

New York State Administrative Law Judges Association



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February 14, 2012

Hon. Kenneth Slentz
Deputy Commissioner P-12 Education
State Education Department
Office of P-12 Education
State Education Building
89 Washington Avenue
Albany, NY 12234

RE: Comments on Proposed Amendment of Section 200.1
and 200.5 of Title 8 NYCRR

Dear Deputy Commissioner Slentz:

The New York State Administrative Law Judges Association (NYSALJA) writes to convey comments on changes proposed to the New York State Regulations of the Commissioner of Education related to the special education impartial hearing process.

NYSALJA is the New York State affiliate of the National Association of Administrative Law Judiciary (NAALJ), the largest professional organization devoted exclusively to administrative adjudication in the executive branch of government. Both NYSALJA's and NAALJ's membership include a significant number of special education impartial hearing officers, and NAALJ itself has recently formed a section devoted specifically to the particular issues arising in special education impartial hearings.

The objectives of NYSALJA include promoting and advocating on behalf of improvements in the administrative process as well as studying and comparing administrative law and practice in New York and other jurisdictions. In this context, NYSALJA analyzes and comments on pending law and regulation that can affect administrative adjudication in New York State. The focus of such comments is the process itself; NYSALJA takes no position on issues that affect the substantive law relating to the parties that appear in administrative settings, but comments only on party-neutral issues related to the proceedings themselves.

The attached comments were drafted by a group of more than forty Impartial Hearing Officers (IHOs), many of whom are our members, whose aggregate experience conducting special education hearings totals more than 450 years. These comments respond in detail to the range of proposed changes, but two areas raise particular concern about access to justice for often-unrepresented families and about protection of the Federally-mandated due process rights of the parties appearing in special education hearings. We are concerned that the regulations as proposed might greatly increase the cost to families and to school districts while potentially raising barriers to access to justice.

IHOs are neutral participant/observers in the proceedings they conduct. We believe our IHO members bring a unique perspective to issues relating to the impact of the proposed regulations on the special education impartial hearing process. Indeed, the IHO members who participated in developing the attached comments have conducted thousands of hearings in the course of their many years of service. These comments reflect the consensus of the more than 40 IHOs who responded to a broadly-inclusive invitation to meet to discuss the revisions to the regulations proposed by the State Education Department (SED). The group discussed the SED proposals and drafted the comments, and the alternative proposed amendments, and supports them unanimously.

These comments are premised on the fact that the special education hearing process is a distinctive adjudicative setting. It is characterized by a number of factors, no one of which is unique, but which, taken together, are expressive of particular values in the underlying federal legislation.

Specifically:

1. Special education IHOs and State Review Officers (appellate decision-makers, hereafter SROs) have a very high level of autonomy deriving from interpretation of the federal statutory requirement that they be "impartial" and therefore must be independent of the school district whose recommendations are under review.

- In New York State, trial-level impartial hearing officers do not work for the agency whose cases they hear. They are paid by those agencies but are supervised, outside the context of any single hearing, by the Commissioner of Education and the State Education Department. SROs are employees of the State Education Department, but are mandated to be independent and impartial, by both statute and case law.

- The decisions of IHOs and SROs are not recommendations but are, rather, final orders, binding on the agency.

- Accordingly, agencies may not modify what IHOs order but must appeal them to the Office of State Review (where they are to be reviewed by independent and impartial SROs, whose orders, in turn, may not be appealed to the agency but may be challenged only in State or Federal court).

2. The parties in impartial hearings come to the table in the context of necessarily long-standing relationships concerning a child's education, in which they must find ways to work together, routinely for as long as two decades. The hearing process is part of an effort to resolve disputes arising from that ongoing relationship, and is part of a procedural continuum aimed at facilitating, not antagonizing, the parties' capacity to work together.

3. Parents in these hearings may, and often do, initiate the hearing pro se and come to the table without representation of any kind.

4. State law and regulation is subordinated to the Federal IDEIA funding statute, which requires that any state receiving funds must comply in detail with Federal law and regulation concerning special education due process rights, including the impartial hearing procedure. States may adopt legislation that more fully protects the parties' rights under the IDEIA, but may not limit or diminish those rights in any way. The Federal statute is, in short, a floor, not a ceiling.

For these reasons, we conclude that regulations crafted to define and implement the hearing process should be assessed against several criteria designed to recognize the characteristics of the setting and to further its attendant goals:

- The hearing process should minimize (1) the adversity of the parties, (2) the time and intensity of the litigation, and (3) the tendency to drift away from substance.
- The hearing process should provide an opportunity for the parties to achieve settlement between themselves whenever possible.
- The hearing process should, to the greatest extent possible, focus on the presentation of evidence by clinicians, educators, and parents, and minimize excessive legal formalities.
- The process is defined by the statute, but the rights conferred belong to the parties jointly rather than to the IHO, the State, or the district. Where the parties are in agreement, the process should be structured to implement that agreement and regulations should serve that goal.

We encourage you to review the attached comments closely and urge you to consider the revisions proposed by our colleagues.

Yours truly,

A handwritten signature in dark ink, appearing to read 'James T. McClymonds', written over a horizontal line.

James T. McClymonds
President
New York State Administrative Law Judges Association

Attachment

**COMMENTS OF IMPARTIAL HEARING OFFICERS
ON PROPOSED CHANGES TO NY STATE REGULATIONS
GOVERNING IMPARTIAL HEARINGS
FEBRUARY 14, 2012**

I. Introduction.

As neutral participant/observers in the proceedings they conduct, Impartial Hearing Officers (IHOs) bring a unique perspective to the amendment of Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings proposed by the New York State Education Department (NYSED), P-12: Office of Special Education.

More than 40 IHOs responded to an open call to discuss these recently published proposals. The group that convened was remarkably diverse, ranging from fewer than two years of service as an IHO to more than thirty; aggregating in total almost 500 years of experience as IHOs. The group included men and women, people of color, people of diverse ages, people whose practices span upstate and down, New York City, suburbs and rural districts; in their private practices some represent and have represented school districts and others represent families. We who came together to discuss these proposals are, in short, a largely random sample of the range of IHO backgrounds and experiences.

We discussed the SED proposals and are fully supportive of the goal to achieve a far higher level of compliance with Federally-mandated timelines, and we agree that amendment of the existing regulations can help to accomplish this. We agree in large measure with many parts of the proposed amendments. We disagree, however, in two crucial areas – pre-hearing conferences and requests for, and decisions regarding, extensions of the compliance timeline.

Strikingly, at the conclusion of our discussion we found that we were unanimous across a broad range of comments, both favoring many aspects of the proposals and opposing the two areas just described.

The following conveys those shared individual views.

II. Proposed requirement on IHO availability.

We support the proposal to amend the regulations to make explicit a practice that has already been applied in the past, requiring IHOs to have been willing and available to accept appointment to conduct impartial hearings within the preceding two years, unless excused of that obligation upon provision to the Commissioner of good cause.

We note, however, that IHO's should be permitted to toll the two-year time window by taking a voluntary leave of absence from the list if they believe that something foreseeable and time-limited may make them unavailable for an extended period. The proposed language is, we think, sufficiently clear that it requires an affirmative finding of the IHO's unwillingness and unavailability for a consecutive two-year period. Our support for this proposal is predicated on the premise that a finding requires an affirmative factual demonstration and not a mere presumption based on number of hearings held. Failure to have conducted a hearing over a two-year period could not, by itself, provide sufficient basis for

such a finding, nor could declining to hear one or more cases provide sufficient basis for such a finding absent an affirmative factual demonstration that the IHO continued to decline appointment continuously for two or more years. If this is not the intent of the proposal, it needs to be revised, clarified, and published for comment again.

III. Proposed limitation on IHO representation of families.

We strongly support the proposals insofar as they extend the existing conflict of interest limitations applied to IHOs who represent school districts to those who represent children and families in special education proceedings within those school districts. We support, therefore, the proposed language for amendment of 200.5(j)(i)(c), but note that this language requires further amendment to 200.1 to define the new term of art utilized in the proposed language: “direct special education advocacy.” Without such a definition, the limitation becomes unenforceably vague.

IV. Proposed consolidation regulation.

Similarly, we strongly support the proposed amendment to permit multiple duplicative and overlapping cases to be consolidated where appropriate. Because of the unique circumstances surrounding each individual case, we believe, however, that the detailed language in the proposal:

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 impartial hearing officer shall consider factors that include,

- the similarity of the issues of the due process complaints;
- 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;
- whether the parties have sought mediation with regard to a due process complaint notice pursuant to subdivision (h) of this section; and
- whether consolidation would:
 - impede a party’s right to participate in the resolution process prescribed in paragraph (2) of this subdivision;
 - prevent a party from receiving a reasonable opportunity to present its case in accordance with subparagraph (xiii) of this paragraph; or
 - prevent the impartial hearing officer from timely rendering a decision pursuant to paragraph (5) of this subdivision.

should be deleted from the proposal and disseminated in a guidance memorandum.

V. Proposed treatment of withdrawn and re-filed case.

We strongly support the proposals’ effort to address problems of *res judicata* and forum shopping that arise from present treatment of complaints that are withdrawn and refiled. We note, however, that the existing proposals go substantially further than the IDEIA appears to permit or than standard *res judicata* doctrine would routinely allow. Whether or not a post-commencement withdrawal is with or without prejudice should be a matter for the IHO to determine in light of the facts of the case. Insofar as the matter, if re-filed, will return to the same IHO, the presumption should be that the matter may be

withdrawn without prejudice unless a balancing of the equities supports an order that the withdrawal is with prejudice.

VI. Concern about proposal on settlement orders.

We are uncertain why it would be beneficial to limit the range of settlement order that may be so-ordered by IHOs, or what the consequences (intended and unintended) of doing so would be.

VII. Pre-hearing conference proposals.

We share the concern of the State Education Department that IHOs be expected to “move the hearing forward in a smooth, orderly fashion, and to render decisions in an efficient and expeditious manner.”

However we strongly feel that there are significant problems with the proposed amendment of 200.5(j)(xi) that would impede access to justice for the families guaranteed that right under Federal law, violate the State statutory allocation of the burden of proof in special education hearings, and violate fundamental tenets of due process in administrative proceedings.

In particular, we note the following problems:

1. The regulations as written would require a pre-hearing conference – effectively, an additional hearing day prior to the commencement of the hearing -- for every impartial hearing requested on or after July 1, 2012, to be held during the 30 day resolution period mandated by statute (or its statutory alternatives). The overwhelming majority of hearings are resolved during resolution or contemporaneous mediation, and do not presently go to a hearing. [<http://www.p12.nysed.gov/specialed/spp/apr2012/ind17.htm>] The Federal and State law are designed to minimize the involvement of attorneys in these proceedings, and to render them as informal as possible. Adding a highly structured adversarial legal proceeding, such as the pre-hearing conference contemplated in the proposed regulation, to the resolution period would disrupt the fabric of this statutory preference for non-adversarial mechanisms, and is, we believe not permissible under the Federal statute.
2. Even if such a pre-hearing conference during the resolution period were legally permissible, it would be ill-advised to mandate it in every case. This would add, quite literally, thousands of conferences and thousands of formal, written orders, to cases that will resolve without a hearing commencing at all, significantly increasing cost and personnel burdens on school districts throughout the state. In the 2010-11 school year, the most recent for which data was available at the time of writing, 3320 out of 6147 hearings requested were resolved without a hearing. Of the 2827 hearings that were convened at all, fewer than one out of seven proceeded to a final adjudication and order. Thus *at a minimum* 3320, perhaps as many as 5766, unnecessary hearing conferences would be required to be conducted. In other words, the vast majority of all the newly-mandated formal conferences and orders would be

unnecessary, increasing cost dramatically and fueling adversity among parties who, more than 93% of the time, manage to resolve their differences in a non-adversarial manner. [data derived here as well from the federally-sponsored website: <http://www.p12.nysed.gov/specialed/spp/apr2012/ind17.htm>]

3. Even if the proposed amendment were restructured to require pre-hearing conferences only after the resolution and, if applicable, mediation processes had concluded without resolution, the requirement of a written order in the remaining cases would vastly add to the cost and unnecessary over-lawyering of the impartial hearing process. In 2009-10, that would have generated 1353 such orders, even though 925 of those cases were nonetheless resolved without a final order from an IHO (by settlement, dismissal, or voluntary withdrawal). Only 425 cases were fully litigated.
4. Even if the amendment could somehow be narrowed to apply only to those 425 cases or some approximation of them, the proposed language would violate the State's burden of production and burden of persuasion law in special education hearings. That law places both burdens exclusively upon the school district to respond to the problem(s) articulated in the complaint. Existing law permits the complaint to be challenged as insufficient if it does not meet statutorily-mandated substantive minima, but once deemed sufficient, or after the timeframe for a sufficiency challenge has passed, the burden expressly shifts to the school district. Despite this mandate, the proposed language requires that a conference be held for the purpose (in part) of "simplifying or clarifying the factual issues in dispute." Changes in a sufficient complaint are exclusively within the authority of the complainant, and imposing changes, even by virtue of a desire for simplicity or clarity, would shift the burden improperly. To be sure, parties may stipulate to agreed-upon facts, and the complainant may amend the complaint with the consent of the other party and perhaps the IHO, but an Order modifying, or even restating in different words, the issues in the complaint would deprive the complainant of their statutory right to make the other side fully meet its burden. There are, to be sure, problems even in the existing language in this regard, and so we propose a revision of the proposal that would modify the existing provision in a manner that addresses this.
5. There are similar problems surrounding requiring the parties to list evidence to be submitted and witnesses to be called more than 5 days prior to commencement of the hearing. The appended proposal would address these concerns as well.
6. Mandating pre-hearing conferences would place a further potential access to justice burden on *pro se* litigants, who may ill-afford an additional day of being present at a detailed and potentially lengthy pre-hearing conference, or even of making themselves available for an extended conference call during business hours. A mandatory prehearing conference effectively undermines the ability of and opportunity for a *pro se* parent to present his or her case and could require a *pro se* parent to take off time from work to attend a conference that

will not address or resolve his/her substantive issues and may even be used in a manner that could intimidate a legally unsophisticated parent. The proposed language grossly exacerbates this problem, violating generally accepted principles of due process by requiring the IHO to go forward with the conference even if a party cannot attend, irrespective of the reason, and requiring issuance of an Order even in the absence of a party.

7. The Federal and State statutes require provision of a translator for all parents who are non-English-speaking, yet another logistical nightmare and cost implication for a significant number of these proposed newly-mandated pre-hearing conferences.

VIII. Compliance timelines.

We fully support the efforts to meet the Federal definition of timely completion of all cases brought in New York (i.e., completion within the 45 day timeline or properly-ordered extension of that timeline). However, we believe that the proposed changes in compliance deadline requirements will defeat the intended purpose of the proposed regulations, and will cause more cases to be out of compliance: they will further complicate already confusing regulations, will impose additional, unnecessary burdens on the parties and IHOs, will be hard to implement, and will violate the parties' rights under IDEIA. Any proposed regulations should simplify, rather than encumber, the process, and leave these deeply fact-specific circumstances in the hands of the IHO (where they are squarely placed by Federal law), who are best able to balance the parties' demands and interests of speedy justice. Federal concern about lack of compliance will be better served by clarifying the process and removing unnecessary impediments to timely conclusion of impartial hearings.

Specifically, we note the following problems with the existing and proposed compliance regulations:

1. Federal law affords both parties the right to request an extension of the 45 day default compliance period. This is a matter of some importance, insofar as nationally the compliance data suggest that only one case in 4 out of those fully adjudicated is completed within 45 days in the median state's experience, and, drawing again on the statistics cited above, only 1 in 2.7 in the group identified as "highest" in complying with the sole federal measure of timeline compliance (Indicator 17, the per cent of cases completed within 45 days or a duly-authorized extension; see <http://nichcy.org/laws/idea/partb/indicators-partb>). While an extension is not a matter of right for either of the parties, or even the two together when seeking an extension jointly, the parties each have a Federal right to have the IHO decide whether or not to grant their request. In New York, however, regulation forbids IHOs to grant extensions for a variety of reasons, limits the duration of extensions, and places constraints on the manner in which they are granted. By encroaching on the rights of parties to seek extensions, and encroaching on the discretion of IHOs to grant them (without any basis for doing so in State law), the regulations treat the Federal statute as a ceiling, not a floor, and violate the fundamental precept that states may not foreclose rights afforded under the IDEIA.

2. The existing regulations further impinge on public policy by barring (in the present rules) or limiting (in the proposed regulations) extensions to permit settlement negotiations and execution.
3. The existing regulations impinge on districts' capacity to present the witnesses essential to meet their burden under the law by prohibiting extensions based on school vacations, schedules, or the limits imposed by employment contracts.
4. The existing regulations impinge on districts' and parents' capacity to be represented by the counsel of their choosing by prohibiting extensions based on attorney calendar and availability.
5. Federal and State regulations require scheduling consistent with the reasonable convenience of the parents, but not of the district. When extensions are discouraged, IHOs are forced by law to prioritize district availability behind that of the parents, rather than using their judgment to permit extensions that might afford comparable respect for district constraints when appropriate. The comments to the applicable Federal regulations acknowledge that doing so might well be desirable, but declined to make doing so mandatory.
6. Special education litigation in New York is profoundly reliant on the record built at the impartial hearing level. Although appeals may be taken to the SRO, no new evidence available at the time of hearing may be presented. No oral argument or trial is permitted at the SRO appeal. And appeals to the federal district courts are routinely decided on summary judgment motions relying entirely on the record below. As a result, the trial record constitutes not merely all that the IHO will have before him or her, but all that will be available on appeal up through the administrative and judicial reviews. It is potentially devastating to the record to deny extensions, as the proposed regulations by and large require "because of vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reason."
7. Witness availability, attorney availability, and the availability of parties are not mere procedural luxuries, they strike to the substantive heart of the parties' capacity to be heard. Interference with these core elements of due process severely narrows the parties' right to seek extensions under the IDEIA and should be eliminated from the proposed regulations. Settlement negotiations should be encouraged as a third means of non-adversarial dispute resolution (after resolution and mediation), not discouraged as they are in the proposals. A draft of proposed language that follows the federal standard is appended and endorsed by our comments here.

For the foregoing reasons we urge the Regents to revise the proposals amending 200.5(j)(3)(xi), 200.5(j)(4), and 200.5(j)(5) in a manner fully consistent with the language appended to these comments.

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APPENDIX 1 – Proposed Revised Amendments to Part 200

Proposals for 200.1

Add definition: Record of an Impartial Hearing:

The record of the impartial hearing includes:

- All evidence admitted during the hearing.
- All subpoenas issued by the hearing officer during the hearing.
- All scheduling, interim, and final orders issued by the hearing officer as a part of the hearing.
- A verbatim written transcript of the hearing.

Add definition: Compliance Date.

The 45th day after commencement of the hearing shall constitute the Compliance Date unless an extension has been duly granted pursuant §200.5(j)(5)(i).

Proposals for Amendment of 200.5

Replace pre-hearing conference regulation and proposals [200.5(j)(3)(xi)]:

A prehearing conference with the parties may be scheduled. Such conference may be conducted by telephone. A transcript or a written summary of the prehearing conference shall be entered into the record by the impartial hearing officer. A prehearing conference is for the purposes of:

- a. establishing date(s) for the completion of the hearing;
- b. addressing other administrative matters as the impartial hearing officer deems necessary to complete a timely hearing.

Replace compliance date regulations and proposals, record closed date regulations, and decision date regulation [200.5(j)(5)]:

(i) The district is responsible for maintaining the record of the impartial hearing for a period of at least five years from the date of the hearing officer's final order.

The impartial hearing officer shall determine when the record is closed and notify the parties of the date the record is closed no more than 14 days after the date on which the record has been closed.

The district shall maintain a list of all documents and other materials constituting the record of the hearing. The district shall provide the impartial hearing officer and the parties with the list of all documents and other materials constituting the record of the hearing no later than five days after receiving notice that the record has been closed. The parties may raise any objection to the list provided by the district no later than five days after receipt of the final list from the district. If any objections are raised by either party, or by the hearing officer, the hearing officer will determine what corrections, if any, to make to the list, and will work with the district and the parties to assure that the district has a full and correct copy of all items included on the corrected list. The hearing officer shall then certify the final list maintained by the district of all documents and other materials constituting the record. The certification shall include a determination of the date on which the record closed. A copy of the certification of the record shall be provided to each party to the hearing.

If appealed, the district is responsible for transmitting a certified copy of the record to the Office of State Review.

(ii) A hearing officer may grant specific extensions of the Compliance Date at the request of either party.

If a party requests an extension, the hearing officer must afford all other parties an opportunity to respond prior to issuing a decision on the request.

Parties may request one or more extensions at a single time. Extension requests that are opposed must be considered and decided individually. Unopposed requests may be granted simultaneously. Extensions shall be no longer than 30 days, unless both parties jointly request the extension.

Unless the decision as to the extension is made on the record during the hearing, the hearing officer's decision with respect to any request for an extension must be in writing delivered to both parties and made a part of the record of the hearing. If the request is not made on the record during a hearing or in writing to the hearing officer and the other party, the order will include the date of the request, and the reason(s) for the request.

If the request is opposed by any party, the order granting or denying the extension request must include a summary of the reasons for the request, the bases for the other party's objections, if any, and the reasons for the hearing officer's decision to grant or deny the extension.

(iii) The hearing officer must (1) issue a final decision in the hearing; and (2) mail a copy of the decision to each of the parties no later in time than the earlier of (1) the Compliance Date or (2) thirty days after the date certified by the hearing officer as the date on which the hearing record 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.