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November 5, 2021

Office of Special Education
New York State Education Department
89 Washington Avenue
Albany, New York 12234

Re: *New York State Education Department's Request for Information for the Office of Special Education: Impartial Hearing Officer System in New York City*

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On behalf of Advocates for Children of New York (AFC), we are writing to respond to the New York State Education Department's (NYSED's) Request for Information (RFI) to address the New York City Department of Education's (NYCDOE's) outstanding noncompliance with its obligations under the Individuals with Disabilities Education Act (IDEA), its implementing regulations, and NYSED regulations to maintain a functional special education due process system providing timely impartial due process hearings.

As you know, every year, AFC helps thousands of families navigate the special education system in New York City (NYC), providing technical assistance, in-depth advocacy, and legal representation at impartial hearings. As advocates for students with disabilities in the 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 families across the City are experiencing due to significant 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 systemic delays with the impartial hearing process.

Any IDEA due process hearing system in NYC must consist of hearing officers who are independent of the NYCDOE and the New York City government that oversees the NYCDOE, knowledgeable and experienced in the federal IDEA and Section 504 of the Rehabilitation Act, and knowledgeable and experienced in IDEA and Section 504 law in New York State specifically. New York State Education Law has requirements and provisions relating to special education that are unique to the state, including placing the burden of proof on the Local Education Agency (LEA) rather than the parent who typically brings the hearing request, designating the NYCDOE as the LEA for charter schools for purposes of special education requirements, and setting a different statute of limitations for IDEA claims (2 years) as compared to Section 504 claims (3 years) when parents assert a denial of a Free Appropriate Public Education (FAPE) under both laws.



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In addition, special education due process hearings in NYC are particularly litigious due to the strategies used by the NYCDOE. As a result, all hearing officers must be well-versed in special education law, regulations, caselaw, and practice, as well as in the unique qualities of special education hearings in NYC in order to protect the rights of students with disabilities. For these reasons, while we agree that change is needed, we do not support proposals to move the NYC special education due process hearing system to the NYC Office of Administrative Trials and Hearings (OATH).

While this letter will not provide a full new model for a special education due process system in New York City, we do believe that changes and improvements must be made to the current structure that will reduce the backlog of hearings and better protect students' rights. This letter will highlight the causes of delays in the current system, based on our experience on the ground, and present solutions that must be incorporated into any model for New York City's special education due process system.

It is important to note that a major cause of widespread delays in the current impartial hearing system is the systemic failure of the NYCDOE to properly engage in alternatives to hearings and instead proceeding to hearing on matters that are either undisputed or could be resolved expeditiously through appropriate IEP meetings, resolution sessions, mediation sessions, or settlement agreements. If NYSED could assist in removing the barriers to effectively resolving matters without hearings, the number of cases requiring impartial hearings would decline dramatically.

1. Effective Alternative Dispute Resolution: Resolution Sessions and Mediation

Although there are several areas where the NYC special education impartial hearing system can improve, we are unlikely to see significant progress unless families are provided access to effective and productive alternatives to proceeding to hearing. Currently, while the NYCDOE can participate in resolution sessions and mediations with families as well as enter into settlement agreements, the process for each alternative is riddled with barriers preventing families from being able to resolve matters quickly and leaving families with no alternative but to inundate the impartial hearing system.

A. Lack of “Decision-Making Authority” for NYCDOE Representatives at Resolution Sessions and Mediation

The IDEA and New York State regulations require local school districts to convene a resolution session within 15 days of receiving notice of the parents' due process complaint and to involve a representative of the school district with “decision-making authority” in the meeting. *See* 20 U.S.C. § 1415(f)(1)(B)(i); N.Y. Comp. Codes R. & Regs. tit. 8 § 200.5(j)(2). However, the NYCDOE is failing to meet these obligations, and missing a crucial opportunity to resolve due process complaints quickly and efficiently,



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and without the need for impartial hearing. As NYSED reported in its Compliance Assurance Plan (CAP), “NYCDOE does not defend numerous cases at hearing, but rather admits that it did not provide FAPE and does not offer to settle these cases, adding to the unacceptable number of due process complaints filed.” (CAP at 19.). These cases can, and should be, resolved through resolution, mediation, or settlement. However, a large number of cases cannot be resolved through resolution session or mediation because the NYCDOE representatives lack the authority or power to offer reasonable relief or to enter into agreements with families. Failure to make use of this part of the process that is required by law undeniably adds to the overload of the hearing office with cases that should not need to proceed to hearing. AFC staff and clients routinely participate in resolution sessions in which the DOE explicitly or implicitly lacks authority to offer reasonable relief. If NYSED would require the NYCDOE to change course from its practice of sending representatives to resolution sessions who have no authority to resolve cases, the impact on reducing the strain on the impartial hearing process would be considerable. Notably, even after NYSED ordered the NYCDOE to provide a more robust mediation system in the 2019 Compliance Assurance Plan, NYCDOE representatives at mediation still state that they do not have authority to resolve many complaints.

Regularly, NYCDOE representatives at both resolution sessions and mediation fully acknowledge that they lack the authority to approve resolution of routine requests for relief, including:

- “Enhanced”-rate or market-rate independent assessment authorizations
- “Enhanced”-rate or market-rate compensatory services, such as tutoring and related services
- Compensatory services based on what the student needs to place them in the position they would have been in but for the denial of a free appropriate public education (FAPE)
- Placement at a New York State-approved non-public school (NPS)
- Tuition for special education private school placement
- Reimbursement for expenses incurred by families, including for the cost of meals or transportation

In fact, NYCDOE representatives do not have the authority to agree at a resolution session or mediation to any relief that involves paying a private provider or private school, rendering the resolution session or mediation pointless in such cases, even if the parties agree on the appropriateness of the relief. In addition, in a number of cases, NYCDOE representatives who attend resolution sessions or mediations have explained that they lack the authority to agree to any changes to a student’s IEP; they can only agree to schedule an IEP meeting for a later date with no guarantee that the IEP team will agree to the relief requested through the due process complaint or mediation request.

In our experience, the forms of relief that are often rejected by the NYCDOE during the resolution or mediation processes are later won during simple impartial hearings in which the DOE chooses to not



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even defend its provision of a FAPE. In these situations, the failure to resolve issues at resolution or mediation results in damaging delays in the delivery of services for children, as well as steep costs to parents, advocates, the NYCDOE, and impartial hearing office staff in valuable time, resources, and attorneys' fees.

While NYCDOE has hired “mediation liaisons” since the issuance of the CAP to attempt to improve the use of mediation, we have had experiences where NYCDOE representatives at mediation still lack decision-making authority to agree to routine forms of relief, thereby rendering mediation ineffective.

Given the pervasiveness of NYCDOE representatives' lack of authority to resolve matters prior to litigation, we propose the following solutions:

- **Require NYCDOE to empower NYCDOE representatives with the authority to approve reasonable and regularly sought forms of relief at resolution and mediation, such as the types of relief mentioned above.** The NYCDOE's systemic failure to reasonably fund evaluations and services not only unnecessarily prolongs legal cases, but it prevents students from receiving critical and high-quality services and evaluations in a timely way—or at all. Granting NYCDOE representatives the authority to approve reasonable forms of relief at resolution or mediation will provide a real opportunity to resolve a large number of undisputed cases, ensuring that the only cases that move forward to the impartial hearing officer are those which truly require the intervention of a hearing officer.
- **Formally increase “standard” rates for evaluations and services to more accurately reflect market rates.** Currently, many providers are unwilling to accept the DOE's standard rate for evaluations and services because the rate is significantly lower than market rate, but the DOE representative at mediation or resolution often lacks the authority to agree to a higher rate through resolution or mediation. In addition to giving the DOE representatives authority to agree to enhanced rates, the DOE should adjust its standard rates and also include an annual cost-of-living adjustment to prevent rates from falling below market-rate in the future.
- **Require NYCDOE to provide data biannually to NYSED reporting how often resolution sessions and mediations occur and how often cases are resolved using either method.** In order for there to be meaningful change in NYCDOE's systemic failure to be able to resolve matters through resolution or mediation, NYSED must require reporting on NYCDOE's use of such methods to ensure actual improvement in the effectiveness of alternative dispute resolution. If data reveals that NYCDOE continues to involve representatives in the resolution or mediation process that do not possess the authority to resolve matters, NYSED should take further action to ensure NYCDOE complies with state and federal law regarding resolution sessions and mediations.



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B. Failure to Schedule Resolution Sessions

In addition to failing to involve a representative with decision-making authority at the resolution session, often, the NYCDOE does not convene a resolution session at all or does not convene a resolution session within the timeline required by law. In our experience, we have represented numerous families on cases over the course of several years where the DOE does not convene a resolution session. The NYCDOE's frequent failure to conduct resolution sessions is depriving both NYCDOE and families of the opportunity to engage in a meaningful discussion to attempt to resolve the matter without having to proceed with litigation.

We propose the following recommendations:

- **Require NYCDOE to submit the status of the resolution session to the impartial hearing officer (IHO) prior to expiration of resolution period.** NYSED should require NYCDOE, at a minimum, to report to the IHO that the session has been scheduled with an NYCDOE representative with authority to engage in resolving disputes and conducted prior to the end of the resolution period. Any IHO system should comply with the timelines in the IDEA for resolution of hearings, and NYCDOE's claims that it is "investigating the case" should not be considered a valid justification to extend the compliance deadlines in the IDEA, especially where the NYCDOE did not take any action during the resolution period.
- **Require NYCDOE to provide bi-yearly data to NYSED regarding its compliance with regulations mandating resolution sessions.** As noted above, in order for there to be meaningful change in NYCDOE's systemic failure to engage in the resolution process, NYSED must require reporting on NYCDOE compliance and take further steps to ensure that NYCDOE complies with state and federal law regarding resolution sessions.

2. Expediting Resolution of Undisputed Cases at the Impartial Hearing Office

In many of our cases, NYCDOE either does not present a case to defend its provision of FAPE or concedes that it did not provide a FAPE. In fact, within the last couple of years, the DOE has either conceded FAPE or not put on a case to defend its actions in the majority of impartial hearings with AFC.

Additionally, as NYSED accurately observed in the CAP, NYCDOE's requirement for an order from a hearing officer before implementing pendency, even when pendency is not in dispute, "unnecessarily add[s] to the number of due process complaints filed." (CAP at 19.). While NYCDOE has introduced the use of pendency agreements in an attempt to reduce the number of pendency hearings at the impartial hearing office, the process for obtaining a pendency agreement is marred with barriers to



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expeditious resolution. Proposed pendency agreements submitted by the parent are currently reviewed by the Special Education Unit of NYCDOE's Office of Legal Services. However, often parents do not receive a response to their submission, resulting in many cases still requiring an impartial hearing officer to issue an order to obtain pendency despite pendency being an automatic right. In circumstances where the parent receives a response stating that the NYCDOE intends to contest the parent's request for pendency, it is often contrary to the position of the NYCDOE representative at hearing who ultimately does not contest the request for pendency at the hearing. The failure of the Special Education Unit either to respond or to take a defensible position related to pendency further exacerbates the unnecessary need for pendency hearings. Consequently, impartial hearing officers must conduct a separate pendency hearing and draft and issue a pendency decision, taking away from their availability to hear matters that require an impartial hearing officer to resolve the dispute on the merits.

To reduce the time and resources spent on unnecessary cases requiring an impartial hearing, we suggest the following solutions:

- **NYSED must issue explicit guidance to IHOs regarding when to enter default judgments against the NYCDOE.** The NYCDOE bears the burden in demonstrating it offered the student a FAPE. In a hearing where the DOE is not presenting a case or concedes FAPE, the IHO should not require the parent to present evidence or testimony regarding the provision of FAPE. However, often, when the NYCDOE does not present a case, the IHO still requires the parent to present some evidence or testimony related to FAPE, inappropriately shifting the burden to the parent and wasting time that could be used on more substantive matters. Since few, if any, IHOs issue default judgments, the DOE continues to employ this evasive strategy, which delays essential services being provided to students and unnecessarily hinders the IHO system's ability to hear matters that are truly in dispute. With explicit guidance allowing for default judgement against NYCDOE when it does not present a case or concedes, the IHO will only have to allocate time and resources to a small portion of the case – appropriateness of relief (in cases involving unilateral placement where the parent has the burden of proof on the appropriateness) – thereby freeing time for cases that require full hearings.
- **NYSED must issue explicit guidance to IHOs regarding pendency orders without the necessity of a hearing.** IHOs should ask the parties within 5 days of receiving a request for pendency if the parties have entered into a pendency agreement and, if not, require the parties to notify the IHO of their positions related to pendency within 5 days. If NYCDOE does not respond, or responds that it will not be contesting pendency, the IHO should issue a pendency order in line with the parent's request without the need for a hearing.



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3. Remove Barriers to Engaging Effectively in the Settlement Process

The NYCDOE can also resolve a larger number of cases through settlement than it is currently resolving. An efficient and speedy settlement of appropriate cases would alleviate the current burden on the impartial hearing office. By settling cases expeditiously, the number of unnecessary hearings will decrease substantially, freeing up time for IHOs, NYCDOE and parents to focus on disputed cases that require a hearing.

A. Separation of the Settlement Attorney and the NYCDOE Impartial Hearing Representative

Currently, most NYCDOE representatives are unable to enter into settlements with parents and instead must “refer” cases for consideration of settlement to the Special Education Unit at the Office of Legal Services. Staff at the Special Education Unit are often disconnected from the hearing process and have no incentive to expedite or review cases to ensure unnecessary cases do not proceed to hearing. AFC often represents parents at impartial hearings where the NYCDOE representative does not contest the allegations but states they were unable to do the level of investigation required by the Office of Legal Services in order to recommend the case for settlement before the hearing. Other times, while the NYCDOE representative has “referred” the case for settlement with the belief that the NYCDOE would not prevail at hearing, the representative does not receive a response or update from the Special Education Unit, leaving them unable to provide a substantive update on the status of settlement to the parent or impartial hearing officer even several months after the case has been “referred.” Lastly, there are instances where the Special Education Unit rejects the NYCDOE representative’s submission for settlement, forcing the representative to litigate a case that they think should be settled. In such cases, hearings proceed even though the NYCDOE often concedes or does not present a case – again clogging the already overwhelmed system with an unnecessary and undisputed case.

We agree with NYSED’s CAP that the DOE must “[e]nsure that staff representing NYCDOE at due process hearings are authorized to enter into settlement or may do so subject to approval, which approval will take no longer than 30 days after request for approval, which request will be made no later than 5 days after agreement has been reached.” (CAP at 23). Failing to empower NYCDOE representatives with the authority to settle cases also undermines the use of resolution and mediation as discussed above.

Given the significant impact of failing to provide the NYCDOE hearing representative with the ability to settle cases, we propose the following solutions:



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- **NYSED must ensure that NYCDOE representatives are authorized to enter into settlement subject to NYC Comptroller approval, which should not take longer than 30 days from such request.** Contrary to the NYCDOE's position that NYSED is not permitted to take such corrective action, NYSED most certainly can enforce this corrective action as it is not requiring NYCDOE representatives to enter into a settlement agreement without NYC Comptroller approval, but instead simply authorizing the representative to agree to a settlement pending approval of the Comptroller.
- **NYSED must issue explicit guidance allowing IHOs to permit the parties to enter into agreements on the record and must ensure that NYCDOE representatives are authorized to enter into agreements on the record pending Comptroller approval.**

B. Failure to Settle Undisputed Cases and Comply with the Current “Fast-Track” Settlement Policy

In 2013, NYCDOE announced a “fast-track” settlement policy to expedite the settlement of certain cases. While we were very hopeful that this policy would help to alleviate the burden for families of lengthy hearings, the DOE is failing to implement this policy. The fast-track settlement policy established under Chancellor Fariña involves cases where parents are seeking tuition payment or reimbursement and is applicable where (a) there was a settlement or unappealed decision awarding the same unilateral placement in the prior year and the DOE program or placement recommendation remains the same as in the prior year, (b) there was a settlement the prior year for the same program, placement, or circumstances, or (c) the child is entering a terminal grade in a school that the DOE previously funded. When the procedure was established, the DOE announced it would settle eligible cases within 90 days. However, currently, the settlement process nearly always takes much longer—routinely taking months or even over a year beyond the school year at issue. As a result, parents often feel it is more expeditious to request a hearing than to wait a full year for a finalized settlement agreement.

The delays in settling cases are extensive and unacceptable. Very frequently, the Special Education Unit attorney handling the matter does not respond to the parent for several months after receiving the documentation required to proceed with settlement. Adding to the delays, this year the NYCDOE began asking parents to submit settlement documents to general DOE email inboxes as opposed to giving parents a direct contact in the Special Education Unit, leaving parents without any direct contact to determine the status of their settlement following the submission of documents. Furthermore, staff in the Special Education Unit often are inconsistent with their requests for documentation or fail to have the requisite knowledge to understand why certain documentation is or is not required to proceed with settlement. These inconsistencies further delay the settlement process.



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The investigation of these matters for possible settlement often last months if not years after the parent's initial filing. In addition, once a settlement negotiation finally begins, Special Education Unit staff often takes weeks to respond – and sometimes even reverses terms already agreed upon – drawing out the process even longer. The delays at every step of the settlement process often leave parents with no alternative but to seek relief through the impartial hearing system.

We propose the following solutions to improve the effectiveness of the settlement process:

- **NYCDOE must comply with the fast-track settlement policy it announced in 2013.**
- **NYCDOE must develop a protocol for identifying common failures in which there is a substantial probability that the NYCDOE denied the student a FAPE.** Once developed, the NYCDOE should have a dedicated team at the Special Education Unit tasked with approving these cases for settlement. Once the NYCDOE determines that a case is appropriate for settlement, the parent and NYCDOE should be able to settle within a reasonable time.
- **NYCDOE should comply with Local Law 20 of 2020, requiring the NYCDOE to publicly report annual data on timelines for settling special education cases.** Although the DOE was required to post its first report by November 1, 2020 and its second report by November 1, 2021, the NYCDOE has not yet posted either report, in violation of city law.

4. Removing Barriers to Parents' Participation in the Impartial Hearing Process

The IDEA gives parents the right to participate meaningfully in all aspects of the special education process, including the impartial hearing process. However, from our experience working with families, we have seen how incredibly difficult it is for a family to attempt to enforce their rights through the hearing process in NYC. Although the IDEA contemplates a system that is accessible for families to navigate on their own, often that is simply not the case. Frequently, parents who file their own impartial hearing requests are told by IHOs to obtain legal representation prior to proceeding with the case in recognition of the complexity of the hearing process and how difficult it can be to navigate without legal assistance. Even with representation, parents face obstacles to participating in the hearing process, including lack of adequate translation and interpretation services, inflexibility of scheduling of hearing matters, and the location of the hearing office.

Parents are an essential part of the impartial hearing process and any system should ensure their full participation. As such, we propose the following recommendations:

- **Establish a pro-se office and/or helpline for parents.** The office/helpline should be staffed by persons knowledgeable of the impartial hearing process in NYC and independent of the NYCDOE who are able to assist families in navigating the hearing process as well as resolution,



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mediation, and settlement. As part of this initiative, parents must have access to sample documents including sample complaints, motions, subpoenas, opening statements, testimony, and closing arguments in various languages. These documents should not just be available online, but should be available in hard copy to ensure that families with limited access to technology also receive support.

- **Improve interpretation and translation services.** The quality of interpretation at hearings is incredibly deficient, resulting in barriers to participation and delays. In fact, IHOs and families have had to reschedule hearings because they were not provided with an interpreter at all. In other cases, hearings have had to be rescheduled in an effort to be matched with a higher quality interpreter. Even when provided with an interpreter, there are communication issues resulting from differences in the dialects spoken by the interpreter and the family or stemming from a lack of familiarity of special education terms by the interpreter, for example. To increase the effectiveness of the interpretation service, families should be able to indicate their preferred dialect when they request interpretation and translation for a hearing. NYSED should conduct yearly reviews of interpreter-assisted hearings, including surveying families about their experience with interpretation at the hearing office, and reviewing complaints received by the NYCDOE's Translation and Interpretation Unit, to ensure quality and remove any deficient service providers. Additionally, many of the written communications from the hearing office are sent to families only in English, creating significant hurdles for families whose primary language is not English. Any impartial hearing system must have the ability to send all communications to families in their preferred language, including surveying families about their experience with interpretation at the hearing office. Additionally, the impartial hearing system must provide training to interpretation agencies on special education terminology. Lastly, if a hearing must be adjourned because of the lack of an interpreter or deficient interpretation services, the IHO must be able to record this as a reason for the delay so that NYSED can track how often this happens and address either the lack of providers and/or quality interpretation more efficiently.
- **Allow for flexibility in hearing location and timing.** While the impartial hearing office has recently announced that it will conduct hearings via multiple platforms, including virtually and in-person, solely holding hearings during business hours is not equitable or feasible for many working families. The hearing process can take multiple days, requiring families to miss work multiple times or resulting in them being unable to participate in the hearing process. Any hearing office should establish options for hearings outside of typical business hours and should establish at least one office in every borough for in-person hearings. Such offices should have sufficient space for private hearings and waiting rooms, should be independent from local Committee on Special Education (CSE) offices, and should be fully equipped to conduct hearings impartially.



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5. Creating Consistent Procedural Rules for Impartial Hearing Officers

NYSED should ensure that IHOs have the knowledge and training needed to implement consistent procedural rules during the impartial hearing process. Currently, procedural rules and practices vary depending on the IHO assigned to the case. While very few, if any, IHOs will issue default judgment against the NYCDOE for failing to present a case, the majority will not – improperly shifting the burden of proof to the parent. Often, IHOs will allow for a substantial number of extensions solely based on the NYCDOE representative's statement that the case is being "investigated," despite several months passing since the initial filing, or will permit the NYCDOE to adjourn cases at the last minute over the parent's objection.

To create consistency across the impartial hearing office so that it is reliable for the IHOs, parents and NYCDOE, we propose the following recommendation:

- **NYSED must ensure IHOs receive comprehensive training and written guidance on how to conduct a hearing.** Such training must include consistent procedures on which party bears the burden of proof on which aspects of a case, when to enter default judgment, when permitting adjournments is appropriate, and when it is appropriate to issue extensions of compliance.

Thank you for considering our comments. We look forward to working with you to address the delays in the impartial hearing process and ensure New York City has a due process system that works for students with disabilities and their families. If you have any questions, please do not hesitate to contact us.

Respectfully,

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