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SPECIAL EDUCATION FIELD ADVISORY

FROM: James P. DeLorenzo

SUBJECT: New Requirements Related to Special Education Impartial Due Process Hearings: Amendment to Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education

This memorandum is to inform you that the Board of Regents has approved for permanent adoption the amendment of sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education. The amendment addresses seven issues relating to special education impartial hearings:

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

The effective date of the amendment is February 1, 2014. A copy of the full text of the Board of Regents memo can be found at http://www.regents.nysed.gov/meetings/2014/January2014/114p12a2.pdf. A copy of the amended regulations is attached.

To ensure dissemination to appropriate individuals within a school district, I ask Superintendents to please share this memorandum with individuals such as Directors of Special Education, School Psychologists, Committee on Special Education and Committee on Preschool Special Education Chairpersons, Guidance Counselors, Directors of Pupil Personnel and Parent Teacher Associations. A supplemental guidance memorandum will be provided soon.

Questions regarding this memorandum may be directed to the Special Education Due Process Unit at 518-473-0170.

Attachment

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 207, 305, 3214, 4403, 4404 and 4410.

1. Subdivision (x) of section 200.1 of the Regulations of the Commissioner of Education is amended, effective February 1, 2014, as follows:

(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) …

(2) …

(3) …

(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) …

(ii) …

(iii). . .

(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; [and]

(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.

2. Paragraph (3) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended, effective February 1, 2014, as follows:

(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) [Appointment] 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) ….

(b) ….

(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) . . . .

(iv) . . . .

(v) . . . .

(vi) . . . .

(vii) . . . .

(viii) . . . .

(ix) . . . .

(x) . . . .

(xi) . . . .

(xii) . . . .

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(xiv) . . . .

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(xvii) . . . .

(xviii) . . . .

(xiv) . . . .

(xv) . . . .

(xvi) . . . .

(xvii) . . . .

3. Paragraph (4) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended effective February 1, 2014, as follows:

(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) ….

(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.

4. Paragraph (5) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended, effective February 1, 2014, as follows:

(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[, and to the Office of Special Education of the State Education Department,] not later than 45 days from the [date required for commencement of the impartial hearing in accordance with subparagraph (3)(iii) of this subdivision] 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) [the impact on] whether the delay in the hearing will positively contribute to, or adversely affect, the child's educational interest or well-being [which might be occasioned by the delay];

(b) [the need of a party for additional time to prepare or present the party's position] 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 vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, [settlement discussions between the parties,] 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. [Agreement] The impartial hearing officer shall not rely on the agreement of the parties [is not a sufficient] 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, [and] 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) . . . .

(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.

5. Section 200.5(j) of the Regulations of the Commissioner of Education is amended by adding a new paragraph (6), effective February 1, 2014, as follows:

(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.

6. Paragraph (9) of subdivision (h) of section 200.16 is amended, effective February 1, 2014, as follows:

(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)(3)(iii)] 200.5(j)(5) of this Part [or after the initiation of such hearing by the board].