

## **Summary and Guidance on Amendments to the Regulations of the Commissioner of Education Regarding Special Education Impartial Hearing Procedures**

Sections 200.1(x), 200.5(j) and 200.16 of the Regulations of the Commissioner of Education were amended, effective February 1, 2014, relating to special education impartial hearings. Information below provides a summary of the changes with corresponding guidance.

### **Certification of IHOs**

Section 200.1(x)(4)(vi) requires that an impartial hearing officer (IHO) be willing and available to accept appointment to conduct impartial hearings. If an IHO has not been willing or available to conduct an impartial hearing within a two-year period of time, the State may rescind the IHO's certification unless the IHO can provide good cause to the Commissioner, including, but not limited to, cause resulting from poor health as certified by a physician, active military service or similar extenuating circumstances.

- Decisions affecting the certification of an IHO for unwillingness or unavailability to accept appointment will be made on a case-by-case basis.
- IHOs will have the opportunity to provide information to the New York State Education Department (NYSED) for its consideration of whether good cause exists.

### **IHO Appointment**

Section 200.5(j)(3)(i)(c) provides that an IHO shall not accept appointment if he or she is serving as the attorney regarding a due process complaint hearing in the same school district, or has served as the attorney regarding a due process complaint hearing in the same school district within a two-year period of time preceding the offer of appointment, or if the IHO is an individual with special knowledge or training with respect to the problems of children with disabilities<sup>1</sup> who has accompanied and advised a party from the same school district regarding a due process complaint hearing within a two-year period.

- The regulations presume that an IHO, who is appointed to a due process complaint hearing in a school district where he or she is serving as the attorney to a due process complaint hearing in the same school district, or who has served as the attorney regarding a due process complaint hearing in the same school district within a two-year period of time preceding the offer of appointment, or if the IHO is an individual with special knowledge or training with respect to the problems of children with disabilities who has accompanied and advised a party from the same school district regarding a due process complaint hearing within a two-year period, has a conflict of interest.
- It is the responsibility of the IHO to decline appointment to a case if he or she has a conflict of interest as described above. The two-year period is calculated from the date of the offer of appointment, and not from the date that the due process complaint notice was submitted.

<sup>1</sup> Section 200.5(j)(3)(vii) provides that the parties to the proceeding may be accompanied and advised by legal counsel and by individuals with special knowledge or training with respect to the problems of students with disabilities.

## **Consolidation and multiple due process complaint notices for the same student**

A new section 200.5(j)(3)(ii)(a) was added to the Regulations of the Commissioner to establish procedures for the consolidation of due process complaint notices that are filed while an impartial hearing is pending before an IHO involving the same parties and the same student with a disability. Consolidation means that the separate due process requests would be heard by the same IHO. The procedures for consolidation, as prescribed by regulation, are outlined below:

1. **IHO appointment:** Once appointed to a case in accordance with the rotational selection process, the IHO with the pending due process complaint must be appointed to a subsequent due process complaint involving the same parties and student with a disability, unless that IHO is unavailable. See guidance below for district procedures for appointment of the IHO.
2. **Discretion of the IHO:** The IHO may consolidate the new complaint with the pending complaint or provide that the new complaint proceed separately as an individual hearing before the same IHO. 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.
3. **Considerations:** When considering whether to consolidate one or more separate requests for due process, in the interests of judicial economy and the interests of the student, 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 of the due process complaints;
  - any adverse financial or other detrimental consequence which may result from the consolidation of the due process complaints; and
  - whether consolidation of the due process complaints would impede a party's right to participate in the resolution process; prevent a party from receiving a reasonable opportunity to present its case; and/or prevent the IHO from timely rendering a decision.
4. **Written order required:** 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.
5. **Timelines:** If the due process complaints are consolidated, the timeline for issuance of a decision in the earliest pending due process complaint shall apply.

Nothing in the regulations regarding consolidation of hearings precludes a parent from filing a due process complaint on an issue separate from issues set forth in a due process complaint already filed.

- Once a case has been consolidated, an IHO may grant specific extensions of time beyond the 45-day timeline of the earliest pending due process complaint at the request of either the school district or the parent and for good cause, considering the factors set forth in the regulations for granting extension requests.
- When a due process complaint is consolidated with a pending impartial hearing, it is not considered an amendment to the first due process complaint for purposes of section 200.5(i)(7).
- The IHO is not required to submit a redacted copy of the consolidation order to NYSED.

**District procedures for IHO appointments  
upon consolidation of due process complaints**

- Each school district must timely select an IHO from the list of IHOs certified by the Commissioner of Education and in accordance with the rotational selection process.
- However, if a due process proceeding is pending and a subsequent due process complaint is received for the same student involving the same parties, the district must appoint the IHO who was appointed to the pending case to the subsequent case.
- The exception to the rotational selection process and appointment of the IHO in this case would not disrupt the rotational selection process for requests for IHO appointments for other cases. For example:
  - IHO “G” is the next IHO to be appointed from the district’s alphabetical rotation list.
  - A due process complaint is received on a student with a pending impartial hearing in which IHO “M” is the IHO.
  - The district must appoint IHO “M” to this case.
  - IHO M remains in the rotational list in his current location.
  - The next IHO appointment would go back to the rotational list with IHO “G” to be appointed.
- If the IHO determines that the cases should not be consolidated, but should proceed as separate complaints, and the IHO notifies the district that he/she is not available to hear the new complaint, the district must appoint a new IHO to the subsequent case by following the district’s rotational selection process.
- Therefore, the district must, in their procedures for IHO appointments, have a process to determine whether a due process complaint on the same student is pending. As such, school personnel assigned with Board of Education appointments of IHOs should maintain files and/or logs of due process complaint notices and, when in doubt, seek timely review by special education personnel familiar with the student.
- NYSED has revised its sample due process complaint notice to request information as to whether there is a pending due process complaint. However, as stated above, districts

should not rely on this as the only source of information on pending impartial hearings.

- For technical assistance on IHO appointments outside of the IHO rotational list, districts must contact the Office of Special Education, Due Process Unit, at 518-473-0170 or [specedih@mail.nysed.gov](mailto:specedih@mail.nysed.gov).

### **NYSED Impartial Hearing Record System (IHRIS) Case Numbers**

Case numbers are assigned in IHRIS for purposes of data collection and monitoring of timely

- Upon receipt of a new due process complaint notice, the district must enter the case into IHRIS and IHRIS assigns a new case number for tracking purposes.
- If the IHO of the pending case consolidates the subsequent case into that pending case, the subsequent complaint is subsumed under the pending case number and the case number for the new due process complaint notice is reported as 'consolidated<sup>2</sup> in IHRIS.
- If the IHO determines that the subsequent case should not be consolidated into the pending case, but will be heard by the same IHO as a separate case, the case number assigned upon receipt of the due process complaint is maintained.
- If a new IHO is appointed because the IHO of the pending case is not available to hear the separate case, the case number assigned upon receipt of the due process complaint is maintained.

### **Decisions of the IHO**

Section 200.5(j)(4) provides that:

- an IHO cannot issue a so-ordered decision on the terms of a settlement agreement reached by the parties in other matters not before the IHO in the due process complaint or amended due process complaint; and
- a party is not precluded from seeking to admit a settlement agreement or administrative decision into evidence.

- An IHO's authority to render a decision is limited to those matters described in 34 C.F.R. section 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of a free appropriate public education (FAPE) to the student) or permissible under State law, and that are properly raised in the due process complaint notice or amended due process complaint notice before the IHO.
- Nothing in the regulations would limit an IHO from so-ordering an appropriate remedy reached through a settlement agreement that resolves issues included in the due process

<sup>2</sup> IHRIS is being modified to accept "consolidation" as a case closure reason. Until such time as that change is made, districts should report the reason as "withdrawn" and notify IHRIS so that a notation can be made in the case notes that this closure was due to consolidation.

complaint notice or amended notice before the IHO, provided the terms of the settlement agreement are limited to the identification, evaluation or educational placement of the child or the provision of FAPE to the child pursuant to 34 C.F.R. section 300.503(a)(1) and (2) or to those matters under State law in which an IHO has authority to render a decision.

### **Timeline to render a decision**

Section 200.5(j)(5) conforms the timeline for an IHO to render a decision consistent with the federal timeline in 34 CFR Part 300 as follows:

- **If a school district files the due process complaint:** The decision must be rendered not later than 45 days<sup>3</sup> from the day after the public agency's due process complaint is received by<sup>4</sup> the other party and NYSED.
- **If the parent files the due process complaint notice:** The decision is due not later than 45 days<sup>5</sup> from the day after one of the following events, *whichever shall occur first*:
  - a) both parties agree in writing to waive the resolution meeting;
  - b) after either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;
  - c) if both parties agree in writing to continue mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process; or
  - d) the expiration of the 30-day resolution period.
- In cases where extensions of time have been granted beyond the applicable required timelines, the decision must be rendered and mailed no later than 14 days from the date the IHO closes the record.

### **Requirement to transmit a copy of the IHO decision to NYSED**

Section 200.5(j)(5) requires that, within 15 days of mailing the decision to the parties<sup>6</sup>, the IHO must submit the decision to NYSED's Office of Special Education. All personally identifiable information, in accordance with the guidelines provided by the Commissioner, must be deleted from the copy forwarded to the Office of Special Education.

### **Extensions to the due date for rendering the impartial hearing decision**

Section 200.5(j)(5)(i) provides that an IHO:

- may grant a request for an extension of time beyond the date the decision is due at the request of either the school district or the parent; and
- shall not solicit extension requests or grant extensions on his or her own behalf or unilaterally issue extensions for any reason.

<sup>3</sup> Except for preschool and expedited impartial hearings [8 NYCRR sections 200.16(h)(9) and 201.11(b)(3)].

<sup>4</sup> 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.

<sup>5</sup> Except for preschool and expedited impartial hearings [8 NYCRR sections 200.16(h)(9) and 201.11(b)(3)].

<sup>6</sup> Prior to the amendment, the IHO was required to provide NYSED with a copy of a redacted decision at the same time he/she issued the decision to the parties.

Section 200.5(j)(5)(ii) provides that an IHO may grant a request for an extension only after fully considering the cumulative impact of each of the following:

- whether the delay in the hearing will positively contribute to, or adversely affect, the child’s educational interest or well-being;
- whether a party has been afforded a fair opportunity to present its case at the hearing in accordance with the requirements of due process;
- any adverse financial or other detrimental consequences likely to be suffered by a party in the event of delay; and
- whether there has already been a delay in the proceeding through the actions of one of the parties.

Section 200.5(j)(5)(iii) provides that:

- absent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of 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 IHO cannot rely on the agreement of the parties as a basis for granting an extension; and
- no extension shall be granted after the record close date.

- In determining whether to grant any extension, the IHO must consider each of the factors set forth in section 200.5(j)(5)(ii), including those that require a compelling reason or specific showing of substantial hardship or good cause as set forth in section 200.5(j)(5)(iii).
- In cases where extensions of time have been granted beyond the 45-day timeline, the decision must be rendered and mailed no later than 14 days from the date the IHO closes the record. The IHO determines the date the record will be closed in consideration of the date post-hearing briefs are to be submitted, if any. The record close date may be revised for good cause by the IHO, but the revised record close date cannot extend the date the decision is due. The decision is due not later than the last date of the extended timeline or not later than 14 days after the record close date, whichever date comes first. An IHO cannot grant a request for an extension of the timeline even if the record close date is revised.
- The record close date that the district must record in IHRS is the date the IHO identified to the parties as the date the record was closed.

Section 200.5(j)(5)(iv) provides that the IHO:

- must promptly respond to the parties in writing to each request for an extension and set forth the facts relied upon for each extension granted;
- must include the response to the parties on the extension request as part of the record;
- may render an oral decision to an oral request for an extension if the discussions are conducted on the record, but must subsequently provide that decision in writing and include it as part of the record; and

- must, for each extension granted, set a new date for rendering his or her decision, notify the parties in writing of such date, and if applicable, revise the schedule of remaining hearing dates that may have been previously set forth in a prehearing order in order to ensure that the IHO's decision is issued by the revised decision due date.

- The record of the hearing must include not only the dates by which extensions were granted, but the IHO's reasons (analysis of the considerations and facts) for granting such requests.
- Upon granting each extension, the IHO must revise the remaining hearing dates to ensure the IHO's decision is timely rendered.

### **Impartial Hearing Record**

Section 200.5(j)(5) requires that, 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.

Section 200.5(j)(5)(vi) requires that the "record", for purposes of special education impartial hearings, include:

- 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 issued in the case including an order granting or denying a party's request for an order and an order granting or denying an extension of the time in which to issue a final decision in the matter;
- any subpoenas issued by the IHO in the case;
- all written and electronic transcripts of the hearing;
- any and all exhibits admitted into evidence at the hearing, including documentary, photographic, audio, video, and physical exhibits;
- any other documentation deemed relevant and material by the IHO; and
- any other documentation as may be otherwise required by section 200.5.

- The term "promptly" means without delay. Generally it would be expected that the IHO would transmit the record within a week after the decision of the IHO is sent to the parties.
- 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.

## **Withdrawals of requests for due process hearings**

Section 200.5(j)(6) establishes the procedures for when a party wishes to withdraw his/her request for a due process hearing as follows:

- Prior to the commencement of the hearing, a voluntary withdrawal by the party requesting the hearing shall be deemed by the IHO to be without prejudice unless the parties otherwise agree. The commencement of the hearing means the first date the hearing is held after a prehearing conference (if a prehearing conference was conducted).
- Except for withdrawals made prior to the commencement of the hearing, a party seeking to withdraw a due process complaint must immediately notify the IHO and the other party. The IHO must issue a written order of termination.
- A withdrawal shall be presumed to be without prejudice except that the IHO may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice.
- The decision of an IHO in the order of termination that a withdrawal shall be with or without prejudice is binding upon the parties unless appealed to the Office of State Review.
- 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 term “with prejudice” for purposes of these regulations means that the party is barred from bringing another action on the same claim.
- The term “without prejudice” for purposes of these regulations means the party can request a due process hearing at a subsequent date on the same issues.
- For purposes of this regulation, “commencement of the hearing” does not include a prehearing conference (if one was held), but rather refers to the first hearing after the prehearing conference.
- Withdrawals should be in writing with notice to the IHO and to the other party.
- When the party who requested the hearing withdraws the due process complaint prior to the commencement of the hearing, the party notifies the district and the IHO and the district reports to IHRS, as of the date of that notification, that the case is ‘withdrawn’.
- If the party who requested the hearing decides to withdraw his/her due process complaint after the hearing has commenced, the date of withdrawal of the hearing is the date indicated in the order of termination issued by the IHO.



- 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 (SRO).
- While the regulations do not prescribe a timeline for the IHO to issue his/her order of termination, the IHO must do so in a timely manner and prior to the conclusion of the 45-day timeline or any appropriate extended timeline, while still providing the parties with a reasonable opportunity to be heard on the issue.
- An IHO's activities relating to the withdrawal of a case are activities relating to the hearing for which the IHO must be compensated.
- The record related to a case that is withdrawn after the commencement of the hearing must include the IHO's order of termination and the record must be promptly transmitted to the school district.
- Because the order of the IHO as to the conditions of the withdrawal of the case could be appealed to the SRO, the order of termination must be included in the record submitted to the district; however, a redacted copy of the order does not need to be submitted to NYSED.

#### **District procedures for IHO appointments relating to withdrawals**

- If a party withdraws his/or her due process complaint notice (either before or after the hearing commences) and 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 must appoint the same IHO appointed to the prior complaint.
- Under this circumstance the district is authorized (and required) to appoint the IHO outside of the alphabetical rotational selection process.
- If a subsequent request for a due process hearing is submitted on the same student within one year of a withdrawal of a previously submitted due process complaint that was dismissed with prejudice, the district must still appoint the IHO and the IHO would then, on the face of the complaint notice, rule on whether the complaint is based on the same or substantially similar claims as those that were withdrawn with prejudice.
- The exception to the rotational appointment of an IHO would not disrupt the rotational selection process for requests for IHO appointments for other cases. For example:
  - IHO "G" is the next IHO to be appointed from the district's alphabetical rotation list.
  - A due process complaint is received on a previously withdrawn case to which IHO "M" was the previously appointed IHO.
  - The district must appoint IHO "M" to this case.

- The next IHO appointment would go back to the rotational list with IHO “G” to be appointed.
- IHO “M” remains in the rotational list in his current location and would be appointed after IHO “L”.

If the IHO who was previously appointed to the case that was withdrawn 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 (in the above example, IHO “G”).

Therefore, the district must, in their procedures for IHO appointments, have a process to determine whether a due process complaint on the same student that involved the same or substantially similar claims was submitted and withdrawn within 12 months of the date the new due process complaint notice was submitted. As such, school personnel assigned with Board of Education appointments of IHOs should maintain files and/or logs of due process complaint notices and, when in doubt, seek timely review by school district special education personnel familiar with the student.

The decision as to whether a due process complaint includes substantially similar claims as one that was submitted and withdrawn within 12 months is made by and based on the best judgment of school district personnel. If school personnel are unclear regarding this decision, the IHO appointment should go to the IHO who was appointed to the withdrawn request, who could then determine that the issues were not substantially similar and that a new IHO should be appointed in accordance with the rotational schedule.

NYSED has revised its sample due process complaint notice to request information as to whether a previous complaint for the same student that involved the same or substantially similar claims was previously submitted and withdrawn within 12 months.

For technical assistance on IHO appointments outside of the IHO rotational list, districts must contact the Office of Special Education, Due Process Unit, at 518- 473-0170 or [specedih@mail.nysed.gov](mailto:specedih@mail.nysed.gov).