



Advocates for Children of New York

Protecting every child's right to learn

Testimony to be delivered to the New York State Education Department

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

June 11, 2020

Good morning. Thank you for the opportunity to testify today concerning the proposed amendments to New York State's special education regulations concerning the qualifications of special education Impartial Hearing Officers (IHOs). My name is Daniel Hochbaum and I am a Senior Staff Attorney at Advocates for Children of New York (AFC).

For nearly fifty years, AFC has worked with low-income families to secure high-quality public education services for their children, including children with disabilities. Each year, AFC represents dozens of parents at impartial hearings brought under the IDEA and Section 504 and advises thousands more on their special education rights.

The special education Impartial Hearing system in New York City is facing a deep crisis, and families of students with disabilities are being denied their federally guaranteed right to a hearing within 75 days. Ultimately, the delays in the hearing system are causing students with disabilities to miss out on critical special education services, therapies, and accommodations they need in order to learn for months and sometimes even years.

We agree that the State and City must take urgent action and appreciate NYSED's recognition of the need to address the delays in impartial hearings. **However, we are extremely concerned about the proposed amendment that would allow non-attorneys to serve as impartial hearing officers and urge NYSED to work with stakeholders to identify alternative solutions to help address the delays.**

Special education hearings are complex legal proceedings and require trained attorneys to hear them. The IDEA itself requires that IHOs know federal and state laws, regulations, and case law; be able to conduct hearings according to standard legal practice; and have the ability to issue decisions consistent with standard legal practice. This means that IHOs must have the skills to develop a factual record, rule on motions and objections, apply the law, and write orders in the same way that judges in a courthouse do. Many, if not all, of these skills come from years of legal

- Board of Directors**
Eric F. Grossman, *President*
Jamie A. Levitt, *Vice President*
Harriet Chan King, *Secretary*
Paul D. Becker, *Treasurer*
Carmita Alonso
Matt Berke
Jessica A. Davis
Lucy Fato
Robin L. French
Brian Friedman
Kimberley D. Harris
Caroline J. Heller
Maura K. Monaghan
Jon H. Oram
Jonathan D. Polkes
Veronica M. Wissel
Raul F. Yanes
- Executive Director**
Kim Sweet
- Deputy Director**
Matthew Lenaghan



training and practice. We are concerned that non-attorneys do not have the requisite knowledge and skillset to serve as qualified impartial hearing officers given the legal complexity of many special education cases.

As an attorney representing parents in special education administrative hearings, I have seen the need for hearing officers who can answer a wide range of complicated legal questions. For example, in one of my cases, when the DOE unexpectedly called a rebuttal witness, we requested that the DOE offer a proffer as to why it needed to call this witness, and the hearing officer needed to consider arguments about whether the testimony was barred because it was not offered during the district's case in chief. In another case, the hearing officer needed to make a determination in the midst of the hearing about whether a witness should be prevented from presenting so-called "retrospective testimony," which is not admissible in hearings following the Second Circuit's decision in *R.E. v. NYC DOE*. And, in another case, the hearing officer had to decide whether to apply the statute of limitations of the IDEA, the statute of limitations of Section 504 of the Rehabilitation Act, or an exception to the statute of limitations and, as a result, whether the parents could make claims dating back 7 years, 3 years, or only 2 years. These are just a few of the many examples I could give that demonstrate the importance of maintaining the requirement for hearing officers to be attorneys.

We are also concerned that without the necessary legal knowledge, training, and practice experience, non-attorney IHOs will be more likely to make legal errors, which will lead to more appeals and, in turn, delay special education services to students. This regulatory change will impact our clients the hardest. As advocates for low-income New York City students whose families cannot afford to pay for services upfront and sue for reimbursement later, our clients may have to wait months or years during appeals to get the services they are entitled to by law. Therefore, even if this proposed change results in a faster hearing, the likelihood of appeals would slow the ultimate receipt of services by our clients, defeating the purpose of the proposed amendment.

We believe that any potential benefits to having non-attorneys serve as IHOs in contested special education cases will be outweighed by the potential harms. However, we believe that non-attorneys can serve other functions in the hearing process to help clear the backlog of cases in New York City. These include:

- expediting undisputed pendency agreements;
- conducting pre-hearing conferences to determine whether the DOE will be contesting or conceding any claims; and
- entering so ordered relief when the DOE does not contest the hearing request, concedes certain parts of the claims, or does not intend to present evidence.



We have included other examples in our written comments.

We strongly 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.

We recognize the depth of the crisis in the NYC Impartial Hearing system and agree that change is urgently needed. We support some of the other proposed amendments, as described in our written comments, as steps toward addressing the backlog. However, the proposed regulatory changes by themselves will not address the problems that caused the crisis in the first place. We urge NYSED to reject changes that would allow non-attorneys to serve as IHOs, and we stand ready to work side by side with you to develop solutions that will bring our state back into compliance with federal law while serving the interests of students with disabilities.

Thank you.