Advocates for Children of New York
Protecting every child's right to learn since 1971

May 8, 2023

Christopher Suriano
Assistant Commissioner of the Office of Special Education
New York State Education Department
Room 301M, Education Building
89 Washington Avenue
Albany, New York 12234
Sent via email to: **REGCOMMENTS@nysed.gov**

Re: Comments Concerning Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education relating to Special Education Due Process Hearings

Dear Assistant Commissioner 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 section 200.5 of the Regulations of the Commissioner regarding extensions in special education due process hearings and related procedures.

For over 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 special education proceedings 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 being harmed 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, the State's interest in efficiency should not override basic principles of fairness and equity to which parents are legally entitled throughout these proceedings.

A primary way to reduce the burden of these hearings on the system is to improve the efficiency of the process for resolving cases prior to hearing. Too many cases are forced to proceed to hearing – and are pending beyond the legal timelines – under the current rules because the New York City Department of Education (NYC DOE) lacks an efficient way to move cases through the resolution, mediation, and settlement processes, including the Comptroller approval process. NYSED must ensure that the NYC DOE improves its settlement process so that cases that both the parent and the district want resolved are resolved promptly and moved off the docket. We urge NYSED to work with stakeholders to identify alternative solutions to help address the delays in settlements while ensuring that every student whose parent files a due process complaint has their case heard and resolved quickly. 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. Below are our comments about the proposed changes.

2005.(h)(1) – Mediation

We support the proposed amendments to 200.5(h)(1). We are pleased that the proposed language makes clear that children have the right to stay in their then-current educational placement when parents request mediation prior to filing a due process complaint and for an additional 14 days following the determination that the parties are unable to resolve the matter that is the subject of mediation. This amendment will be helpful in some cases, particularly where parents are pursuing certain changes to services within the public school system.

However, while Advocates for Children supports NYSED's goal of making mediation more readily available and accessible to families, it is important for NYSED to recognize that the proposed amendment will do little to address the key barriers to achieving that goal. In our experience, the NYC DOE representatives that participate in these resolution and mediation sessions often do not have the authority to settle the entirety of the claims or relief requested by the due process complaint brought by the parent. The NYC DOE representatives will repeatedly inform the parent and the parent's counsel that they do not have the authority to enter into a resolution or mediation agreement at the time the parties are attempting to resolve the matter. Without this authority, participation in these sessions only further delays the resolution of the claims because parents cannot meaningfully engage in these sessions, and as a result, are left with no other options but to proceed to a hearing. Consequently, parents, their witnesses, and attorneys spend time preparing for and testifying at

hearings in cases in which the NYC DOE has already determined that the case is appropriate for settlement and concedes that it has failed to provide the student with a Free Appropriate Public Education ("FAPE") or does not present any witnesses, adding the cost of the parent's legal fees to the NYC DOE's payment obligation. Therefore, NYSED needs to take action to ensure that the district representatives attending these mediations and resolution sessions have the actual authority to enter into an agreement that can resolve all forms of relief at the time the parties are attempting to resolve the matter.

2005.(j)(5)(iv) – Dismissals to Pursue Settlement

We urge you to reject the addition of 200.5(j)(5)(iv), which would allow cases to be dismissed for up to six months in order for the parties to settle a case and instead include settlement as an example of an exceptional circumstance warranting a further extension under 200.5(j)(5)(iii) when both parties agree. The proposed amendment to 200.5(j)(5)(iv) does not further the goal of expediting settlements, and in fact encourages the NYC DOE to further delay finalization of settlement, to the detriment of students and parents, as well as delay ultimate resolution of the due process proceeding. We are concerned that the proposed amendment would lead to the dismissal of due process complaints when parents and the DOE are working toward a settlement but do not yet have an executed settlement agreement in place, taking pressure off the DOE to move forward with the settlement process in such cases. In our experience representing parents, the NYC DOE often delays negotiating and finalizing the written settlement agreement even after the parent and NYC DOE have agreed upon the terms of the settlement. As a result, the finalization of the settlement typically does not occur until several months after the parties have actually agreed upon the terms. If the hearing officer orders a dismissal due to the settlement negotiations and the NYC DOE delays finalizing the settlement agreement or settlement discussions fall through, it places the burden on the parent to refile their claims six months later. This refiling would trigger the IDEA timelines to re-start, positioning the parent's hearing request at the back of the line of cases to be assigned a hearing officer and requiring the parties to engage in another resolution period, resulting in even more delay. In cases where the parent needs to re-file, this proposal will not lead to more efficient and timely decisions as intended, but instead will hinder their access to the basic due process guaranteed to them by state and federal law. This is particularly concerning for pro se parents who may have more difficulty navigating the complex due process system that is in place. The proposed amendments also do not take into account the NYC DOE's practices of settling parts of a hearing request but proceeding on other claims.

The burden on the parent under the proposed amendment hurts the student in other ways as well. If the parent misses the six-month deadline to re-file the case, it appears that the student would lose their right to pendency even as the dispute continues. Keeping the IHO's jurisdiction over the case

while the parties finalize settlement ensures that a student's pendency rights remain intact until the settlement agreement is executed or the case is decided and expedites resolution of the entire hearing request either by settlement or hearing decision.

We recommend that NYSED reject this proposed amendment and instead allow additional extensions for the purpose of settlement, as we discuss below.

2005.(j)(5)(iii) – Issuance and Limitations of Extensions

With regard to the proposed amendment limiting the IHO's ability to issue extensions of the compliance deadline, we appreciate NYSED's attempts to quash the NYC DOE's practice of requesting limitless and unwarranted extensions resulting in substantial delays in the student receiving much needed services. However, we are concerned that the proposed amendments unjustly limit a parent's ability to secure extensions of hearing dates for valid reasons, commonly accepted in other types of judicial proceedings, and thereby, undermine parents' rights and access under the IDEA to due process. This is especially true for pro se parents who have more difficulty navigating the complex due process system that is in place.

There are situations where extensions are important to the proper resolution of a case. The IDEA provides that special education hearings be conducted at a time and place that is reasonably convenient to the parents involved. Unlike the NYC DOE, whose job it is to attend the hearing on the scheduled date, parents often must take time off from work and find alternative forms of childcare to attend the hearing. Furthermore, there are cases where a parent requests, or a hearing officer orders, that an evaluation take place before deciding on appropriate services for the child, requiring sufficient time for the completion of the evaluation prior to the hearing. As another example, while we fully agree that the NYC DOE needs to move much more quickly to settle cases and should not be given unlimited extensions to delay finalizing the settlement agreement, it is important to allow more than one extension in order to settle a case when the parent requests the extension for settlement purposes without having to have their case dismissed, so that there will be continued oversight from a hearing officer and so they can proceed to hearing quickly if settlement negotiations are not successful or the NYC DOE is unnecessarily delaying finalization of the settlement without needing to re-file the complaint and re-start the timeline.

We are concerned that, under the proposed amendments, hearing officers will set an unreasonably high bar for further extensions due to "exceptional circumstances," particularly given that the current

language provides only one example of an exceptional circumstance. We urge you to amend the proposed standard for granting further extensions to include additional examples of "exceptional circumstances" so that it reads:

> Exceptional circumstances shall include but not be limited to:
> (a) the need to present additional witness testimony that could not reasonably be completed within the length of an ordinary hearing day (i.e., eight hours with reasonable breaks, including lunch, unless shorter due to the parent's work or childcare needs); (b) situations when the parent requests, and the school district agrees, that the compliance deadline should be extended due to substantial progress towards settlement; (c) situations when the parent requests extensions to wait for the results of evaluations that will have bearing on the case; (d) situations when a parent is unavailable on the scheduled date due to a job, family or medical emergency, or childcare limitations; or (e) when a pro se parent is seeking representation.

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

Sincerely,
/s/ Brianna M. Kitchelt