



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

**TO:** P-12 Education Committee

**FROM:** Ken Slentz

**SUBJECT:** Proposed Amendment of Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings

**DATE:** June 8, 2012

**AUTHORIZATION(S):**

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### SUMMARY

#### Issue for Discussion

Should the Board of Regents amend sections 200.1 and 200.5 of the Regulations of the Commissioner of Education relating to the special education impartial hearings?

#### Reason for Consideration

Review of policy to address both process and cost efficiencies in New York State's special education due process system and to ensure timely decisions by impartial hearing officers (IHOs).

#### Proposed Handling

The revised proposed amendment is before the P-12 Education Committee for discussion at the June 2012 meeting.

#### Procedural History

The proposed amendment was before the P-12 Education Committee for discussion in January 2012. A Notice of Proposed Rule Making was published in the State Register on February 1, 2012. Public hearings were conducted on February 15,

21 and 23, 2012 in New York City, Albany and Rochester. In response to public comment, the proposed amendment has been revised. A Notice of Revised Rule Making will be published in the State Register not later than July 3, 2012.

### Background Information

The Department is responsible for State oversight of the special education impartial hearing process and to establish procedures for the proper conduct of such hearings. The State certifies impartial hearing officers and has the authority to suspend or revoke an impartial hearing officer's certification upon a finding of misconduct or incompetence. Federal law and regulations require that once initiated, an impartial hearing must be completed not later than 45 calendar days, except where the timelines have been properly extended.

The Department recommends revisions to its impartial hearing procedures based on several factors, including but not limited to the following:

- The current regulations contain a cross-citation error which must be amended to ensure consistency with federal timelines.
- The U.S. Department of Education, Office of Special Education, recently determined that New York State (NYS) "Needs Assistance" in part, because it failed to ensure that 100 percent of impartial hearings were adjudicated in a timely manner. In 2010, only 84.25 percent of the State's special education impartial hearings were adjudicated within the required timelines. As a result, the State must review and revise its policies and procedures and improvement activities as appropriate to address this noncompliance issue.
- There are many IHOs who are certified by the State, but who do not conduct impartial hearings. The State provides costly resources and training to IHOs. Therefore, the State must responsibly take action to ensure that IHOs are available to conduct impartial hearings.
- There needs to be greater consistency across IHOs in how certain procedural matters are handled, such as requests to consolidate cases, requests to withdraw due process requests and extensions to the decision due dates.

Accordingly, this revised proposed rule would further align this State's timeline requirements for issuing decisions to the federal requirements; address factors leading to delays in the completion of impartial hearings; and would address other issues relating to the manner in which an impartial hearing is conducted. The proposed rule will promote the timely issuance of hearing decisions by providing a more efficient and expeditious process for conducting hearings, in consideration of various causes of delay that have been identified by the Department over the past few years. The proposed rule addresses six procedural issues relating to impartial hearings:

1. Certification and appointment of IHOs;
2. Consolidation of multiple due process requests for the same student;
3. Prehearing conferences;

4. Withdrawals of requests for due process hearings;
5. Extensions to the timelines for an impartial hearing decision; and
6. Timeline to render a decision.

Since publication of a Notice of Proposed Rule Making in the State Register on February 1, 2012, the State Education Department received written and/or oral comments on the proposed amendments from 84 individuals. In response to public comment, the proposed amendment has been revised as follows:

### **Certification and Appointment of IHOs**

The revised proposed rule would require an individual certified by the Commissioner as a hearing officer to be willing and available to accept appointment to conduct impartial hearings, and would provide for the rescinding of an IHO's certification if he or she is unavailable or unwilling to accept an appointment within a two-year period of time, unless good cause is shown.

The revised proposed rule would also prohibit an IHO from accepting appointment as an IHO if he or she is an attorney involved in a pending due process complaint involving the same school district, or has, within a two-year period of time, served in the same district as either an attorney in a due process complaint or as 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.

- Proposed section 200.5(j)(3)(i)(c) was revised to define an individual who has provided direct special advocacy as 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.

### **Consolidation of Multiple Due Process Requests for the Same Student**

In the interests of judicial economy and in furtherance of the student's educational interests, the revised proposed rule would establish procedures for the consolidation of multiple due process hearing requests filed for the same student, including the factors that must be considered in determining whether to consolidate separate requests for due process.

- Proposed section 200.5(j)(3)(ii)(a) was revised to add that the IHO must consider relevant factors as indicated in the regulations and to remove sub clauses (1) and (4), which were added in the original proposed amendment, and which provide, respectively, that the IHO consider the similarity of the issues of the due process complaints and whether the parties have sought mediation with regard to a due process complaint notice when determining whether to consolidate one or more separate requests for due process.

## **Pre-hearing Conferences**

The revised proposed rule would require that IHOs conduct pre-hearing conferences for all due process requests received on or after January 1, 2013 and that the IHO issue a pre-hearing order to address certain procedural matters and to identify the factual issues to be adjudicated at the hearing. These requirements will provide IHOs with the tools to move the hearing forward in a smooth, orderly fashion, and to render decisions in an efficient and expeditious manner.

- Proposed section 200.5(j)(3)(xi) was revised to clarify that a pre-hearing conference may be scheduled only upon the commencement of the hearing; and that the IHO has no authority to convene a pre-hearing conference prior to the date by which the due process hearing may be initiated in accordance with the timeline requirements; and to change the proposed date by which IHOs are required to conduct pre-hearing conferences from July 1, 2012 to January 1, 2013.
- Proposed section 200.5(j)(3)(xi)(b)(4) and (5) was revised to clarify, unlike the disclosure of evidence which must be disclosed at least five business days prior to the start of the hearing, disclosure of witnesses is not required to be submitted at least five business days prior to hearing.
- Proposed section 200.5(j)(3)(xi)(d) was revised to add that both parties may object to the pre-hearing order issued by the IHO.
- Proposed section 200.5(j)(3)(xi)(e) was revised to add that the notice to the parties of the pre-hearing order must be included in the hearing record.
- Proposed section 200.5(j)(3)(xi)(f) was revised to add that the IHO is not authorized to conduct a pre-hearing conference prior to the conclusion of the resolution period.

## **Impartial Hearing Record**

The proposed rule would address the IHO's responsibility to provide the record to the school district.

- Section 200.5(j)(5) has been revised to add a new subparagraph (vi) to define the required contents of the 'record' for purposes of an impartial hearing.
- Proposed section 200.5(j)(5) has been further revised to add that, after a final decision has been rendered, the IHO must promptly return the record to the school district together with a certification of the materials included in the record.

## **Extensions to the Impartial Hearing Decision Due Date**

The revised proposed rule would expressly prohibit an IHO from soliciting extensions for purposes of his or her own scheduling conflicts; clarify the factors that an IHO must consider in granting an extension; prohibit an IHO from granting an extension after the record close date; and require the IHO to set forth in the record the facts relied upon for each extension granted.

- Proposed section 200.5(j)(5)(iii) was revised to delete the proposed amendment which would have authorized not more than one 30-day extension for the purpose of settlement discussions between the parties.
- Proposed section 200.5(j)(5)(ii) was revised to remove subsections (e) whether the reasons for the delay were foreseeable; and (f) whether granting the extension is likely to contribute to reaching a final decision within the revised timeline or is likely to cause additional extension requests, from the factors the IHO must fully consider when considering granting a request for an extension.

## **Withdrawals of Requests for Due Process Hearings**

The revised proposed rule would establish procedures for the withdrawal of a due process complaint, which would require a withdrawal to be made on notice to the IHO if it is made after the commencement of the hearing; would stipulate that a withdrawal would be without prejudice, except that the IHO, upon review of the balancing of the equities, may issue a written decision that the withdrawal shall be with prejudice; and would provide for the same IHO to be appointed if the party who withdrew subsequently files another due process complaint within one year from the withdrawal that is based on or includes the same or substantially similar claims as made in a prior complaint.

- Proposed section 200.5(j)(6)(ii) was revised to require that, a withdrawal shall be presumed to be without prejudice except that the IHO, upon review of the balancing of the equities, may issue a written decision that the withdrawal shall be with prejudice.

Attached is a copy of the revised proposed terms and the Assessment of Public Comment.

## **Recommendation**

It is recommended that the P-12 Education Committee reach consensus on the intent of the proposed rule prior to taking action at the September 2012 Regents meeting.

### Timetable for Implementation

The proposed amendment is before the P-12 Education Committee for discussion in June 2012. A Notice of Revised Rule Making will be published in the State Register not later than July 18, 2012. Public comment on the revised rule will be provided for 30 days after the date it is published in the State Register. It is anticipated that the proposed amendment will be presented for permanent adoption at the September 2012 Regents meeting. The effective date of the proposed amendment is October 3, 2012.

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 October 3, 2012, 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[.]; and

(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 October 3, 2012, 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. While a due process complaint is pending before an impartial hearing officer selected in accordance with the rotational selection process established in section 200.2(e)(1) of this Part, any additional due process complaint subsequently filed on a separate issue relating to the same subject student, shall be assigned to and scheduled before the same impartial

hearing officer, who may consolidate the complaints or provide that they proceed separately as individual complaints. 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:

(1) the potential negative effects on the child's educational interests or well-being which may result from the consolidation;

(2) any adverse financial or other detrimental consequence which may result from the consolidation of the due process complaints; and

(3) whether consolidation would:

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

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

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

(b) 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.

(c) If an impartial hearing officer becomes unavailable to accept further appointments in accordance with this subparagraph, a new impartial hearing officer shall be appointed from the rotational list, established in section 200.2(e)(1) of this Part, to serve as the impartial hearing officer for such due process complaint and shall be authorized to consolidate any new complaint in accordance with this paragraph.

(iii) ....

(iv) ....

(v) ....

(vi) ....

(vii) ....

(viii) ....

(ix) ....

(x) ....

(xi) [A] Upon the commencement of the hearing, as prescribed in subparagraph (iii)(a) and (b) of this paragraph, the impartial hearing officer may schedule a prehearing conference with the parties [may be scheduled] to facilitate a fair, orderly and expeditious hearing, except that, for impartial hearings requested on or after January 1, 2013, the impartial hearing officer shall schedule a prehearing conference. 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) A prehearing conference [is] shall be held for the purposes of:

[(a)] (i) simplifying or clarifying the factual issues in dispute;

[(b)] (ii) establishing dates for [the completion of] conducting and completing the hearing and for rendering the impartial hearing officer's decision;

[(c)] (iii) identifying evidence to be entered into the record;

[(d)] (iv) identifying the number of witnesses expected to provide testimony;

and/or;

[(e)] (v) addressing other [administrative] matters as the impartial hearing officer deems necessary to complete a timely hearing.

(b) Upon the conclusion of the prehearing conference, the impartial hearing officer shall promptly issue and deliver to the parties, or their legal representative, a written prehearing order which confirms and/or identifies the:

(1) time, place, and dates of the hearing;

(2) factual issues to be adjudicated at the hearing;

(3) relief being sought by the parties;

(4) deadline date for final disclosure of all evidence intended to be offered at the hearing, which must be no later than at least five business days prior to the first scheduled date of the hearing;

(5) deadline date for final disclosure of the identification of witnesses expected to provide testimony at the hearing;

(6) the briefing schedule, if applicable;

(7) the date by which the final decision of the impartial hearing officer shall be issued; and

(8) any other information determined to be relevant by the impartial hearing officer.

(c) With the consent of all parties, an impartial hearing officer may, in his or her discretion, dispense with the parties' presence at a prehearing conference and rely upon alternative methods of communication regarding matters set forth in this subparagraph, provided, however, that the use of such methods of alternative communications shall

not relieve the impartial hearing officer of the duty to issue the written prehearing order in conformity with the requirements set forth in this subparagraph.

(d) If a party does not participate in the prehearing conference, the impartial hearing officer may proceed with the conference and issue the written prehearing order in conformity with clause (b) of this subparagraph, provided that both parties are given an opportunity to render objections to the prehearing order.

(e) The impartial hearing officer shall include the notice to the parties of the prehearing order and any amendments thereto in the hearing record.

(f) Nothing in this section shall authorize the impartial hearing officer to conduct a prehearing conference prior to the conclusion of the resolution period pursuant to paragraph (2)(v)(b) of this subdivision, nor shall it preclude the impartial hearing officer from requiring additional conferences after the hearing has commenced to aid in the disposition of the hearing.

(xii) ....

(xiii) ....

(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 October 3, 2012, 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. 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 October 3, 2012, 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 notice, the decision is due not later than 45 days from the day after one of the following events, whichever shall occur first: the date upon which the impartial hearing officer receives the parties' written waiver of the resolution meeting; or the date the impartial hearing officer receives the parties' written confirmation that a mediation or resolution meeting was held but no agreement could be reached; or the expiration of the

30-day resolution period except when the parties agree in writing to continue mediation at the end 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 return 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 two copies of 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] one of the copies forwarded to the Office of Special Education. Whenever possible, copies submitted to the State Education Department shall be transmitted by secure electronic document submission or in another electronic format.

(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 at the] 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. [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 subparagraph (ix)(c) of this paragraph 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 mean and include copies of:

(a) the due process complaint notice and any response to such complaint;

(b) all motion papers, briefs or arguments 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 motion argument and an order granting an extension of the time in which to issue a final decision in the matter;

(d) any subpoenas or other orders of discovery 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 October 3, 2012, 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 or prehearing conference, a voluntary withdrawal by the party requesting the hearing shall be without prejudice unless the parties otherwise agree.

(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 who shall issue a notification to the parties that the due process complaint has been withdrawn. A withdrawal shall be presumed to be without prejudice except that the impartial hearing officer, upon review of the balancing of the equities, may issue a written decision that the withdrawal shall be with prejudice.

(iii) The withdrawal of a due process complaint does not alter the timeline pursuant to paragraph (1)(i) of this subparagraph 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 claim 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 part 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. Section 200.16(h)(9) is amended, effective October 3, 2012, 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].

PROPOSED AMENDMENT OF SECTIONS 200.1 and 200.5 OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION PURSUANT TO EDUCATION LAW SECTIONS 207, 305, 3214, 4403, AND 4410 RELATING TO SPECIAL EDUCATION IMPARTIAL HEARINGS

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Proposed Rule Making in the State Register on February 1, 2012 the State Education Department received the following substantive comments on the proposed amendments.

**Section 200.1(x)(4)(vi) – Impartial Hearing Officer (IHO) Certification**

COMMENT:

The proposal is reasonable and helps to ensure impartiality; will remove those individuals who might find the IHO credential to be helpful, but who have no real interest in actually serving; will reduce the time devoted to the appointment of IHOs by eliminating those who currently remain on the list and have to be canvassed regardless of availability; and will discourage continued unwillingness to accept an appointment without good cause.

DEPARTMENT RESPONSE:

Comments are supportive and no response is necessary.

COMMENT:

The proposed requirement on IHO availability must be based on fact and not a presumption based on the number of hearings held. IHOs should be allowed to take a leave of absence.

DEPARTMENT RESPONSE:

The proposed regulation would not prohibit an IHO from taking a leave of absence. The determination as to whether an IHO has been unwilling or unavailable to accept appointments within a two-year period would be made on a case by case basis and would include the reasons for the IHO's leave of absence and the number of appointments offered to the IHO during the two-year period.

**Section 200.5(j)(3)(i) – IHO Acceptance of Appointments**

COMMENT:

The amendment should be expanded to prohibit individuals from serving as IHOs when they have represented parents anywhere in NYS during the prior two years. There may be a misperception that an IHO who is an educational consultant only works for parents because he/she is biased toward parents and against school districts.

DEPARTMENT RESPONSE:

It would be inappropriate to further restrict the appointment of an IHO based on his/her history of representation of parents. The purpose of the proposed amendment is to further ensure that an IHO does not have a personal or professional interest which would impede his or her objectivity in the hearing.

COMMENT:

The proposed amendment will eliminate conflicts of interest and foster impartiality in the impartial hearing process; will increase the efficiency of the hearing process by eliminating the need for a party to request the recusal of the IHO in a case where there may be a conflict of interest, and will help to eliminate the IHO having to

make a decision, in his or her discretion, whether to recuse him or herself from the case.

DEPARTMENT RESPONSE:

Comments are supportive and no response is necessary.

COMMENT:

Define “direct special education advocacy.”

DEPARTMENT RESPONSE:

The proposed amendment has been revised to replace the term “special education advocacy” with an individual with special knowledge or training with respect to the problems of students with disabilities who has accompanied and advised a party from the same school district in a due process complaint within a two year period.

COMMENT:

This proposal sets dealing with an individual parent who happens to reside or send their child to school within a specific school district on an equal footing with dealing with the school district itself.

DEPARTMENT RESPONSE:

The intent of this comment is unclear.

COMMENT:

The restriction on attorneys does not include any of the other services that a school district could pay an attorney to do. IHOs who are members of firms or organizations in which other members have represented the school district within two years should likewise be prohibited from accepting an appointment with that school district.

DEPARTMENT RESPONSE:

As attorneys, many NYS IHOs have other employment responsibilities. The purpose of the proposed rule is only to further ensure that the IHO does not have a professional conflict of interest with the school district in which he or she is presiding over in a special education due process hearing.

**Section 200.5(j)(3)(ii) – Consolidation and multiple due process hearing requests**

COMMENT:

Consolidation of cases will result in improved efficiency of resources; save time, expense and reduce confusion; result in determinations made in the best interests of children; enhance efficiencies; streamline the hearing process; eliminate forum shopping and will ultimately serve both parties by eliminating redundant testimony, addressing current abuses and increasing efficiencies. The proposal will avoid the duplication of attorney fees and professional time. It would be in the best interests of parents and their children to be assured that multiple issues warranting a fair hearing will be handled as expeditiously as possible.

DEPARTMENT RESPONSE:

Comments are supportive and no response is necessary.

COMMENT:

The detailed considerations should be deleted from the proposal and disseminated in guidance. The specific procedures and factors must be clarified.

DEPARTMENT RESPONSE:

The proposed amendment, as revised, retains the considerations, but clarifies that the IHO must consider only those factors that are relevant to the consolidation, and

deletes the factors in the proposed amendment relating to the similarity of the issues and whether the parties have sought mediation with regard to a due process complaint. It would be at the discretion of the IHO, based on his or her consideration of such factors to determine if consolidation of a due process complaint filed prior to the commencement of the hearing would be appropriate. The proposed considerations would guide the IHO in justifying his or her decision regarding consolidation and address inconsistent consolidation practices across IHOs. A consolidation is not an amendment to a due process complaint. A decision to consolidate two or more due process complaints is a decision to hear two or more separate issues simultaneously, on the same hearing schedule.

COMMENT:

Consolidation should be prohibited if the subsequent due process complaint is filed within five days of the commencement of the hearing, unless the other party consents in writing.

DEPARTMENT RESPONSE:

The consolidation determination is at the discretion of the IHO, based on his/her consideration of various factors. Either party may object to the consolidation. To limit the cases that could be consolidated to those due process complaints filed within five days of the commencement of the hearing may not be in the interests of judicial economy and in furtherance of the student's educational interests.

**Section 200.5(j)(3)(xi) – Pre-hearing Conferences:**

COMMENT:

The proposal allows the IHO to research issues that may affect a decision, and focus on pertinent issues; will facilitate more efficient and expeditious decisions; will result in greater efficiencies, which will hopefully lead to shorter hearings; and will be in the best interests of parents and their children by assuring that the factual issues in question are commonly understood prior to the actual hearing. The use of pre-hearing meetings has led to positive outcomes.

DEPARTMENT RESPONSE:

Comments are supportive and no response is necessary.

COMMENT:

The proposal could impose a burden on *pro se* parents; place a further potential access to justice burden on *pro se* litigants, who may ill-afford an additional day of being present at a detailed and potentially lengthy pre-hearing conference, or even of making themselves available for an extended conference call during business hours. The imposition of an “order” is a further “chilling” effect on parents trying to exercise their rights under federal law.

DEPARTMENT RESPONSE:

The proposed amendment authorizes the IHO to assist an unrepresented party (e.g., *pro se* parent) at all stages of an impartial hearing, including a pre-hearing conference. The proposed pre-hearing conference requirement is likely to reduce and not increase the number of days a parent would be expected to attend hearings. An impartial hearing is a formal hearing in which IHOs issue orders. The effect of a pre-hearing conference order that confirms and/or identifies the time, place and dates of the hearing and other administrative matters (such as identifying the issues to be

adjudicated, relief being sought, the deadline date for disclosure of evidence, the briefing schedule, the date by which the final decision of the IHO is to be issued) should assist the parties, including the parents, in planning for hearing sessions and should assure the parent that the matter regarding the student will be resolved in an expeditious and fair manner.

**COMMENT:**

Current regulations are more reasonable which allow, but do not require, pre-hearing conferences. The added time required to schedule pre-hearing conferences on cases that ultimately will settle is likely to create delays in scheduling those cases that do require adjudication. A pre-hearing conference should be ordered only upon the request of a party. A pre-hearing conference order should not be required in every case; only when warranted. This proposal will add an unnecessary layer of litigation that will delay the proceedings, increase costs to all parties and contravene Congress' purpose of promoting collaboration between schools and parents. If the State were to require pre-hearing conferences, the State must take steps to ensure efficiency of conferences.

**DEPARTMENT RESPONSE:**

The pre-hearing conference is necessary to ensure that the IHO effectively and efficiently manages the federal and State required timeline to complete the impartial hearing and issue the decision. Upon review of data on the conduct and timeliness of NYS impartial hearings, and in consideration of IHO procedures in other states, the State has determined that the proposed required pre-hearing conferences are necessary to provide IHOs with a consistent process and procedures to move the

hearing forward in a smooth, orderly fashion, and to render decisions in an efficient and expeditious manner.

COMMENT:

The proposal would formalize the informal resolution period; cause the IHO to become involved when resolution is likely without his/her involvement and require the parties to focus on hearing preparation rather than resolution. This proposed amendment takes away the opportunity for an early informal resolution and could pose a hardship for parents who are hoping to resolve an issue without an attorney or with as few hearing dates as possible.

DEPARTMENT RESPONSE:

Nothing in the proposed amendment would require a pre-hearing conference to be conducted prior to the end of the resolution period. To clarify this, the proposed amendment has been revised to add a new paragraph stating that the IHO is not authorized to conduct a pre-hearing conference prior to the conclusion of the resolution period.

COMMENT:

This proposal will delay hearings by tying up an already overburdened calendar and creating scheduling difficulties; significantly increase cost and personnel burdens on school districts by adding thousands of conferences and formal, written orders, to cases that will resolve without a hearing commencing at all. Absolutely unworkable in NYC, adding thousands of mandated proceedings to an already overburdened system. The proposal would result in a logistical nightmare and cost implication as the federal and State statutes require provision of a translator for all parents who are non-English-

speaking. The proposal will increase costs for parents and districts by leading to an increase in litigation. It will cause an additional day of hearing. The proposal is likely to create delays in scheduling those cases that do require adjudication.

**DEPARTMENT RESPONSE:**

A pre-hearing conference is expected to result in fewer hearing sessions and more timely decisions, thereby reducing, not increasing costs. Currently, many impartial hearing sessions are scheduled sequentially, resulting in duplication of testimony and additional printings of transcripts to refresh an IHO's recollection of the issues presented. Because a pre-hearing conference would be convened only for those cases whereby the parties have been unable to reach a resolution during the resolution period and for which the timelines require that the IHO initiate the hearing, a mandatory pre-hearing conference would not increase hearing sessions and orders for cases that will resolve without a hearing commencing at all.

**COMMENT:**

This proposal requires the parent to provide all the issues up front without knowing why the district did what it did; would require the parties to narrow or exclude issues before all evidence is presented; would skew the process in favor of the district; may be used to deny the party commencing the hearing his/her right to be heard on certain issues; and does not allow the addition of issues when evidence is brought forth during the hearing. The pre-hearing conference would shift the burden of proof and deny the parent the right to plead, and have heard, all of their claims against the school. The proposed amendment that the pre-hearing conference be used to identify the factual issues to be adjudicated at the hearing is not permissible under the federal

statute. An Order modifying, or even restating in different words, the issues in the complaint would deprive the complainant of their statutory right to make the other side fully meet its burden thereby violating the State's burden of production and burden of persuasion law in special education hearings. The proposed requirement that the IHO identify the factual issues in a pre-hearing order would give the IHO authority to rephrase and even limit the petitioner's claims for relief, thus depriving petitioners of their right to state their own claims.

#### DEPARTMENT RESPONSE:

The IHO must have clarity on the issues in order to properly focus on and manage the issues to be presented at a hearing and to decide whether issues are within his/her jurisdiction. Additionally, the parties need clarity on the issues in order to prepare for the hearing. Nothing in the proposed amendment would deny the parent the right to file a separate IDEA claim against the school district or to request an amendment to the due process complaint to add issues. In addition, further clarity on the issues might lead the parties to an earlier resolution of the matter. How the IHO clarifies the issues at the pre-hearing conference will impact the length of the hearing and, in some cases, whether a hearing is even necessary. Nothing in the proposed amendment would authorize the IHO to modify the issues in the due process complaint.

#### COMMENT:

The proposal would require parties to identify their evidence and witnesses much earlier than the five-day disclosure deadline and might prevent parties from introducing evidence or witnesses that are discovered between the pre-hearing conference and the five-day disclosure deadline.

DEPARTMENT RESPONSE:

Federal and State regulations require that the parties disclose to all other parties not less than five business days prior to a hearing all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. Because the list of witnesses is not required for disclosure five business days before the hearing, the proposed regulation has been revised to separate the pre-hearing order requirement for the list of witnesses expected to provide testimony at the hearing from the requirement that the deadline date for final disclosure of all evidence intended to be offered at the hearing, which must be no later than at least five business days prior to the first scheduled date of the hearing.

COMMENT:

The proposed language violates generally accepted principles of due process by requiring the IHO to go forward with the conference even if a party cannot attend, irrespective of the reason, and requiring issuance of an Order even in the absence of a party. The proposed regulation does not include a notice requirement which may result in pre-hearing conferences being held with little or no notice to the parties; this could result in IHOs conducting conferences and issuing orders without the participation of all affected parties.

DEPARTMENT RESPONSE:

As with the hearing session, the pre-hearing conference must be conducted at a time and place which is reasonably convenient to the parent and the student involved. The proposed amendment has been revised to add that if a party does not participate in the pre-hearing conference, the IHO may proceed with the conference and issue the

written pre-hearing order, provided that both parties are given an opportunity to render objections to the pre-hearing order.

**Section 200.5(j)(4)(iii) – Settlement Agreements**

COMMENT:

This recommendation provides an appropriate boundary for decision-making between IHOs and other decision-making bodies. Matters not before the IHO should not be included in a settlement. It is in the interests of parents and their children to be assured that any decisions rendered are consistent with the matters brought before the IHO.

DEPARTMENT RESPONSE:

The proposed amendment is not intended to limit settlement agreements to only those issues before the IHO, but rather to limit the IHO's authority to so-order a settlement agreement on any issues not before the IHO in a due process complaint.

COMMENT:

When both parties agree, the IHO should have discretion to so-order a settlement agreement on matters not before the IHO in the complaint. The purpose of the proposed amendment is unclear and what the intended or unintended consequences of doing so would be. The IHO should have discretion to review the proposed settlement and to opine as to its benefit to the parties. There is no mandate relief from limiting the range of settlement orders that may be so-ordered by IHOs.

DEPARTMENT RESPONSE:

Both federal and State regulations require that the subject matter of the impartial due process hearing be limited only to those issues raised in the due process complaint

notice or amended due process complaint notice. An IHO can only hear and issue decisions on those matters. The decision of the IHO must be based solely upon the record of the proceeding before the IHO and must set forth the reasons and factual basis for the determination. Therefore, the proposed regulation clarifies that while an IHO may order a settlement agreement, he/she is limited in the authority under IDEA to do so only for issues that were raised in the due process complaint or amended due process complaint notice.

**Section 200.5(j)(5) - Timeline to Render a Decision**

COMMENT:

The proposal guarantees an adhered-to timeline, especially where tuition payment is involved; and promotes the timely resolution of due process complaints. Recognizing that the granting of extensions can be abused, we would support a regulation that discourages any extension of the timelines over the objection of the other party. Parents and their children should be assured that decisions would, to the best extent possible, be rendered within the required 45 day time period.

DEPARTMENT RESPONSE:

Comments are supportive and no response is necessary.

COMMENT:

The proposed changes in compliance deadline requirements will defeat the intended purpose of the proposed regulations, and will cause more cases to be out of compliance. The proposal will further complicate already confusing regulations, will impose additional, unnecessary burdens on the parties and IHOs, will be hard to implement, and will violate the parties' rights under IDEIA. The federal concern about

lack of compliance will be better served by clarifying the process and removing unnecessary impediments to timely conclusion of impartial hearings. The problem of untimely decisions needs to be addressed through careful monitoring of the abuses, rather than by imposing new mandates that eliminate the ability to make these decisions after consideration of the unique circumstances presented in each case. We oppose any regulatory restriction that mandates a particular outcome regardless of the facts and circumstances.

DEPARTMENT RESPONSE:

The proposed amendment on the timeline to render a decision does not provide further regulatory restrictions or burdens on the parties than is required by federal law and regulation; and does not violate parties' rights or the IHO's ability to make decisions on a case-by-case basis.

COMMENT:

The parties should have to go to a resolution meeting when the district files a due process complaint.

DEPARTMENT RESPONSE:

Federal law and regulation do not require a resolution session when the school district files a due process complaint. IDEA section 615(f)(1)(B)(i) requires a school to convene a resolution meeting when a parent files a due process complaint. The purpose of a resolution session is for the parents to discuss their due process complaint and the facts that form the basis of the due process complaint so that the school has an opportunity to resolve the dispute.

**Section 200.5(j)(5) – Submission of IHO Decisions**

COMMENT:

The proposal allows SED to be better aware of cases and decisions. The recommendation will maintain greater confidentiality for all parties.

DEPARTMENT RESPONSE:

Comments are supportive and no response is necessary.

COMMENT:

Current redaction guidelines run counter to NYS Freedom of Information Laws (FOIL). There should be follow-up by SED where it is deemed necessary upon SED's review. Redaction requirements are unduly complicated, burdensome, unnecessary and interfere with the purpose of disclosure. IHOs should be paid for redaction. Narrower redaction standards should be developed. Will increase the cost of the hearing process by requiring IHOs to spend additional time, at school district expense, redacting personally identifiable information from their decisions for SED. The additional time and expense of this activity should be assumed by the State.

DEPARTMENT RESPONSE:

The requirement that IHOs submit a redacted copy of the IHO decision to the State is a long-standing requirement and is based on federal regulations that require that the public agency make the findings and decisions, after deleting any personally identifiable information, available to the public. Therefore, the cost is properly placed on the schools. The NYSED guidelines for redaction of impartial hearing decisions are periodically reviewed and revised, consistent with FOIL redaction standards. The State

has an obligation to ensure that the confidentiality of the student is appropriately protected in the broad public sharing of IHO decisions.

**Section 200.5(j)(5)(i)-(iv) - Extensions to the Due Date for Rendering the Impartial Hearing Decision**

COMMENT:

It is important from a district perspective to resolve these matters in a timely manner. The proposal will promote quick resolution to conflicts and enable parties to move forward; makes it less likely that extensions will be granted for the wrong reasons; and likely increase adjudication rates within required timelines. It is in the best interest of parents engaged in special education impartial hearings to be provided a timely decision.

DEPARTMENT RESPONSE:

Comments are supportive and no response is necessary.

COMMENT:

There should not be any extensions. The timeline is sufficient and extensions should not be granted.

DEPARTMENT RESPONSE:

Federal law and regulation require that the public agency ensure that not later than 45 days after the expiration of the 30-day resolution period or the adjusted time period described in 34 CFR §300.510(b), a final decision must be reached and a copy of the decision mailed to the parties and further allows for a specific extension of time beyond this time period if requested by either party, with the exception of expedited impartial hearings. Federal regulations allow the 45 timeline to be properly extended.

COMMENT:

SED should not micromanage impartial hearings. By encroaching on the rights of parties to seek extensions, and encroaching on the discretion of IHOs to grant them (without any basis for doing so in State law), the regulations treat the federal statute as a ceiling, not a floor, and violate the fundamental precept that states may not foreclose rights afforded under the IDEA. The additional timeline extension limits that have been proposed serve no reasonable purpose. The proposal to emphasize the importance of granting extensions for only limited purposes (and adding to that list) is to totally ignore the real and practical considerations involved in impartial hearings. The proposed change adds several considerations and outright prohibitions that only add to the restrictions on granting extensions, making it harder to accommodate reasonable scheduling and damaging all the parties in a hearing. The existing regulations further impinge on public policy by barring (in the present rules) or limiting (in the proposed regulations) extensions to permit settlement negotiations and execution; on districts' capacity to present the witnesses essential to meet their burden under the law by prohibiting extensions based on school vacations, schedules, or the limits imposed by employment contracts; and on districts' and parents' capacity to be represented by the counsel of their choosing by prohibiting extensions based on attorney calendar and availability. It is potentially devastating to the record to deny extensions, as the proposed regulations by and large require, "because of vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reason." If both parties are represented by counsel, they should have a right to extend deadlines by agreement. The proposal

discourages extensions resulting in IHOs being forced by law to prioritize district availability behind that of the parents, rather than using their judgment to permit extensions that might afford comparable respect for district constraints when appropriate. Witness availability, attorney availability, and the availability of parties are not mere procedural luxuries; they strike to the substantive heart of the parties' capacity to be heard. Interference with these core elements of due process severely narrows the parties' right to seek extensions under the IDEIA and should be eliminated from the proposed regulations. It is unclear how extenuating circumstances (e.g., severe weather, health emergency, power outages, etc.) should be handled. The proposed rule, as written, would preclude adjournments needed due to the school board calendar. The proposed change will further complicate already confusing regulations, impose additional unneeded expenses and other burdens on the parties and the IHO, be hard to implement and will violate the parties federally granted due process rights. The current rules improperly limit the length of any extensions. Proposed and existing regulations violate public policy and encourage litigation. Existing regulations impinge on districts' and parents' right to be represented by attorneys of their choice by prohibiting extensions based on attorney availability and should be changed to protect the due process rights of all parties. Amend the regulations to allow for extensions based on the availability of the parties, their attorneys and the various witnesses to make certain that parties are allowed to fully present their case and to allow consideration of the schedule of the parties involved school closings and the resultant unavailability of district witnesses.

## DEPARTMENT RESPONSE:

The State must have procedures in place to ensure that extensions to impartial hearings are properly granted. Because New York State's impartial hearing system includes approximately 125 independent IHOs, the State must rely on its regulations and reviews of IHO conduct to responsibly oversee the federally-required timelines. This responsibility was further enforced in a court settlement agreement whereby the State agreed to the regulations on extensions to impartial hearings. Even with these regulations and the State's oversight of these regulations, the Department finds that IHOs have not always properly exercised discretion in these matters. Therefore, the current regulations regarding extensions are not proposed for repeal or substantive amendment. IHOs have the authority to grant or deny a party's request for an extension. Current regulations that authorize an IHO to grant a party's request for an extension require that the IHO fully consider the cumulative impact that the requested extensions would have on the child's educational interest or well-being which may be occasioned by the delay, the need of a party for additional time to prepare or present the party's position at the hearing, any 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. Further, the regulations prohibit extensions for certain reasons unless there is compelling reason or a specific showing of substantial hardship that would warrant an extension for these reasons. The proposed amendment relating to the considerations prohibits, consistent with federal law, an IHO from soliciting extension requests, granting extensions on his or her own behalf (e.g., to accommodate

his/her vacation plans or work load), and unilaterally issuing extensions for any reason. Federal law authorizes an extension to the timeline only by request of one or both of the parties and the IHO may not use his/her position of authority to influence the parties to request extensions. The proposed amendments further clarify the intent of the current regulatory considerations regarding the impact on the child's educational interest or well being, a party's fair opportunity to present its case and the adverse financial or other detrimental consequences likely to be suffered by a party in the event of a delay. This proposed amendment does not impose additional restrictions on granting extensions, but rather strengthens and clarifies the IHO's authority and responsibility to bring the impartial hearing to a timely resolution and grant extensions only when it is proper. The State has studied the extensive use of extensions in special education impartial hearings and has reviewed numerous cases in which the IHO did not properly document the reasons for such decisions. However, to address some of the above comments, the proposed amendment has been revised to remove the two additional considerations proposed (whether the reasons for the delay were foreseeable and whether granting the extension is likely to contribute to reaching a final decision within the revised timeline or is likely to cause additional extension requests). However, the Department believes these are reasonable and relevant additional factors that the IHO should also be considering to ensure that the impartial hearing is expeditiously and efficiently managed. In determining whether to grant a request for an extension, the IHO must promptly respond in writing to the parties and set forth the facts relied upon for each extension. Upon further reflection by Department staff, section 200.5(j)(5)(ii)(a) was also revised to clarify that in considering whether to grant a request for an

extension of the hearing, the IHO should consider whether the delay of the hearing would positively contribute to, or adversely affect, the child's educational interests or well-being. Such section had originally required the IHO to consider the overall impact of the delay on the child's educational interests and well-being. The revisions are necessary to clarify that the IHO should continue to consider whether the delay would result in an adverse impact on the child, as well as whether the delay would positively contribute to the child's educational interests, such as awaiting a determination of custodial matters in a pending divorce proceeding or foster care placement, which would clarify the identity of the individual acting as the parent or guardian with the educational decision-making authority.

**COMMENT:**

The proposed amendment would limit the time permitted in cases where both parties represent, in good faith, that a matter is going to settle and offers credible statements to support the need for additional time to do so. This proposal, while a step forward, pushes matters unnecessarily into costly and time consuming adversarial proceedings, regardless of the parties intentions, and it runs counter to the overriding intent of the law that embraces a cooperative model and early conflict resolution. Settlement negotiations are a legitimate ground for requesting an adjournment and should not be limited to one 30-day period. Settlement negotiations should be encouraged as a third means of non-adversarial dispute resolution (after resolution and mediation), not discouraged as they are in the proposals. Settlement agreements must allow for public notice, school board meetings, etc. Settlement agreements should be a reason for granting extensions, but should not have an arbitrary time limit. The

proposed amendment should be modified to a 45-day extension for the purpose of settlement negotiations to give the parties enough time to exchange documents and resolve all aspects of the case. Narrowing the parties' right to seek extensions should be eliminated from the proposed regulations. What is the purpose of allowing only one extension for a settlement process that often takes additional years?

**DEPARTMENT RESPONSE:**

Nothing in the proposed amendment discourages settlement negotiations and agreements. IDEA, as reauthorized in 2004, provided a 30-day period prior to the parent's right to a due process hearing for the purpose of providing the parent an opportunity to discuss the due process complaint with the school district so that the school district has an opportunity to resolve the complaint and to enter into a written settlement agreement with the parent prior to initiating an impartial hearing. In addition, the parties may agree to waive the resolution process to use mediation to resolve the dispute, or if both parties agree in writing, to continue the mediation at the end of the 30-day resolution period. However, once the impartial hearing is initiated, it is the IHO's responsibility to ensure that the matter is resolved in a timely manner. Nothing in the proposed amendment would limit the parties' continued discussions around settlement during the hearing process. Because the proposed amendment that would authorize the IHO to approved one 30-day extension for settlement discussions was read to limit the IHO's discretion to grant or not grant a party's extension based on a full consideration of the cumulative impact that the requested extension would have on the child's educational interest or well-being which may be occasioned by the delay, the need of a party for additional time to prepare or present the party's position at the

hearing, any 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, it has been deleted in the revised proposed amendment.

**Section 200.5(j)(3) – Withdrawals of Requests for Due Process Hearings**

COMMENT:

The proposal is appropriate as it is very costly for school districts to be “held” up on revisiting issues both in attorney’s fees and professional time. This recommendation will eliminate confusion and decrease inefficiencies in the current process; reduce any incentive to withdraw a due process hearing complaint with the intent of reactivating the complaint later to improve chances for a favorable decision under a new IHO; support the State’s efforts to eliminate forum shopping through the withdrawal and re-filing of due process complaints; will assure parents that legitimate requests for withdrawal will be respected; ensure that neither party will be able to manipulate the system to their advantage by withdrawing and resubmitting requests; and provide greater assurance that the process will be used to reach good decisions rendered on their merits and minimize the capacity for parties to use the process to their advantage in a manner that is unrelated to the merits of the issues in questions.

DEPARTMENT RESPONSE:

Comments are supportive and no response is necessary.

COMMENT:

The proposed amendment to section 200.5(j)(6)(iv) contains a typographical error in that it fails to state that the original hearing officer would be appointed to hear the re-filed due process complaint. The proposal will be interpreted to have the IHO who is

assigned to a hearing that results in a settlement for school year #1, (a settlement that would be accompanied by a withdrawal) then, arbitrarily assigned to the hearing brought by the same parents/child for school year #2. The proposal is unclear; there is a need for more discussion to know the pros and cons. A parent should have an unrestricted right of withdrawals. The existing proposals go substantially further than the IDEIA appears to permit or than standard *res judicata* doctrine would routinely allow. Whether or not a post-commencement withdrawal is with or without prejudice should be a matter for the IHO to determine in light of the facts of the case. Insofar as the matter, if re-filed, will return to the same IHO, the presumption should be that the matter may be withdrawn without prejudice unless a balancing of the equities supports an order that the withdrawal is with prejudice. Automatic determination of when prejudice attaches should not occur. Restricting a parent's ability to withdraw a case without prejudice after the pre-hearing conference may force parties into unnecessary hearings and will increase the cost of litigation. Parties will have very little time after a hearing request has been filed before they need to seek IHO permission to withdraw without prejudice. The proposed regulations include a strong presumption that an IHO should find that withdrawals are with prejudice and require a motion to be made if a party seeks to withdraw without prejudice. The proposal strongly advises IHOs against permitting hearing requests to be withdrawn without prejudice. The proposed changes may force parents who currently would settle hearings without litigation to go forward to a hearing even when the district fully supports the parent's request to withdraw without prejudice; this will greatly increase costs of hearings without a benefit for anyone involved. Giving IHOs authority to dismiss claims with prejudice creates disincentives for settlement

negotiations. Claims should not be precluded in future proceedings when they are withdrawn prior to adjudication on the merits. The proposal is particularly problematic for pro se parents who may find themselves overwhelmed by the intricacies of prosecuting a claim under IDEA and may wish to withdraw in order to obtain legal counsel. Most of the cases that are withdrawn are actually cases which have been resolved or settled. If parties are withdrawing due process complaints because they are trying to pick and choose their IHO's, then the proposed rule should apply to all withdrawals not just those occurring after the commencement of the hearing.

**DEPARTMENT RESPONSE:**

The proposed amendment has been revised to indicate that a party's withdrawal shall be presumed to be without prejudice except that the IHO, upon review of the balancing of the equities, may issue a written decision that the withdrawal shall be with prejudice. The proposed amendment has also been revised to clarify that original IHO will hear the refilled due process complaint.

**COMMENT:**

Commencement of the hearing needs to be defined; is it after the pre-hearing conference or after or during the first day of testimony?

**DEPARTMENT RESPONSE:**

The timeline for commencing the hearing or pre-hearing conference is stipulated in 8 NYCRR § 200.5(j)(3)(iii).