



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

August 31, 2020

VIA EMAIL

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Re: Proposed Amendment to Paragraph (1) of subdivision (x) of section 200.1 of the Regulations of the Commissioner of Education

Dear Mr. Suriano:

Advocates for Children of New York (AFC) appreciates the opportunity to submit additional comments regarding the New York State Education Department (NYSED) proposal to amend section 200.1(x)(1) of the Regulations of the Commissioner regarding the qualifications of special education Impartial Hearing Officers (IHOs) in New York State. As you know, we previously submitted comments opposing the proposal to allow non-attorneys to serve as IHOs and, once again, would like to express our deep concern about this proposal.

As advocates for students with disabilities in New York City, we know that parents need a fully functioning due process system in order to safeguard their children's special education rights. We also know the harm many of AFC's clients are experiencing due to lack of available hearing officers and the resulting delays in receiving settlements, hearings, orders, and implementation of orders. 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. **Nevertheless, we believe that the legal complexity of special education due process hearings requires that an attorney adjudicate them to ensure that legal procedures are properly followed and the law is correctly applied.**



Special education hearings are formal 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.

In the past, NYSED itself has agreed that special education hearings require attorneys to preside over them precisely because of their legal complexity. In 2001, NYSED stated that “hearings have become increasingly complex” and that they “*require* individuals with *expertise* in substantive and procedural law involving special education in this State” (emphasis added). We are concerned that non-attorneys do not have the requisite knowledge and skillset to serve as qualified impartial hearing officers and cannot obtain the legal expertise needed to conduct a hearing in a weeklong training.

Hearings today are even more legally complex than they were in 2001 and today’s IHOs must be able to answer a wide range of complicated legal questions. For example, in one recent case handled by AFC, the district unexpectedly called a rebuttal witness, the parent’s attorney requested that the DOE present a proffer as to why it needed to call this witness, and the IHO 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 IHO was called upon to apply Second Circuit precedent in the midst of the hearing to determine whether a witness should be prevented from presenting so-called “retrospective testimony,” which is not admissible in hearings following the decision in *R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167, 186 (2d Cir. 2012). Due to the litigious nature of NYC DOE impartial hearings, cases also frequently require IHOs to rule on the precise dates by which parents may make a claim based on the statutes of limitations under the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act, even before reaching substantive issues like a Free Appropriate Public Education. The ability to analyze and apply the laws in these situations takes years of legal training and experience.

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. As we have stated previously, delays caused by appeals will impact low-income families – like our clients – the most. Low-income New York City families cannot afford to pay for tuition, evaluations, therapies, and tutoring upfront, and sue for reimbursement later. As a result, our clients may have to wait months or years



during appeals to get the services they are entitled to by law. These delays may be even longer if the Office of State Review becomes overwhelmed by appeals. Consequently, even if permitting non-attorneys to serve as IHOs results in a faster hearing, the prospect of lengthy appeals due to legal and procedural errors could delay the start of services by students with disabilities, defeating the purpose of the proposed amendment.

We also note that the proposed regulation applies only to New York City and 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. We feel strongly that New York City students' rights should be no different than those of students elsewhere, and that they must be entitled to the same type and level of due process as students in the rest of the state.

While we do not believe that having non-attorneys serve as IHOs is a feasible solution to the shortage of IHOs and the backlog in hearings, we continue to urge NYSED to consider alternate uses of non-attorneys in the special education hearing process. We previously proposed having non-attorneys fill the following potential functions and respectfully request that you reconsider them:

- expediting undisputed pendency agreements between the parties;
- conducting settlement conferences to expedite settlement;
- conducting pre-hearing conferences to streamline evidence and determine whether the DOE will be contesting or conceding any claims;
- setting hearing schedules; and
- so ordering 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 speed up the hearing process for families and remove unnecessary matters from the schedules of IHOs.

We also recognize that NYSED has taken a variety of other steps to address the crisis in the New York City special education hearing system. For example, NYSED recently trained and certified a new crop of IHOs who are attorneys, and these IHOs have begun taking cases. Additionally, NYSED is proposing other regulatory changes such as expanding the pool of IHOs to attorneys from different jurisdictions. We believe that NYSED should adopt the regulatory changes we supported in our initial comments and continue to explore other solutions to this situation rather than taking the deeply concerning step of allowing non-attorneys to adjudicate special education cases.



For the reasons stated above, as well as the reasons noted in our initial comments in May 2020 and in our oral testimony in June 2020, we strongly urge NYSED to reject the amendment that would permit non-attorneys to serve as IHOs and adjudicate contested special education hearings in New York City.

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,

A handwritten signature in blue ink that reads "Daniel M. Hochbaum". The signature is fluid and cursive, with a long horizontal stroke at the end.

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