Advocates for Children of New York
Protecting every child's right to learn

May 15, 2020

VIA EMAIL
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Re: Proposed Amendments to Sections 200.1 and 200.5 of Title 8 NYCRR

Dear Mr. Suriano:

Advocates for Children of New York (AFC) appreciates the opportunity to submit comments regarding the New York State Education Department (NYSED) proposal to amend sections 200.1 and 200.5 of the Regulations of the Commissioner regarding the qualifications of special education Impartial Hearing Officers (IHOs) in New York State, videoconferencing for special education due process hearings, and confidentiality of student records in due process proceedings.

For nearly fifty years, AFC has worked with low-income families to secure quality public education services for their children, including children with disabilities. AFC routinely advocates for the rights of children and their families under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act. Each year, AFC represents dozens of parents at impartial hearings brought under the IDEA and Section 504 and advises thousands of parents on their rights. We are seeing firsthand the harm that parents and students are experiencing because of delays in impartial hearings in New York City. As such, we are well positioned to comment on the proposed amendments.

We share NYSED's frustration with the delays and backlog of impartial hearings in New York City, and we appreciate NYSED's attempts to address the delays. Many of AFC's clients and their children are suffering because of the delays in receiving settlements, hearings, orders, and implementation of orders, resulting in children not receiving services that they need for months, and sometimes years. We agree that the State and City must take urgent action. **However, we are very concerned about the proposed amendment that would allow non-attorneys to serve as impartial hearing officers. In light of the growing legal complexity of special education**

cases, we urge NYSED to work with stakeholders to identify alternative solutions to help address the delays while ensuring that every student whose parent files a due process complaint has a qualified attorney to hear their case. Below are our detailed comments about the proposed changes.

Paragraph (1) of subdivision (x) of section 200.1: Non-attorney IHOs

While we recognize the scale and scope of the crisis we currently face, we are greatly concerned that any potential benefits to having non-attorneys serve as IHOs will be outweighed by the potential harms. As a result, we strongly recommend that NYSED reject the proposed amendments to allow non-attorneys to serve as IHOs.

As a base requirement, the IDEA requires that IHOs possess knowledge of federal and state statutes, regulations, and case law; the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice. *See* 20 U.S.C. § 1415(f)(3)(A)(i)-(iv). In practice, this means that IHOs must be able to make evidentiary and other rulings during proceedings; develop a factual record; apply statutes, regulations, and case law to facts; and draft and issue findings of fact and decisions. Many, if not all, of these skills come from years of legal training and practice.

In 2001, when NYSED first proposed requiring IHOs in New York to be attorneys, NYSED itself recognized the importance of this legal background. NYSED stated that requiring that IHOs be attorneys would "ensure that impartial hearings are conducted by individuals with the necessary and appropriate procedural and content knowledge and background to conduct an impartial hearing related to special education." Following the proposed rule-making at that time, NYSED once again stated that IHOs must be attorneys "since hearings have become increasingly complex and require individuals with expertise in substantive and procedural law involving special education in this State."

Since 2001, special education hearings have only become more legally complex. As time has passed, both the body of case law and types of legal issues that IHOs must analyze have expanded due, in part, to the 2004 amendments to the federal IDEA, which envisioned a more adversarial hearing process. IHOs must now analyze issues ranging from motions to dismiss involving the statutes of limitations to claim preclusion based on the sufficiency of the impartial hearing request to the liability of the school district for students attending charter schools.

Changing the qualifications for IHOs to adjudicate IDEA cases also implicates parents' and students' claims under Section 504. Because parents bring claims under Section 504 and the IDEA in one claim in New York City and IHOs preside over the related, but legally distinct, causes of action all at once, IHOs must have the legal expertise to analyze complex issues regarding disability discrimination and accommodations under Section 504, understand Section 504's various legal burdens and standards, and understand the differences between Section 504 and the IDEA. Thus, it is important that NYSED retain the requirement for IHOs to be attorneys.

In addition, we are concerned that, without the requisite legal knowledge and training, non-attorney IHOs will be more likely to make legal errors, leading to more appeals and, in turn, delays in the delivery of services to students. Thus, while NYSED's intent is to address the delays in the impartial hearing process for children and families, the result may be that some children have to wait even longer for the services they need. Such a process would not only delay services but would be burdensome and costly for parents and the school district. As advocates for low-income New York City students, our clients cannot afford to pay upfront for services during a hearing, let alone potentially lengthy appeals. Thus, even if the hearing itself occurs faster due to the employment of non-attorneys, the likelihood of appeals would slow the ultimate receipt of services by our clients.

Finally, we are concerned that this proposal would result in students in New York City having IHOs who are less qualified than IHOs hearing cases in the rest of New York State. Students in New York City should be entitled to the same level of due process as students anywhere in the rest of the State. The major qualifications of an IHO and the due process to which a student is entitled should not differ based on a student's zip code.

For the reasons described above, we do not believe that having non-attorneys serve as IHOs is a viable solution to the shortage of IHOs and the backlog in hearings. However, the addition of non-attorneys serving in other capacities within the hearing process might be able to provide some relief to families. For example, non-attorneys could serve the following functions:

- expedite undisputed pendency agreements between the parties;
- conduct settlement conferences to expedite settlement;
- conduct pre-hearing conferences to streamline evidence and determine whether the DOE will be contesting or conceding any claims;
- set hearing schedules; and
- so order relief when the DOE does not contest the hearing request, concedes certain parts of the claims, or does not intend to present evidence.

Each of these functions would remove unnecessary matters from the schedules of IHOs so that IHOs can more quickly preside over those hearings in which claims are in dispute. Even more importantly, families would receive requested relief on undisputed claims sooner.

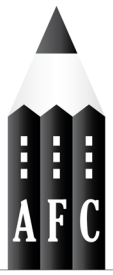
We urge NYSED to reject any amendments that would permit non-attorneys to serve as IHOs and adjudicate contested special education hearings in New York City.

Paragraph (1) of subdivision (x) of section 200.1: Bar Admissions And Years Of Practice For IHOs

In general, given the delays our clients are facing in having hearing officers assigned to their cases, we support the amendments that would allow attorneys licensed in other jurisdictions to serve as IHOs in New York State and lower the required years of related experience from two years to one year. However, we have a few recommendations to help ensure that these attorneys have sufficient knowledge of special education law in New York.

As you know, the practice of special education law in New York is unique. Thousands of cases are filed and litigated each year, and IHOs must stay apprised of highly nuanced and ever-changing legal precedent from the Second Circuit and federal district courts governing New York State and our State Review Officer. IHOs must be able to recognize that in New York the burden of production, persuasion, and proof (except for the appropriateness of a unilateral placement) is on the school district, which is not the same in some other jurisdictions. Thus, IHOs must understand how to weigh evidence and arguments to assess if the district has met its burden. Beyond the complexities in the special education field, IHOs must have firm understandings and experience-based knowledge of typical legal concepts and trial procedures including statutes of limitations, waivers, claim preclusion, admission of evidence, and ruling on objections.

For those reasons, as NYSED opens up IHO positions to attorneys licensed outside New York and reduces the minimum length of relevant experience, we recommend that NYSED amend the regulations so that only applicants with sufficient knowledge of the New York special education system may be hired. First, we were glad to see in the March 2020 presentation that NYSED recommended an examination before applicants could be certified as an IHO. We recommend incorporating these important requirements into the regulations and suggest that the examination cover the New York State Part 200 regulations, IDEA case law from the Second Circuit,



and Section 504 case law from both the state and federal courts. Second, NYSED should require that applicants have a minimum of two years of legal practice generally with a minimum of one year experience in the relevant practice areas or have handled a minimum number of cases in relevant practice areas.[1]

To help ensure that IHOs have the knowledge they need and so that the proposed amendment does not diminish the due process students with disabilities deserve, we encourage you to amend section 200.1(x)(1) so that it reads:

> (1) be an individual admitted to the practice of law and who is currently in good standing in any jurisdiction in the United States, who has a minimum of two years of legal practice and/or experience, including at least one year of practice and/or experience in the areas of education, special education, disability rights or, civil rights, and who has passed an examination concerning New York State and Federal laws and regulations relating to the education of students with disabilities and the interpretation of such laws and regulations by State and Federal courts and the Office of State Review; or be an individual certified by the State of New York as an impartial hearing officer on September 1, 2001;

Paragraph (1) of subdivision (x) of section 200.1: Administrative Law As Qualifying Experience

We do not believe that experience in Administrative Law qualifies an individual to become an IHO and urge NYSED to reject this proposed amendment.

As noted above, special education is a highly complex field. First, an individual must understand the intricate web of regulations, both state and federal, that govern every action a school district takes relative to a student with a disability and how they are interpreted by the courts. Equally important, individuals practicing in this area must develop a degree of substantive expertise in evaluative tools, diagnosis, and pedagogy, among other topics, in order to assess whether a student received a substantive FAPE. That is precisely why, until now, the regulations have required practice or experience in education, special education, disability rights, or civil rights.

The current proposal to allow experience in "administrative law" to count as the attorney's only qualifying experience would invite applicants who lack the

[1] Without these requirements, lawyers one year out of law school or individuals who have handled only one special education case that lasted for a year could become IHOs.

specialized knowledge to serve as effective IHOs. Administrative law is too broad of a category and would allow attorneys to become IHOs who practice in wholly irrelevant fields including everything from labor to zoning. Individuals who practice in other areas of administrative law do not necessarily have the relevant knowledge or experience to adjudicate claims regarding the education for students with disabilities and whether the school complied with the IDEA, New York Education Law, and Section 504.

Therefore, we recommend that NYSED reject this proposed amendment to ensure that IHOs have the specialized knowledge they need to adjudicate special education hearings.

Paragraph (2) of subdivision (e) of section 200.5: Confidentiality

We support NYSED's recommendation to extend the confidentiality provisions of 200.5(e) to IHOs. Our clients are entitled to confidentiality at all stages of the special education process, and we agree that all persons involved in their child's education should be subject to the confidentiality provisions in the law.

Clause (c) of subparagraph (xii) of paragraph (3) of subdivision (j) of section 200.5: Permitting Witness Testimony By Video Conference

In general, Advocates for Children supports the amendment to permit IHOs to receive witness testimony via video conference. However, we have a number of proposals to strengthen this amendment.

Now that technology has advanced sufficiently, we agree that IHOs should be able to hear testimony by video conference. First and foremost, this would make the process of testifying easier for many witnesses, especially for those who have difficulty taking the time to travel to and from a hearing office to testify. Additionally, this proposal would enhance the level of due process by allowing IHOs to better assess witness credibility than what is possible via phone and to ensure that witnesses are testifying in a private location without the help of notes or other aides.

However, we do have a few concerns that require careful regulation before video conferencing is permitted. First, it is critical that districts be required to use technology that is reliable, confidential, and secure. Second, NYSED must mandate that the video and audio from any testimony via video conference be recorded to ensure that there are no inaccuracies in the transcript. Finally, to ensure fairness across the board, we recommend that the regulations require IHOs to take testimony

by video conferencing when requested rather than leaving it to the discretion of individual IHOs.

We encourage you to amend the second sentence of section 200.5(3)(xii)(c) so that it reads:

> At the request of the party calling the witness, the impartial hearing officer must receive testimony by telephone or by video conference, provided that such testimony shall be made under oath and subject to cross examination.

We further encourage you to amend 200.5(j)(5)(vi) as follows:

> (vi) For purposes of this section, the record shall include copies of:
>
> > (h) <u>all video and audio from any testimony taken via video conference</u>
> > <u>(i)</u> any other documentation as may be otherwise required by this section.

<u>Subparagraph (xii) of paragraph (3) of subdivision (j) of section 200.5: Conducting Hearings by Video Conference</u>

While we support the taking of testimony via video conference, we can only support the hearing as a whole being conducted via video conference if it is *at the request* of the parent and the technology allows for parents to privately confer with their representatives.

We recognize the many benefits of conducting hearings via videoconferencing for our clients. Videoconferencing could help our clients' cases be heard sooner as it would enable hearing officers from other parts of New York State and other jurisdictions to conduct hearings in New York City, thereby helping clear the backlog of cases. Video hearings could also alleviate some of the physical space constraints at the NYC DOE hearing office. Video hearings could expand the number of hearings that are calendared per day both because parties would not need to secure one of the limited rooms available at the NYC DOE hearing office and because the hours during which hearings are conducted could be expanded. Finally, video hearings could help some families who have difficulty traveling to the NYC DOE's downtown Brooklyn hearing office.

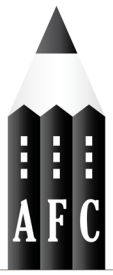
Despite the benefits, we know that many low-income parents like our clients may struggle to participate in video hearings because they may lack access to video conferencing technology or an internet connection, may be unfamiliar or uncomfortable with video conferencing technology, may not have a quiet place they can use to take part in the hearing, and may not want to allow the IHO or the NYC DOE to have a glimpse into their home. Such parents must be able to choose an in-person hearing and to have that hearing take place within the legal timeline.

We are concerned that the proposed regulations, as currently drafted, would allow an IHO from another part of New York State or another jurisdiction to accept a case on the assumption that the parties will agree to a videoconference only to learn ten days before the hearing that the parent does not have the technology needed or does not wish to participate via videoconference. This scenario could result in a significant delay in getting a hearing date including potentially awaiting the assignment of a new hearing officer who can hear the case in person or waiting for a date when the IHO can travel to the parent's location. Since NYSED's intent is to address delays in the hearing process, NYSED must revise the proposed regulations to avoid this situation. We recommend that NYSED develop a form that a parent can use at the start of the hearing process to indicate whether they are requesting an in-person hearing or a hearing via video conference with an explanation of the technology needed to participate in the video conference. In the absence of such procedures, we recommend that hearings proceed via videoconference only if the parent requests a video hearing. In other words, we encourage the video hearings to be an opt-in option for parents, rather than an opt-out.

Finally, NYSED should require that the video conferencing technology allow for private communications between parents and attorneys. Parents and their attorneys frequently confer during hearing breaks to clarify what is happening in the proceedings and to make key strategic decisions. Videoconferencing will make it harder for attorneys and clients to confer privately during the hearing. As a result, NYSED must mandate that the technology allow for these private conversations.

To ensure that our concerns are addressed, we encourage you to amend proposed section 200.5(j)(3)(xii)(h) to read:

> (h) Impartial hearings may be conducted by video conference only upon request of the parent. Hearings may proceed via video conference provided that the video conferencing technology allows for private communications and conferences between parents and any individual representing them in the proceeding. Additionally, hearings may proceed via video conference



provided that all personally identifiable data, information or records pertaining to students with disabilities during such hearing shall be subject to the requirements of section 200.5(e)(2) of this Part.

The opening paragraph of paragraph (5) of subdivision (j) of section 200.5: Additional Confidentiality Provisions

While all parties must protect student confidentiality, we have concerns about the amendment requiring IHOs to render a decision in a format consistent with NYSED confidentiality guidelines and pursuant to 8 NYCRR § 200.5(e)(2), shifting the burden for redacting the decision from the State Education Department or school district to the IHO. IHOs already lack critical support they need in order to do their jobs in a timely and efficient manner. This proposal could add administrative tasks to the IHOs for which they are not paid. It could also have the unintended consequence of slowing their work and adding to, rather than reducing, the backlog of cases in New York City. Moreover, the current proposal does not mandate that IHOs be provided with technology (like redaction software) to ensure that they issue decisions in a format that preserves student confidentiality. As such, unless these concerns are addressed, we oppose this amendment and request that the State Education Department or school district, which are routinely tasked with redacting various documents and likely have far more administrative support and resources than an individual IHO, retain the responsibility for redacting decisions.

Conclusion

We share NYSED's concern with the extreme delays families of students with disabilities are currently facing in accessing the basic due process guaranteed to them by state and federal law. This is an unprecedented crisis, and we commend NYSED for its efforts to fix this badly broken system.

However, allowing non-attorneys to serve as hearing officers is not in the interest of students with disabilities and is not the way to resolve this crisis. Furthermore, while allowing hearing officers from other jurisdictions or hearings by videoconference may help alleviate some of the current delays in hearings, we do not believe that the amendments being currently proposed will address the problems that caused the crisis in the first place; nor are these the only solutions. Both NYSED and NYC DOE must

make efforts to reduce unnecessary administrative tasks for IHOs and improve compensation to a level that will attract qualified attorneys to become IHOs. NYSED must demand that NYC DOE comply with the May 2019 Compliance Assurance Plan and immediately end the practice of requiring pendency hearings in uncontested cases which will, in turn, reduce the strain on the impartial hearing system. NYC DOE must improve its settlement process so that cases that both the parent and the district want resolved are resolved promptly and moved off the docket. Most importantly, NYC DOE must comply with the IDEA and provide a FAPE to students so that fewer hearings need to be filed in the first instance.

Thank you for considering our comments. If you have any questions, please feel free to contact me at 212-822-9547 or dhochbaum@advocatesforchildren.org.

Sincerely,

Daniel M. Hochbaum
Senior Staff Attorney for Direct Services and Impact Litigation