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### **SPECIAL EDUCATION FIELD ADVISORY**

**From:** James P. DeLorenzo 

**Subject:** **Summary and Guidance on Regulations relating to Special Education Impartial Hearings**

The purpose of this memorandum is to provide additional guidance relating to recent amendments to sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education relating to special education impartial hearings. The amendments, effective February 1, 2014, address:

- certification and appointment of impartial hearing officers (IHOs);
- consolidation of multiple due process complaint notices for the same student;
- decisions of the IHO;
- the timeline for an IHO to render a decision;
- extensions of the timelines for an impartial hearing decision;
- the impartial hearing record; and
- withdrawal of due a process complaint notice.

Collectively, these new regulations will help to further ensure that sufficient numbers of IHOs are available to conduct impartial hearings; that IHOs do not accept appointments when they have a personal or professional interest that might conflict with their objectivity in the hearing; that decisions by IHOs are more timely; that records are complete when submitted to the district upon a decision in the hearing; and consistency in procedures amongst IHOs for consolidation and withdrawals of hearings. In addition to changes to the procedures for conducting an impartial hearing, the revised regulations also necessitate changes to school district procedures for IHO appointments and data reporting to the Impartial Hearing Reporting System (IHRS).

Attachment 1 provides a copy of the sections of the regulations that were amended, with new language underlined. Attachment 2 provides a summary of and supplemental guidance on the regulatory changes. Questions regarding this memorandum should be submitted to the P-12: Office of Special Education, Due Process Unit [specedih@mail.nysed.gov](mailto:specedih@mail.nysed.gov).

Attachments

**Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings (underlined language is new)**

*(Readers are advised to consult Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York (8 NYCRR), published by the Department of State, and the State Register for the official exposition of the text of these amendments and any subsequent changes or revisions.)*

Section 200.1

- (x) *Impartial hearing officer* means an individual assigned by a board of education pursuant to Education Law, section 4404(1), or by the commissioner in accordance with section 200.7(d)(1)(i) of this Part, to conduct a hearing and render a decision. No individual employed by a school district, school or program serving students with disabilities placed there by a school district committee on special education may serve as an impartial hearing officer and no individual employed by such schools or programs may serve as an impartial hearing officer for two years following the termination of such employment, provided that a person who otherwise qualifies to conduct a hearing under this section shall not be deemed an employee of the school district, school or program serving students with disabilities solely because he or she is paid by such schools or programs to serve as an impartial hearing officer. An impartial hearing officer shall:
- (1) be an individual admitted to the practice of law in the State of New York who is currently in good standing and who has a minimum of two years practice and/or experience in the areas of education, special education, disability rights or civil rights; or be an individual certified by the State of New York as an impartial hearing officer on September 1, 2001;
  - (2) have access to the support and equipment necessary to perform the duties of an impartial hearing officer;
  - (3) be independent, shall not be an officer, employee or agent of the school district or of the board of cooperative educational services of which such school district is a component, or an employee of the Education Department, shall not have a personal or professional interest which would conflict with his or her objectivity in the hearing, and shall not have participated in any manner in the formulation of the recommendation sought to be reviewed; and
  - (4) be certified by the commissioner as an impartial hearing officer eligible to conduct hearings pursuant to Education Law, section 4404(1) and subject to suspension or revocation of such certification by the commissioner for good cause in accordance with the provisions of section 200.21 of this Part. In order to obtain and retain such a certificate, an individual shall:
    - (i) successfully complete a training program, conducted by the department, which program provides information regarding State and Federal laws and

regulations relating to the education of students with disabilities, the needs of such students, and the procedures involved in conducting a hearing, and in reaching and writing a decision;

- (ii) attend such periodic update programs as may be scheduled by the commissioner;
- (iii) annually submit, in a format and by a date prescribed by the commissioner, a certification that the impartial hearing officer meets the requirements of paragraphs (1), (2) and (3) of this subdivision;
- (iv) possess knowledge of, and the ability to understand, the provisions of Federal and State law and regulations pertaining to the Individuals with Disabilities Education Act and legal interpretations of such law and regulations by Federal and State courts;
- (v) possess knowledge of, and the ability to conduct hearings in accordance with appropriate, standard legal practice and to render and write decisions in accordance with appropriate standard legal practice;
- (vi) be willing and available to accept appointment to conduct impartial hearings. Notwithstanding the provisions of section 200.21 of this Part, unless good cause has been provided to the commissioner including, but not limited to, cause resulting from poor health as certified by a physician, active military services or other similar extenuating circumstances, the certification of an impartial hearing officer shall be rescinded upon a finding that the impartial hearing officer was not willing or available to conduct an impartial hearing within a two-year period of time.

#### Section 200.5(j)

- (j) *Impartial due process hearings.* (1) A parent or a school district must submit a complete due process complaint notice pursuant to subdivision (i) of this section prior to initiation of an impartial due process hearing on matters relating to the identification, evaluation or educational placement of a student with a disability, or the provision of a free appropriate public education to the child.
  - (i) *Timeline for requesting an impartial hearing.* The request for an impartial due process hearing must be submitted within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, except that the two-year timeline shall not apply to a parent if the parent was prevented from requesting the impartial hearing due to specific misrepresentations by the school district that it had resolved the problem forming the basis of the complaint or the school district's withholding of information from the parent that was required to be provided to the parent under this Part or under Part 201 of this Title.

- (ii) Subject matter of the impartial due process hearing. The party requesting the impartial due process hearing shall not be allowed to raise issues at the impartial due process hearing that were not raised in the notice filed under subdivision (i) of this section, unless the other party agrees otherwise.
  - (iii) The school district shall inform the parent in writing of the availability of mediation and of any free or low-cost legal and other relevant services, such as parent centers, available in the area:
    - (a) when an impartial due process hearing is requested; or
    - (b) at the parent's request.
- (2) Resolution process. (i) Resolution meeting. Prior to the opportunity for an impartial due process hearing under paragraph (1) of this subdivision, the school district shall, within 15 days of receiving the due process complaint notice from the parent, convene a meeting with the parents and the relevant member or members of the committee on special education, as determined by the school district and the parent, who have specific knowledge of the facts identified in the complaint, which shall include a representative of the school district who has decision-making authority on behalf of the school district and may not include an attorney of the school district unless the parent is accompanied by an attorney, where the parents of the student discuss their complaint and the facts that form the basis of the complaint, and the school district has the opportunity to resolve the complaint. The school district shall take steps to ensure that one or both of the parents of the student with a disability are present at the resolution meeting, including notifying parents of the meeting early enough to ensure that they will have the opportunity to attend and scheduling the resolution meeting at a mutually agreed on time and place and in a location that is physically accessible to the parents.
- (ii) When conducting meetings and carrying out administrative matters (such as scheduling) under this paragraph, the parent and the school district may agree to use alternative means of meeting participation, such as video conferences and conference calls.
  - (iii) Waiver of resolution process. The parent and the school district may agree, in writing, to waive the resolution process or agree to use the mediation process described in subdivision (h) of this section to resolve the dispute.
  - (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. A party may void such agreement within three business days of the agreement's execution.

- (v) Resolution period. If the school district has not resolved the due process complaint to the satisfaction of the parents within 30 days of the receipt of the due process complaint notice, the impartial due process hearing may occur consistent with the time period provided in section 200.5(j)(3)(iii) of this Part.
  - (vi) Failure to convene or participate. Except where the parties have jointly agreed to waive the resolution process or use mediation, the failure of a parent filing a due process complaint to participate in the resolution meeting will delay the timeline for the resolution process and due process hearing until the meeting is held.
    - (a) If the school district is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented), the school district may, at the conclusion of the 30-day period, request that an impartial hearing officer dismiss the parents' due process complaint.
    - (b) If the school district fails to hold the resolution meeting within 15 days of receipt of the parents' due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of the impartial hearing officer to begin the due process hearing timeline.
- (3) Initiation of an impartial due process hearing. Upon receipt of the parent's due process complaint notice, or the filing of the school district's due process complaint notice, the board of education shall arrange for an impartial due process hearing to be conducted in accordance with the following rules:
- (i) Except as provided in subparagraph (ii) of this paragraph and paragraph (6) of this subdivision, appointment from the impartial hearing officer list must be made in accordance with the rotational selection process established in section 200.2(e)(1) of this Part and the administrative procedures established by the board of education pursuant to section 200.2(b)(9) of this Part.
    - (a) The rotational selection process must be initiated immediately, but not later than two business days after receipt by the school district of the due process complaint notice or mailing of the due process complaint notice to the parent.
    - (b) The impartial hearing officer may not accept appointment unless he or she is available to make a determination of sufficiency of a due process complaint notice within five days of receiving such a request and to initiate the hearing within the first 14 days of the time period specified in clause (a) or (b) of subparagraph (iii) of this paragraph.

- (c) The impartial hearing officer shall not accept appointment if he or she is serving as the attorney in a due process complaint in the same school district or has served as the attorney in a due process complaint in the same school district within a two-year period of time preceding the offer of appointment; or if he or she 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 in a due process complaint within a two-year period.
- (ii) The board of education or trustees shall immediately appoint an impartial hearing officer to conduct the hearing. A board of education may designate one or more of its members to appoint the impartial hearing officer.
- (a) Consolidation and multiple due process hearing requests. For a subsequent due process complaint notice filed while a due process complaint is pending before an impartial hearing officer involving the same parties and student with a disability:
- (1) Once appointed to a case in accordance with the rotational selection process established in section 200.2(e)(1) of this Part, the impartial hearing officer with the pending due process complaint shall be appointed to a subsequent due process complaint involving the same parties and student with a disability, unless that impartial hearing officer is unavailable.
- (2) The impartial hearing officer may consolidate the new complaint with the pending complaint or provide that the new complaint proceed separately as an individual complaint before the same impartial hearing officer.
- (3) Consolidation of such complaints or the denial of such consolidation shall be by written order.
- (4) 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 relevant factors that include, but are not limited to:
- (i) the potential negative effects on the child's educational interests or well-being which may result from the consolidation;
- (ii) any adverse financial or other detrimental consequence which may result from the consolidation of the due process complaints; and
- (iii) whether consolidation would:

(a) impede a party's right to participate in the resolution process prescribed in paragraph (2) of this subdivision;

(b) prevent a party from receiving a reasonable opportunity to present its case in accordance with subparagraph (xiii) of this paragraph; or

(c) prevent the impartial hearing officer from timely rendering a decision pursuant to paragraph (5) of this subdivision.

(5) If the due process complaints are consolidated, the timeline for issuance of a decision in the earliest pending due process complaint shall apply.

(6) Nothing in this section shall be construed to preclude a parent from filing a due process complaint on an issue separate from a due process complaint already filed.

(iii) Timeline for commencing the hearing or pre-hearing conference. Unless an extension is granted pursuant to subparagraph (5)(i) of this subdivision:

(a) when a school district files a due process complaint notice, the hearing or pre-hearing conference shall commence within the first 14 days after the date upon which the impartial hearing officer is appointed.

(b) when a parent files a due process complaint notice, the hearing or a pre-hearing conference shall commence within the first 14 days after:

(1) the date upon which the impartial hearing officer receives the parties' written waiver of the resolution meeting; or

(2) the impartial hearing officer receives the parties' written confirmation that a mediation or resolution meeting was held but no agreement could be reached; or

(3) the expiration of the 30-day resolution period, whichever shall occur first, unless

(4) the parties agree in writing to continue mediation at the end of the 30-day resolution period, in which case, the hearing or pre-hearing conference shall commence within the first 14 days after the impartial hearing officer is notified in writing that either party withdrew from mediation.

- (iv) The impartial hearing officer shall be authorized to administer oaths and to issue subpoenas in connection with the administrative proceedings before him/her.
- (v) A written or, at the option of the parents, electronic verbatim record of the proceedings before the impartial hearing officer shall be maintained and made available to the parties.
- (vi) At all stages of the proceeding, where required, interpreters of the deaf, or interpreters fluent in the native language of the student's parent, shall be provided at district expense.
- (vii) 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. At all stages of the proceeding, the impartial hearing officer may assist an unrepresented party by providing information relating only to the hearing process. Nothing contained in this subparagraph shall be construed to impair or limit the authority of an impartial hearing officer to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record.
- (viii) In the event the impartial hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.
- (ix) In the event the impartial hearing officer determines that the interests of the parent are opposed to or are inconsistent with those of the student, or that for any other reason the interests of the student would best be protected by appointment of a guardian *ad litem*, the impartial hearing officer shall appoint a guardian *ad litem* to protect the interests of such student, unless a surrogate parent shall have previously been assigned. The impartial hearing officer shall ensure that the procedural due process rights afforded to the student's parent pursuant to this section are preserved throughout the hearing whenever a guardian *ad litem* is appointed.
- (x) The hearing shall be conducted at a time and place which is reasonably convenient to the parent and student involved and shall be closed to the public unless the parent requests an open hearing.
- (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) simplifying or clarifying the issues;
  - (b) establishing date(s) for the completion of the hearing;

- (c) identifying evidence to be entered into the record;
  - (d) identifying witnesses expected to provide testimony; and/or
  - (e) addressing other administrative matters as the impartial hearing officer deems necessary to complete a timely hearing.
- (xii) The parents, school authorities, and their respective counsel or representative, shall have an opportunity to present evidence, compel the attendance of witnesses and to confront and question all witnesses at the hearing. Each party shall have the right to prohibit the introduction of any evidence the substance of which has not been disclosed to such party at least five business days before the hearing.
- (a) Additional disclosure of information. Not less than five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. An impartial hearing officer may bar any party that fails to comply with this requirement from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.
  - (b) The impartial hearing officer, wherever practicable, shall enter into the record a stipulation of facts and/or joint exhibits agreed to by the parties.
  - (c) The impartial hearing officer may receive any oral, documentary or tangible evidence except that the impartial hearing officer shall exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious. The impartial hearing officer may receive testimony by telephone, provided that such testimony shall be made under oath and shall be subject to cross-examination.
  - (d) The impartial hearing officer may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious.
  - (e) The impartial hearing officer may limit the number of additional witnesses to avoid unduly repetitious testimony.
  - (f) The impartial hearing officer may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination.

- (g) The impartial hearing officer may receive memoranda of law from the parties not to exceed 30 pages in length, with typed material in minimum 12-point type (footnotes minimum 10 point type) and not exceeding 6 1/2 by 9 1/2 inches on each page.
  - (xiii) Each party shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision. Additional hearing days, if required, shall be scheduled on consecutive days wherever practicable.
  - (xiv) The parents shall have the right to determine whether the student shall attend the hearing.
  - (xv) If, by mutual agreement of the parties, the impartial hearing officer is deemed incapacitated or otherwise unavailable or unwilling to continue the hearing or issue the decision, the board of education shall rescind the appointment of the impartial hearing officer and appoint a new impartial hearing officer in accordance with the procedures as set forth in this subdivision.
  - (xvi) Commencing July 1, 2002, each board of education shall report information relating to the impartial hearing process, including but not limited to the request for, initiation and completion of each impartial hearing, to the Office of Special Education of the State Education Department in a format and at an interval prescribed by the commissioner.
  - (xvii) When carrying out administrative matters relating to an impartial due process hearing, such as scheduling, exchange of witness lists and status conferences, the parent and the school district may agree to use alternative means of meeting participation, such as video conferences and conference calls.
- (4) Decision of the impartial hearing officer. (i) In general. Subject to subparagraph (ii), a decision made by an impartial hearing officer shall be made on substantive grounds based on a determination of whether the student received a free appropriate public education.
- (ii) Procedural issues. In matters alleging a procedural violation, an impartial hearing officer may find that a student did not receive a free appropriate public education only if the procedural inadequacies impeded the student's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parent's child, or caused a deprivation of educational benefits. Nothing in this paragraph shall be construed to preclude an impartial hearing officer from ordering a school district to comply with procedural requirements under this Part and Part 201 of this Title.

(iii) Settlement agreements. An impartial hearing officer shall not issue a so-ordered decision on the terms of a settlement agreement reached by the parties in other matters not before the impartial hearing officer in the due process complaint or amended due process complaint. Nothing in this subdivision shall preclude a party from seeking to admit a settlement agreement or administrative decision into evidence.

(5) Timeline to render a decision. Except as provided in section 200.16(h)(9) of this Part and section 201.11 of this Title, if a school district files the due process complaint, the impartial hearing officer shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents and to the board of education not later than 45 days from the day after the public agency's due process complaint is received by the other party and the State Education Department. Except as provided in section 200.16(h)(9) of this Part and section 201.11 of this Title, if the parent files the due process complaint notice, the decision is due not later than 45 days 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 the 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 impartial hearing officer closes the record. The date the record is closed shall be indicated in the decision. After a final decision has been rendered, the impartial hearing officer shall promptly transmit the record to the school district together with a certification of the materials included in the record. The record of the hearing and the findings of fact and the decision shall be provided at no cost to the parents. Within 15 days of mailing the decision to the parties, the impartial hearing officer shall submit the decision to the Office of Special Education of the State Education Department. All personally identifiable information, in accordance with the guidelines provided by the commissioner, shall be deleted from the copy forwarded to the Office of Special Education.

(i) An impartial hearing officer may grant specific extensions of time beyond the periods set out in this paragraph, in subparagraph (3)(iii) of this subdivision, or in section 200.16(h)(9) of this Part at the request of either the school district or the parent. The impartial hearing officer shall not solicit extension requests or grant extensions on his or her own behalf or unilaterally issue extensions for any reason. Each extension shall be for no more than 30 days. Not more than one extension at a time may be granted. The reason for each extension must be documented in the hearing record.

(ii) The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

- (a) whether the delay in the hearing will positively contribute to, or adversely affect, the child's educational interest or;
  - (b) whether a party has been afforded a fair opportunity to present its case at the hearing in accordance with the requirements of due process;
  - (c) any adverse financial or other detrimental consequences likely to be suffered by a party in the event of delay; and
  - (d) whether there has already been a delay in the proceeding through the actions of one of the parties.
- (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. No extension shall be granted after the record close date.
- (iv) 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 (xi)(b) of paragraph (3) of this subdivision to ensure that the impartial hearing officer's decision is issued by the revised decision due date.
- (v) 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.

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

- (a) the due process complaint notice and any response to the complaint pursuant to paragraphs (4) and (5) of subdivision (i) of this Part;
- (b) all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer;
- (c) 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;
- (d) any subpoenas issued by the impartial hearing officer in the case;
- (e) all written and electronic transcripts of the hearing;
- (f) any and all exhibits admitted into evidence at the hearing, including documentary, photographic, audio, video, and physical exhibits;
- (g) any other documentation deemed relevant and material by the impartial hearing officer; and
- (h) any other documentation as may be otherwise required by this section.

(6) Withdrawal of a Due Process Complaint. A due process complaint may be withdrawn by the party requesting a hearing as follows:

- (i) Prior to the commencement of the hearing, a voluntary withdrawal by the party requesting the hearing shall be without prejudice unless the parties otherwise agree. For purposes of this paragraph, the commencement of the hearing shall not mean the initial prehearing conference if one is conducted, but shall mean the first date the hearing is held after such conference.
- (ii) Except for withdrawals in accordance with subparagraph (i) of this paragraph, a party seeking to withdraw a due process complaint shall immediately notify the impartial hearing officer and the other party. The impartial hearing officer shall issue an order of termination. A withdrawal shall be presumed to be without prejudice except that the impartial hearing officer 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 impartial hearing officer that a withdrawal shall be with or without prejudice is binding upon the parties unless appealed to the State review officer.

- (iii) The withdrawal of a due process complaint does not alter the timeline pursuant to paragraph (1)(i) of this section for requesting an impartial hearing.
- (iv) If the party subsequently files a due process complaint 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 that was previously withdrawn by the party, the school district shall appoint the same impartial hearing officer appointed to the prior complaint unless that impartial hearing officer is no longer available to hear the re-filed due process complaint.
- (v) Nothing in this section shall preclude an impartial hearing officer, in his or her discretion, from issuing a decision in the form of a consent order that resolves matters in dispute in the proceeding.

#### Section 200.16(h)

- (9) Impartial due process hearings. Impartial due process hearings shall be conducted in accordance with section 200.5(j) of this Part, provided that the decision of the impartial hearing officer shall be rendered, in accordance with section 4410 of the Education Law, not later than 30 days after the time period pursuant to section 200.5(j)(5) of this Part or after the initiation of such hearing by the board.

**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

<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.

the offer of appointment, and not from the date that the due process complaint notice was submitted.

### **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 (IHRS) Case Numbers**

Case numbers are assigned in IHRS for purposes of data collection and monitoring of timely decisions.

- Upon receipt of a new due process complaint notice, the district must enter the case into IHRS and IHRS 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 IHRS.
- 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

<sup>2</sup> IHRS 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 IHRS so that a notation can be made in the case notes that this closure was due to consolidation.

reached through a settlement agreement that resolves issues included in the due process 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

<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.

- shall not solicit extension requests or grant extensions on his or her own behalf or unilaterally issue extensions for any reason.

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).



**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**

**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 timeline 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 pendency<sup>1</sup>, 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

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<sup>1</sup> 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.

**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.