



# Advocates for Children of New York

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August 14, 2023

Christopher Suriano  
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Sent via email to: [REGCOMMENTS@nysed.gov](mailto:REGCOMMENTS@nysed.gov)

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## **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



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State and City must take urgent action and appreciate the opportunity to submit additional comments on this matter. 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. 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. 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.

#### **200.5(j)(3)(xii)– Remote/Virtual Hearing Protocol**

We are pleased that NYSED supports providing flexibility for impartial hearing officers to conduct hearings by video conference or teleconference. Allowing increased flexibility with the medium in which hearings are conducted provides parents with more opportunities for meaningful participation in their cases. However, we urge NYSED to reject the proposed amendment requiring a school district's consent to conduct virtual hearings and, instead, to return to the originally proposed language requiring only the parent's consent to conduct the hearing by video conference or teleconference. 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. A school district should not be allowed to prevent a parent from participating in a hearing by video conference or teleconference when this option will work best for the parent.

#### **Dismissals to Pursue Settlement**

We support NYSED's decision to withdraw the addition of 200.5(j)(5)(iv) described in the earlier proposal, which would have allowed cases to be dismissed for up to six months in order for the parties to settle a case.



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### **200.5(j)(5) – Limitations on Issuing Extensions**

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. Additionally, we are pleased that NYSED amended the proposed regulations to permit impartial hearing officers to consider substantial progress toward settlement as a reason to grant an extension if it is determined that the parties agree and the settlement negotiations are proceeding expeditiously and in good faith. However, we are concerned that the proposed amendment restricting the extension timeline unjustly limits a parent's ability to secure extensions for valid reasons, commonly accepted in other types of judicial proceedings, and thereby, undermines 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. As we previously highlighted, 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, parents often must take time off from work or other important obligations to attend the hearing. While NYSED stated in its assessment of public comment: "It is the Department's position that an unrepresented parent's unavailability due to work constitutes an extraordinary circumstance," we would request that NYSED include a parent's unavailability due to work or childcare responsibilities, along with a few additional key examples, in the regulations themselves to help promote clarity and consistency among hearing officers. As another example, 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, often longer than 30 days, for the completion of the evaluation prior to the hearing.

We recommend that NYSED include the following language in the regulations in 200.5(j)(v):

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 extensions to wait for the results of evaluations that will have bearing on the case; (c) situations when a parent is unavailable on the scheduled date or for the entire length of the hearing due to a disability, job, family or medical emergency, or childcare limitations; or (d) when a pro se parent is seeking representation.



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Such language would help provide impartial hearing officers with guidance to follow when making these determinations and help avoid inconsistent proceedings and unrealistic deadlines imposed on parents, advocates, and school districts.

Finally, 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 hearings or finalizing the settlement agreement. At the same time, we recognize that more than one extension may be needed to finalize a settlement agreement in certain cases. We hope that, with the express language proposed in 200.5(j)(5)(vi), hearing officers will have the authority to allow more than one extension in order to settle a case when the parent requests the extension for settlement purposes.

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](mailto:bkitchelt@advocatesforchildren.org)

Sincerely,  
*/s/ Brianna M. Kitchelt*