



**QUESTIONS RELATING TO IMPARTIAL HEARING PROCEDURES PURSUANT TO
SECTIONS 200.1, 200.5 AND 200.16 OF THE REGULATIONS OF THE
COMMISSIONER, AS AMENDED EFFECTIVE FEBRUARY 1, 2014**

(Revised September 2016)

CONSOLIDATION

- 1. How is a consolidated case entered into the Impartial Hearing Reporting System (IHRS)?**

When consolidated, the new complaint is entered as case closed 'consolidated'.

- 2. Does an IHO need to submit a consolidation decision?**

The IHO must issue a written order as to whether he/she will or will not consolidate the complaints. The written order must include the reason(s) [i.e., analysis] for the IHO's decision. While the IHO's consolidation order must be provided to the parties, there is no requirement that the consolidation order be submitted to the New York State Education Department (NYSED) pursuant to section 200.5(j)(5).

- 3. What happens in two pre-2/1/14 cases with two IHOs already appointed and after 2/1/14, it is determined that the cases should be consolidated?**

It is unclear in the above question who determined the two cases should be consolidated. The determination that cases should, or should not be consolidated is made solely by the IHO and does not rely on agreement of the parties to consolidate or not to consolidate. However, in a situation where, prior to the effective date of the regulations, two IHOs were appointed to pending cases involving the same parties and the same student with a disability, a request may be made by a party to consolidate the two cases. In this situation, the request should first go to the IHO who was most recently appointed. If this IHO agrees, the IHO of the earlier pending complaint may be asked to consider consolidation. The IHO of the earlier complaint must make the appropriate considerations. If the IHO agrees to consolidate the cases, the IHO of the more recent case must recuse him/herself from the case. If the IHO does not consolidate the cases, the IHO appointed to the second case retains his/her appointment.

4. Will there be a new resolution period for the case consolidated into a pending case? If so, how does this new resolution period affect the hearing timeline?

Yes, a resolution meeting must be scheduled pursuant to the requirements of section 200.5(j)(2)(i). When considering whether to consolidate one or more separate requests for due process, the IHO must consider whether consolidation would impede a party's right to participate in the resolution process.

5. A parent filed two requests for two impartial hearings; one month apart. In one request she is represented by counsel and in the other request she is acting pro se without representation by counsel. Are the 'parties' considered the same?

Yes. Because the parties are the same in both complaints, the IHO of the pending case must be appointed. The IHO should consider any adverse financial or other detrimental consequence which might result from the consolidation of the due process complaints, such as the consideration that the parent has engaged legal counsel for only one of the complaints.

6. There is a new case that requires a determination on consolidation from the IHO on a pending case. That IHO is active, but has notified the district that he/she is temporarily unavailable to accept new cases for a specified period of time. Is he/she still appointed to the case?

Yes. If the IHO has a pending due process complaint (i.e., is an 'active' IHO) but has notified the district that he/she wants to be listed as temporarily unavailable to accept new cases, then that IHO must be appointed to determine whether the new complaint should be consolidated. However, if the IHO determines that the case should not be consolidated, but rather should proceed separately as an individual complaint, and the IHO is unavailable to accept the new case, then a new IHO should be appointed in accordance with the rotational list.

7. Consolidation determinations now require a written order. Please define order. Is a simple email stating that the IHO will not consolidate a new case with an old case enough or is something more formal needed? If something more formal is needed, please specify what needs to be included.

For this purpose, the term 'order' and 'decision' are used interchangeably. The IHO must issue a written order as to whether he/she will or will not consolidate a subsequent due process request into a pending case. The written order must include the reason(s) [i.e., analysis] for the IHO's decision. The regulations do not address the format that the IHO's written order must be in, but an email is not an appropriate format. A formal order with a caption, the required contents, the date

and the signature of the IHO is required. The IHO's order must be transmitted directly to the parties.

8. Does the parent have any say in the consolidation?

The determination that cases should, or should not be consolidated is made solely by the IHO and does not rely on agreement of the parties to consolidate or not to consolidate. In the interests of judicial economy, consolidation must be a consideration in subsequent and pending due process complaints involving the same parties and the same student with a disability. However, in making the consolidation decision, the IHO must consider relevant factors that include, but are not limited to the potential negative effects on the child's educational interests or well-being which may result from the consolidation; any adverse financial or other detrimental consequence which may result from the consolidation of the due process complaints; and whether consolidation would impede a party's right to participate in the resolution process, prevent a party from receiving a reasonable opportunity to present its case, or prevent the IHO from timely rendering a decision. It is within the discretion of the IHO whether to consult with the parties on these matters prior to the IHO making a decision on whether to consolidate the complaints.

9. Since the 2/1/14 regulatory changes require a single case resulting from case consolidation, how should two cases consolidated prior to 2/1/14 be handled at this time in order to meet the requirements of the current regulations?

If cases were consolidated prior to 2/1/14, then the revised regulations do not apply. If a case is consolidated after 2/1/14, then the new procedures must be implemented.

10. Although section 200.5(j)(3)(ii)(a) calls for a written order on the issue of consolidating the hearing requests, there seems to be no procedure or time- line regarding the right of the parties to be heard or offer written submissions on the issue. At what point are the parties themselves notified of the consolidation? What are the parties' right to/and timeline for being heard?

The determination that cases should, or should not be consolidated is made solely by the IHO. In making the determination, the IHO must consider the factors listed in question 9 above. It is at the discretion of the IHO to determine the information needed to make these considerations. Upon determination, the IHO issues a written order as to whether he/she will or will not consolidate the complaints, including the reason for the determination. A copy of the written order must be provided to the parties.

11. Can an IHO on his/her own consolidate a case (no new request has been filed)?

The question, as written, is unclear. If an IHO is already appointed to two cases involving the same parties and the same student with a disability, he/she may consolidate the two cases pursuant to the revised regulations in effect as of 2/1/14. The determination that the cases should be consolidated is made solely by the IHO and does not rely on agreement of the parties.

12. There are two ongoing cases for a student, both filed within one year. A third complaint is then filed involving the same parties and student with a disability.

A) Which IHO is appointed to consider consolidation - the one with the newer or the older of the two cases?

The IHO with the most recent pending due process complaint involving the same parties and student with a disability would be appointed to the third complaint.

B) If he or she is not available, does the case go back into rotation or go to the IHO of the other pending case?

If the IHO is not available to hear the new complaint, the IHO notifies the district that he/she is not available to hear the new complaint, and the district appoints a new IHO to the subsequent case by following the district's rotational selection process.

13. If a complaint is filed while the student is a preschool student but when a subsequent complaint is filed the student has turned school age, can the two complaints be consolidated?

Yes. But the IHO must consider whether consolidation would prevent the IHO from timely rendering a decision. The decision of the IHO for a preschool child with a disability must be rendered within 30 days after the time period pursuant to section 200.5(j)(5).

HEARING RECORD

14. After a final decision has been rendered, the IHO must promptly transmit the record to the school district together with a certification of the materials included in the record. Can an IHO charge a district for postage or his/her time in transit. How should IHOs transmit the record?

Costs incurred by the IHO in the transmittal of the record to the school district must be considered allowable costs relating to prehearing, hearing and post- hearing activities for which the IHO is entitled to reimbursement.

The regulations do not address a specific method of transmittal of the record to the school district. However, it is recommended that the IHO deliver the complete record in person or by certified mail in order to ensure verification of receipt by the school district.

- 15. What should an IHO do with the record if the case settles after the hearing has commenced and transcripts have been generated or if the case is withdrawn after the hearing has commenced and transcripts have been generated?**

In both situations described above (settlement or withdrawal for another reason), the party is withdrawing the complaint. Therefore, the IHO is required to issue an Order of Termination explaining the circumstances of the withdrawal and the conditions of the dismissal (i.e., with or without prejudice). The record accumulated to date would be transmitted to the school district together with a certification of the materials included in the record.

TIMELINE TO RENDER A DECISION

- 16. How does the district determine that its due process complaint has been received by the parent?**

The district should establish a procedure to verify the date by which the due process complaint notice is received such as sending the request through certified mail, return receipt requested.

EXTENSIONS

- 17. Can an IHO set forth a procedural rule that a request for an extension will only be considered within one week of the current compliance date?**

It is the responsibility of the IHO to manage the hearing in a manner that would ensure a timely decision. It would not be inappropriate for the IHO to set forth such a procedure, provided it is consistent with due process and the hearing rights of the parties and the IHO allows exceptions for consideration of requests based on a compelling reason or a specific showing of substantial hardship.

- 18. The revised regulations state that the IHO shall promptly respond in writing to each request for any extension and shall set forth the facts relied upon for each extension granted. Is a form with boxes checked off sufficient for identifying facts – e.g., a box that notes ‘unavailability of witness’ – or is more detail required?**

The requirement that an IHO must respond in writing to each request for an extension is not a new requirement. The amendment to the regulations added that the IHO must promptly respond in writing and also added that his/her written response must set forth the facts relied upon for each extension granted and the response must become part of the record. Therefore, a form with boxes checked off providing the reason for the request (e.g., availability of witnesses) does not provide sufficient detail as to the facts relied upon by the IHO when rendering an extension request decision.

SETTLEMENT AGREEMENTS

- 19. Section 200.5(j)(5)(iii) states "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 ... No extension shall be granted after the record close date." Does that mean that only one extension can be granted for settlement discussions?**

The regulations do not limit the number of extensions the IHO may grant for purposes of settlement agreements. However, in general, the IHO cannot grant more than one extension at a time.

- 20. Regulations state that no extension shall be granted after "the" record close date. If an extension is granted, a new record close date and a new compliance date are calculated. It sounds as if there can be only one extension based on settlement discussions (i.e., "an" extension) and that no extension shall be granted after "the" record close date, which makes it sound like the request needs to be made after end of the resolution session, or during the resolution period. What happens if there is a request for settlement discussions during the course of the testimony? And if a request is made at that time, is it limited to the record close date that is in effect at the time of the request?**

Nothing in the regulations would require a request for an extension based on settlement discussion to be made only after the end of or during the resolution period. (It would not be appropriate for a party to request an extension during the resolution period.) The parties could be working towards settlement throughout the course of the hearing. When an extension is granted, the IHO must project the date by which the IHO will issue his or her decision based upon the need to accommodate the extension request. This date can be calculated by projecting the date the hearing will be completed; projecting the date the record will be closed (which includes the due date for any post-hearing briefs and the date that the IHO anticipates receiving the transcript of the hearing); and adding up to 14 calendar days to the latest date described above for the IHO to issue his or her decision.

The actual record close date is determined by the IHO when hearings are completed and post-hearing submissions are received by the IHO. Once the post-hearing submissions are received, the IHO must determine that the record is closed. The IHO may not grant a request for an extension after the record close date.

WITHDRAWAL OF A DUE PROCESS COMPLAINT NOTICE

21. Should an IHO issue an order of termination if the only issue addressed at a hearing is pendency?

If a party seeks to withdraw the due process complaint after the IHO rendered a decision on pendency¹, the IHO must issue an order of termination if the pendency issue was addressed after the commencement of the hearing. For this purpose, commencement of the hearing does not mean the initial prehearing conference if one is conducted, but rather the first date the hearing is held after such conference. The timeline for commencing the hearing can be found in section 200.5(j)(3)(iii). Therefore if a pendency hearing is conducted as the first hearing session after the timeline for commencing the hearing in section 200.5(j)(3)(iii) and the party then seeks to withdraw the due process complaint, the IHO must issue an order of termination.

22. Is a pendency hearing that takes place after the close of the resolution period considered the commencement of the hearing? If the case is withdrawn after this pendency hearing, is an order of termination required?

An order of termination would be required because the voluntary withdrawal was made after the commencement of the hearing.

23. Does a pendency hearing held during a resolution period commence the impartial hearing timeline?

No. A pendency hearing held during a resolution period does not commence the impartial hearing timeline. A hearing to discuss and determine the pendency placement of the student may occur during a resolution period but such a hearing held at that time does not commence the impartial hearing itself, until the resolution period has expired. If there is a dispute as to the status of the student during the impartial hearing (i.e., pendency), this issue should be raised immediately with the IHO. Under those circumstances, the IHO needs to render a written decision regarding pendency as soon as possible and prior to determining any other issue relating to the evaluation, identification or placement of a student or the provision of a free and appropriate public education. The decision of the IHO relating to pendency may be immediately appealed to the

¹ Note that the IHO's order regarding the student's status during due process proceedings (i.e., pendency) would no longer be in effect once the hearing is terminated

Office of the State Review pursuant to section 200.5(k) of the Regulations of the Commissioner.

24. Could a pendency hearing commence the impartial hearing timeline?

Yes. An impartial hearing may commence with a 'pendency hearing' if it is the first hearing to take place within 14 days of (a) or (b) of section 200.5(j)(3)(iii) of the regulations.

25. Does commencement of hearing for purposes of termination orders mean the same as commencement of hearing for purposes of amendments to due process complaints?

It is not exactly clear what is being asked here. With amended due process complaints, the applicable timelines for an impartial due process hearing, including the timelines for the resolution process, recommence at the time the party files an amended due process complaint notice. For the purposes of withdrawals, the commencement of the hearing means the first date the hearing is held after a prehearing conference (if a prehearing conference was conducted).

26. Regulations require a written order of termination for hearings that have commenced, upon notice from the party seeking withdrawal to the IHO (and to the other party). How does this affect the compliance date? For example, the district notified the IHO of the withdrawal on February 6, 2014. Will that continue to be the effective date of the withdrawal, or does this regulation requiring an order of termination alter the calculation of the date a hearing is withdrawn?

The date of withdrawal is the date indicated in the order of termination by the IHO.

27. How does the new regulation regarding withdrawal affect the State's calculation of an IHO's timely conclusion of cases? Just how will the conclusion of a hearing be measured?

It is unclear what is being asked in this question. An IHO must render a decision in accordance with timelines in regulations. If a case is withdrawn prior to the decision due date, the case would be recorded as withdrawn. If the case is withdrawn after the decision due date, the State would have in its records that although the IHO failed to render a timely decision, the case was subsequently closed as a result of a withdrawal.

28. Do orders of termination have to be submitted to NYSED?

No.

29. What is "an order of termination"? Does NYSED have a sample order?

A written order of termination is the written decision of the IHO as to the conditions of the withdrawal of the due process complaint notice. The order of termination must include a notice of appeal rights to the State Review Officer. The State has not published a sample 'order of termination'.

30. Once an order of termination is written, what does the IHO do with it? There is no "record" in this case as there never was a pre-hearing conference.

In each case, there is a record. The record would include copies of the due process complaint notice and any response to the complaint; all briefs, arguments or written requests for an order filed by the parties for consideration by the IHO; all written orders, rulings or decisions; any subpoenas issued by the IHO; all written and electronic transcripts of the hearing; any and all exhibits admitted into evidence at the hearing; and any other documentation deemed relevant and material by the IHO or as required by section 200.5 of the Regulations of the Commissioner. The IHO must promptly submit the record to the school district in accordance with the requirement in section 200.5(j)(5)(v) and (vi) together with a certification of the materials included in the record.

31. When a party subsequently files a due process complaint within one year of a withdrawal of a complaint that includes the same school, the same issues but a different school year... is the claim to be considered substantially similar enough to assign back to the previous IHO? Which is the priority for same or similar? School year? Service?

Provided that the subsequent complaint is received within 12 months of a withdrawn complaint, the district must consider whether the new request includes substantially similar claims as one that was previously submitted and withdrawn. There is no "priority for same or similar." In the event school personnel are unclear regarding the similarity of the issues, the IHO appointment should go to the IHO who was appointed to the withdrawn request, who would then determine whether the issues are substantially similar.

However, a due process complaint seeking tuition reimbursement for a different school year should not be deemed to be "the same or substantially similar claim" as made for a prior school year, therefore requiring appointment of the same IHO. Because the claim for a subsequent tuition claim would be based on the individualized education program (IEP) developed for the student for a different school year or the failure to develop an IEP for the new school year, a new IHO must be appointed from the district's rotational appointment list rather than appointment of the same IHO who was appointed to the prior complaint that was withdrawn within one year. However, if the subsequent tuition claim also includes the tuition reimbursement claim that was previously withdrawn by the

party, the school district shall appoint the same IHO appointed to the prior complaint unless the IHO is no longer available to hear the new due process complaint notice.

- 32. If there is a new case that needs to be assigned to an IHO who had previously been appointed as the IHO to a case that was withdrawn within a year and the IHO is active but happens NOT to be available on the particular day that the new request comes in... is he/she still appointed to the case?**

Yes. The February 2014 Special Education Field Advisory states the following regarding **withdrawal**: If the party subsequently files a due process complaint notice within one year of the withdrawal of a complaint that is based on or includes the same or substantially similar claims as made in a prior due process complaint notice that was previously withdrawn by the party, the school district shall appoint the same IHO appointed to the prior complaint unless that IHO is no longer available to hear the new due process complaint notice.

The IHO who heard the case that was withdrawn within one year of the receipt of a subsequent due process complaint based on or including the same or substantially similar claims must be appointed to that subsequent case. If that IHO is unavailable to accept the case, the district must appoint a new IHO according to the rotational selection process.

- 33. There is both an open and a withdrawn case filed within one year for the same student with a disability and with the same or substantially similar issues to a new request. Is the IHO who has the pending case appointed to consider consolidation or is the IHO from the withdrawn case appointed to the case? If the IHO from the withdrawn case is not available to hear the case, does the case go back into rotation or go to the IHO with the pending case?**

In this unique situation, the case should be appointed to the IHO who has the pending case for consideration of consolidation with the pending complaint. However, if the IHO is not available, the IHO appointment should go to the IHO of the previously withdrawn case.

- 34. There are two cases withdrawn within one year with two different IHOs. A new request is filed with the same or substantially similar issues to both of the withdrawn cases. Which IHO is appointed? If he/she is not available, does the case go back into rotation or is the IHO of the other withdrawn case appointed?**

In this unique situation, the district would appoint the same IHO appointed to the most recent prior complaint that was withdrawn within one year. If the IHO who was previously appointed to the case that was most recently withdrawn is no longer available to hear the refiled due process complaint notice, the district must appoint the IHO who was previously appointed to the other case which was withdrawn within one year. If that IHO is no longer available to hear the refiled due process complaint

notice, the district must appoint the next IHO in accordance with the rotational selection list.

35. Must an IHO be compensated for activities related to the issuance of an order of termination?

Yes. A written order of termination is the written decision of the IHO as to the conditions of the withdrawal of the due process complaint notice. As such, it is included in the prehearing, hearing and post-hearing activities to which an IHO is entitled compensation.