentor stated that non-attorney advocates should be required to provide a sworn affidavit, not a sworn statement.

DEPARTMENT RESPONSE: Initially, the Department proposes to replace the word “affirmation” with “sworn statement” to provide greater clarity as to what attorneys and non-attorney representatives must provide.

The Department recognizes the possibility that the proposed regulations may affect the case loads of attorneys representing families at due process hearings. The Department also acknowledges the difficulties inherent in the practice of law. Nevertheless, attorneys are responsible for balancing their clients’ interests with their own schedules.

Nothing in the proposed regulation would prohibit a school district attorney from expressing support for an extension request. Additionally, pro se parents are not required to submit sworn statements.

With respect to signed statements by a non-attorney advocate, the Department understands that requiring a sworn statement by a non-attorney advocate presents additional work. However, the burden of preparing such a statement is minimal at best and outweighed by the importance of limiting the number of unnecessary extension requests in due process hearings.

The purpose of a sworn statement is to support a showing of exceptional circumstance for an extension request – in this case, as the result of an attorney or non-attorney advocate’s unavailability due to another pending matter. Thus, to the extent an attorney or non-attorney advocate provides a sworn statement that the IHO finds

insufficient, the IHO retains discretion to determine the consequences thereof, which could include resubmission of the sworn statement or denial of the extension request. The Department also agrees with the commenter to the extent that this section does not clearly indicate that the sworn statement is made for the purpose of evaluating a request for an extension. Therefore, the Department has made changes to the proposed regulation to address this issue.

10.COMMENT: Multiple commenters stated that one extension is often insufficient to obtain an independent educational evaluation (IEE). If additional extensions are not granted, commenters argue, parents will be forced to withdraw their due process complaints and then refile once the reports come in. Other commenters stated that the need to obtain IEEs should be a permissible reason for granting more than one extension.

DEPARTMENT RESPONSE: A parent is not required to file a due process complaint to obtain an IEE at public expense. Per section 200.5 (g) (1) of the Commissioner's regulations, "if a parent disagrees with an evaluation obtained by the school district, the parent has a right to obtain an IEE at public expense. A parent is entitled to only one IEE at public expense each time the school district conducts an evaluation with which the parent disagrees." And per section 200.5 (g) (1) (iv) of the Commissioners Regulations "if a parent requests an independent educational evaluation at public expense, the school district must, without unnecessary delay, either ensure an independent educational evaluation is provided at public expense or file a due process complaint notice to request a hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria." Thus, the only reason a request for an IEE should be the subject of a

due process hearing is if a school district commences a hearing to defend the appropriateness of its evaluation. Furthermore, the proposed amendment does not preclude an IHO from granting more than one extension for exceptional circumstances as determined by the IHO. This would include awaiting the completion of an IEE, if the IHO determines that the circumstances so warrant.

11.COMMENT: One commentor stated that filing a state complaint for the implementation of mediation agreements is untenable because the process may extend beyond the 60-day timeframe with which a state complaint investigation must be completed.

DEPARTMENT RESPONSE: According to the Commissioner's regulations, state complaints must allege a violation that occurred not more than one year prior to the date that the state complaint is received. As noted by the commentor, the Department must issue its decision within 60 days of receipt of the complaint.[4] It is unclear from the comment why state complaints alleging violations of the parties' implementation of a mediation agreement would be unable to follow these timelines. As a result, no changes to the proposed rule are needed.

12.COMMENT: Several commenters objected to the proposed amendment allowing for students to remain in their then-current educational placement during mediation. Commenters maintained that since mediation is voluntary, requiring the district to provide pendency during mediation may dissuade school districts from participating in mediation. They also complain that maintenance of a student in their then-current educational placement may be costly. Furthermore, without an IHO

[4] Except where exceptional circumstances exist with respect to the complaint or when the parent and school district agree to extend the time to engage in mediation (8 NYCRR 200.5[1],[2]).

present, there would be no one with authority to make a pendency determination if there was a dispute regarding the student's placement during mediation. The commenters recommend deletion of the pendency requirement. Alternatively, commenters suggest the addition of language to clarify that no adverse inference may be made at a hearing if the district declines to participate in mediation. Finally, some commenters stated that since attorney fees are not available in mediation, it is unlikely that parents represented by counsel will be able to use that process.

DEPARTMENT RESPONSE: Contrary to commenters' assertions, the Department anticipates that this process will be less costly, or at least no more expensive, to parents and school districts overall than adjudication of a due process complaint. Moreover, there is no reason to assume that maintaining students in their then-current educational placement during mediation would increase costs to a school district; this requirement attaches upon the commencement of a due process complaint. Rather than dissuade districts from utilizing mediation, the Department's believes that this regulatory change will encourage districts to utilize mediation for cases that do not belong in the due process system (i.e., requests for IEEs, as asserted by commenters in connection with comment 10).

To the extent commenters maintain that lack of an IHO would make it more difficult to deal with disputes concerning a student's pendency placement, we remind commenters that mediation is optional; in the event a dispute over pendency arises, parties may choose to file a due process complaint at that time. It is the Department's hope, especially in situations where pendency is uncontested and the issues are clearly defined (e.g., when a district has no intention of arguing that it provided a free

appropriate public education), that mediation can serve as an efficient alternative to initiating due process.

Having the ability to access pendency as part of a mediation rather than having to submit an impartial hearing request provides additional options to more parties interested in mediation. The IDEA does not prohibit students from accessing pendency during a dispute that is being addressed through mediation. With respect to concerns that an adverse inference could be made at a hearing, the Department has no reason to believe that an IHO would or should draw such an inference and declines to address it within this regulation.

With respect to attorneys' fees, this comment is beyond the scope of the proposed regulation. However, the Department notes that such fees are generally available to a prevailing party who achieves a result that materially changes the legal relationship between parties.

Therefore, no changes to the proposed rule are needed.

13.COMMENT: Several commenters support the efforts to make mediation and resolution agreements a more accessible and feasible option for families to resolve disputes. In particular, these commenters support the ability of students to assert their pendency rights. However, they believe that there are a few important areas of ambiguity in the proposed amendments to § 200.5(h) that should be clarified, including: (1) the regulation should provide more detail concerning how a student or their parent may assert their right to remain in their current placement through an agreement to participate in mediation; (2) there is no clear guidance in the proposed regulation as to how to measure when that determination takes place; and (3) for parents who wish to obtain counsel to represent them at a due process hearing, a 14-day timeline to retain

an attorney and file a complaint is unrealistic, thus requiring an extension or engaging an attorney prior to mediation, which may undermine the goal of promoting mediation as an alternative to due process hearings.

DEPARTMENT RESPONSE: The Department appreciates the supportive comments and has considered the recommended changes to the language of the amendment.

The Department declines to provide any further information explaining how a parent may assert their right to remain in the then-current educational placement within the regulatory text. If a district fails to maintain a student's then-current educational placement during mediation, parents would have the right to challenge the violation of the regulation under subdivision (l) of this section.

With respect to the 14-day timeline to retain an attorney following the parties' inability to reach a resolution at mediation, this timeline is included only to ensure a student's continued right to placement in their then-current educational placement. Parents may otherwise utilize all time afforded to them under the two-year statute of limitations the file a due process complaint (see 34 CFR 300.511[e]).

The Department agrees that the proposed regulation is vague in identifying when a student's right to their then-current educational placement shall goes into effect. Therefore, the Department has made changes to the proposed regulation to address this issue.

14.COMMENT: Several commenters supported the intent of the proposed regulation establishing rules of conduct but suggest changes to the proposed language relating to IHO enforcement of these provisions. One commenter recommended that an IHO be given the authority to impose a monetary sanction or dismiss the case if a

participant engages in abusive or disorderly behavior. The commenter also recommended the addition of language “to reflect that conduct at CSE meetings, mediation or following the filing of an impartial hearing request which is violative of these provisions should be actionable through State Complaint process.” Another commenter stated that the regulation as written demeans the role of the IHO and recommended language requiring parties to follow “reasonable directives” of IHOs and explicitly authorizing hearing officers to issue remedial orders. One commenter stated concern with the focus on parent advocates, the subjective nature of the standards and the possibility of reinforcing implicit bias and potential abuse of power by a hearing officer.

DEPARTMENT RESPONSE: Generally, IHOs have discretion to determine the course and conduct of due process hearings. While the proposed rule articulates a minimum standard of appropriate conduct to be exercised by the parties during the hearing, the Department also believes that any further steps taken are within the discretion of the IHO, so long as they are consistent with their powers and duties under federal and state laws and regulation. The Department has added illustrative examples of what actions an IHO may take under the circumstances, consistent with prior guidance to the field. Additionally, if an advocate or attorney can no longer represent the interests of a child, IHOs have the authority to appoint a guardian *ad litem* (8 NYCRR 200.5 [j][3][ix]).

With respect to implicit bias and potential abuse of power by the IHO based on the subjective nature of these standards, such concerns can already be adequately addressed through other processes; for example, an appeal to the Office of State

Review consistent with 8 NYCRR 200.5(k) and/or a complaint against an IHO consistent with 8 NYCRR 200.21(b). As a result, no changes to the proposed rule are necessary.

15.COMMENT: Several commenters supported providing flexibility for IHOs to conduct hearings by video conference or teleconference, with the consent of the parent. Several commenters noted that they have seen an increase in family engagement and an increase in the opportunity for meaningful participation in many cases over the past few years by allowing increased flexibility with the medium in which hearings are conducted. One commenter also proposed that the school district's consent to a virtual hearing should be required.

DEPARTMENT RESPONSE: The Department appreciates the supportive comments. With respect to the comment suggesting that a school district's consent to a virtual hearing should also be required, the Department has amended the rule to require a school district's consent to remote participation.

16. COMMENT: Multiple commentors stated that the proposed regulations do not address the root cause of the hearing backlog in New York City. Commenters raised general concerns and objections relating to the special education due process in the NYCPS. One commenter, for example, stated that the proposed regulation does not address NYCPS's failure to implement IHO's orders. Several commenters stated that the NYCPS is understaffed and typically does not send a representative or sends a representative who was unprepared to move forward. Multiple commentors stated the way to reduce the burden of these hearings on the system is to improve the efficiency of the NYCPS settlement process including the comptroller approval process.

DEPARTMENT RESPONSE: These concerns are outside the scope of the proposed amendments and, as such, need not be addressed.