



Advocates for Children of New York

Protecting every child's right to learn

October 21, 2024

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

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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 on the proposal of the New York State Education Department (“NYSED”) to amend section 200.5 of the Regulations of the Commissioner regarding the ability of parents to file due process complaints seeking the implementation of services recommended on an Individualized Education Services Plan (“IESP”).

For over fifty years, AFC has worked with low-income families to secure quality 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 and Section 504 of the Rehabilitation Act. Each year, AFC represents dozens of low-income parents at impartial hearings and advises thousands of parents on their rights. While AFC primarily provides legal representation to students with Individualized Education Programs (“IEPs”), we have worked with families whose children are homeschooled or attend private schools through scholarships and have IESPs. As such, we are well positioned to comment on the proposed amendments.



State law requires the New York City Department of Education (“NYCDOE”) to provide students attending nonpublic schools with the services mandated in their IESP. Education Law § 3602-c(2)(b)(1). However, in far too many cases, the NYCDOE fails to provide the services mandated by students’ IESPs, leaving parents with no option but to find private providers on their own. As NYSED acknowledged, the NYCDOE typically does not agree to pay for these providers without the parent filing a due process complaint against the NYCDOE.¹ Even when the parent files the due process request, the NYCDOE frequently contests the rate the private provider is charging to provide these mandated services, despite the fact that the NYCDOE itself has no providers available to serve the student.

Prior to the emergency regulations enacted in July 2024, parents could seek and obtain an order from an impartial hearing officer through a due process hearing requiring the NYCDOE to pay for the services at the provider’s rate, enabling students to receive the needed services. The proposed amendment, as written, eliminates this class of parents’ rights to seek a due process hearing. Instead, parents must file a request with the newly created NYCDOE Enhanced Rate Equitable Services Unit (“ERES”), and the NYCDOE unilaterally determines whether to approve the rate – the same rates that the NYCDOE previously contested at hearings.² If the NYCDOE does not approve the provider’s rate, the proposed amendment restricts parents’ avenue to obtain relief to filing in a “court of competent jurisdiction”—a process that takes longer and is far more burdensome and costly for parents than requesting an administrative due process hearing. *See* Rate Dispute Form and Checklist found at <https://www.nysed.gov/special-education/new-york-state-education-department-rate-dispute-state-complaint-information>.

We agree with NYSED’s statement that “[P]arents [who parentally place their child with a disability in a nonpublic school] can, and should, expect implementation of the services identified on their children’s IESP.” We also agree that parents should not be required to file a due process complaint to obtain payment for IESP services that the district did not provide directly. As NYSED noted, forcing parents to proceed to a due process hearing under such circumstances can impose unnecessary administrative and financial burdens on the parent. However, when the NYCDOE fails to provide a child with their services, a due process hearing allows a parent to obtain an order from

¹ *See* the NYSED Guidance Memorandum that accompanies the Proposed Regulation at <https://www.regents.nysed.gov/sites/regents/files/724p12a1revised.pdf>.

² Indeed, in an *ex parte* November 2023 letter from the General Counsel of the NYCDOE to the state and Office of Administrative, Trials, and Hearings (“OATH”), the General Counsel stated that the NYCDOE would not pay more than \$125 for Special Education Teacher Support Services, regardless of the rate that providers charge.



an impartial decisionmaker requiring the NYCDOE to pay for the services it has failed to provide itself.

We are very concerned that, if adopted, the proposed regulations will strip parents of due process rights and leave children with disabilities without the services they need and have a legal right to receive. Rather than allow the rates to be reviewed and determined by an impartial third-party decision-maker, the proposed amendment gives decision-making authority on whether to pay the rate of the parent's chosen provider to the very entity – the NYCDOE – that failed to provide the child with their mandated services in the first place. At the hearings that AFC currently participates in, the NYCDOE repeatedly challenges the rates of providers, even when they are market rates and the NYCDOE has not identified any providers who can serve the child at a lower rate. While the NYCDOE may be motivated by its interest in reducing costs, it is important to recognize that these are cases where the NYCDOE has been unable to find a provider at a lower cost.

At a due process hearing, the impartial hearing officer decides whether or not to order the NYCDOE to pay the provider's rate after reviewing the evidence and testimony. Impartial hearings allow both parties – the parent and the school district – to present and question evidence and an impartial decisionmaker to decide on an appropriate and equitable remedy. If the district has any concerns about the provider chosen by the parent, a hearing presents the opportunity for the district to raise those concerns and for an impartial third party to determine the reasonableness of the rate.

The proposed amendment takes away that review and gives *carte blanche* to the NYCDOE to refuse to pay a provider's rate without providing any other options for the child to get their services, while imposing on the parent the necessity to take the case to court if they seek review of the NYCDOE's decision. Under the proposed amendment, parents' only avenue of relief if the NYCDOE does not respond within 60 days to their request to pay a private provider will be through the state complaint process, which lacks the formal due process protections and timelines afforded in the impartial hearing setting, such as presentation of testimony and cross-examination. Even more egregiously, the only recourse for parents if the NYCDOE responds, but does not agree to the provider's rate, is the filing of a complaint in court. In other words, the proposed amendment removes virtually any checks on the NYCDOE's limitation of the rates and could result in the NYCDOE agreeing to pay only less than market-rate for the services.

NYSED has stated that it is looking to decrease the burden on parents through this proposed amendment. However, if the NYCDOE does not approve the rate charged by the provider found by the parent, the parent's only recourse is to file a complaint in court—a process far more burdensome than requesting an administrative due process hearing. Resolution of the court complaint can take years, delaying the receipt of the services for these students even further. Having to sue the NYCDOE in court is an incredible burden particularly for parents, like AFC clients, who cannot



afford an attorney and cannot afford to pay for the student's services during the process of a court litigation.

Requiring parents to sue the NYCDOE in court when the NYCDOE fails to provide services and then refuses to agree to pay the provider identified by the parent will likely result in children going without the services they need and have a legal right to receive. The parents to whom Advocates for Children provides assistance cannot afford to pay for these services on their own – and the law requires that the NYCDOE provide these services.

Finally, while this amendment pertains specifically to disputes about rates for IESP services, we are also concerned about the broader detrimental impact passing this amendment could have on the rights of all students with disabilities and their families – including students with IEPs. We have already seen several NYCDOE attorneys file motions to dismiss making jurisdictional arguments in rate disputes involving students with IEPs based on these emergency regulations. Indeed, hearing officers in some of our clients' hearings have taken the position that they cannot rule on the rates of services for students with IEPs because of these emergency regulations regarding IESPs.

Taking away the parent's ability to request an administrative hearing to seek payment for private providers when the NYCDOE does not provide IESP services is not the solution to the problems identified by the State and will result in children going without the services they need and have a legal right to receive. Thus, we recommend that NYSED reject this proposed amendment in its entirety.

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, Esq.