

Legal Update:
Recent Amendments to the Regulations of the Commissioner

NYSED Impartial Hearing Officer Training, Webinar 3
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I. INTRODUCTION

- A. In January 2014, the New York State Board of Regents amended sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education relating to special education impartial hearings.
- B. The effective date of the amended regulations is February 1, 2014. The amended regulations apply to all IDEA Part B hearings regardless of when the request for hearing was filed.
- C. The New York State Education Department Office of Special Education issued a Special Education Field Advisory in February 2014. The memorandum provides additional guidance relating to the amendments of the Regulations of the Commissioner of Education relating to special education impartial hearings. The memorandum is appended to this outline.
- D. This outline provides further practice pointers to the guidance document.

II. CONSOLIDATION

- A. Appointment. An IHO with a pending due process complaint notice must be appointed to a subsequent complaint involving the same parties and student with a disability even if the IHO with the pending complaint is temporarily unavailable at the time the subsequent complaint is filed. The IHO cannot recuse or decline appointment as unavailable until *after* s/he makes the consolidation determination. However, if the IHO determines that the complaints should not be consolidated, but rather should proceed separately, and the IHO is unavailable to accept the subsequent complaint, then a new IHO should be appointed in accordance with the rotational list.

When there are multiple pending due process complaint notices, the IHO with the most recent pending due process complaint involving the same parties and student with a disability is appointed to a subsequent due process complaint.

- B. Discretion. Whether to consolidate a new complaint with a pending complaint or provide that the new complaint proceed separately as an individual hearing before the same IHO is within the sole discretion of the IHO.¹
- C. Written Order. A written order is required and must explain the IHO's decision, which should include a discussion of the relevant factors found at 8 NYCRR § 200.5(j)(3)(ii)(a)(4).² (See Sample Order, attached.) The written order must be included in the record.³
- D. Case Number. The case number for the consolidated complaints is the case number assigned to the pending complaint into which the subsequent complaint is consolidated. If the complaints are not consolidated, the case number assigned to each complaint is maintained.

Should the complaints be consolidated, the written order must identify the correct case number and the parties should be directed to include the correct case number on any subsequent written submission.

- E. Timeline. The timeline for issuance of the decision is the timeline applicable to the pending due process complaint into which the subsequent complaint is consolidated.⁴ The IHO has the discretion to grant – for good cause – specific extensions of time beyond the 45-day timeline at the request of either the school district or the parent.

An extension may be appropriate to accommodate a resolution meeting between the parties regarding the issues raised in the subsequent complaint.⁵

¹ 8 NYCRR § 200.5(j)(3)(ii)(a)(2) (2014).

² See 8 NYCRR § 200.5(j)(3)(ii)(a)(3) and (4) (2014).

³ 8 NYCRR § 200.5(j)(5) (2014).

⁴ 8 NYCRR § 200.5(j)(3)(ii)(a)(5) (2014).

⁵ See 8 NYCRR § 200.5(j)(3)(ii)(a)(4)(iii)(a) (2014).

III. SO-ORDERED DECISIONS

- A. Matters Concerned. An IHO has the authority to issue a so-ordered decision relating to (i) the identification, evaluation or educational placement of a child with a disability, or the provision of a free appropriate public education (FAPE) to the student, or (ii) matters permissible under State law, and that are properly raised in the complaint before the IHO.
- B. Limitation. The authority to issue a so-ordered decision is limited to matters for which the IHO has the authority to render a decision under Federal or State law and which are raised in the complaint or amended complaint. For example, the IHO may so-order a settlement agreement between the parties that solely resolves an evaluation claim. Conversely, the IHO would not be able to so-order the settlement agreement in the example provided if the agreement included a provision relating to attorneys' fees because an IHO does not have the authority to award attorneys' fees. However, the IHO may, in consultation with the parties, so-order those aspects of the proposed settlement agreement that is within the IHO's jurisdiction and address an issue(s) in the complaint or amended complaint.

The IHO also may so-order an appropriate remedy (agreed to by the parties) other than what had been proposed in the complaint or amended complaint, provided the remedy is related to an issue(s) in the complaint or amended complaint for which the IHO has the authority to render a decision under Federal or State law.

IV. TIMELINE TO RENDER A DECISION

- A. Generally. Section 200.5(j)(5) conforms the timeline for an IHO to render a decision consistent with the federal timeline.
1. School District Files. Previously, when the school district filed the due process complaint, section 200.5(j)(5) required the IHO to render a decision not later than 45 days from the date the IHO was *appointed*.⁶ Now, and consistent with IDEA, the 45-day timeline starts to run the *day after* the parent and the State Education Department *receives* the complaint.⁷
 2. Parent Files. Previously, the start of the 45-day timeline was predicated on *receipt* by the IHO of the parties' written

⁶ See 8 NYCRR § 200.5(j)(5), § 200.5(j)(3)(iii)(a) (2013).

⁷ 8 NYCRR § 200.5(j)(5) (2014).

waiver of the resolution meeting, written confirmation that a mediation or resolution meeting was held but no agreement could be reached, or written notification that either party withdrew from mediation (after having agreed to continue mediation beyond the 30-day resolution period).⁸ The language in the amended regulation now aligns with the language in IDEA, which is that the 45-day timeline starts the *day after* one of the following events, whichever shall occur first: both parties agree in writing to waive the resolution meeting; after either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or if both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.⁹

In addition, the expiration of the 30-day resolution period triggers the 45-day timeline, unless the parties agree in writing to continue mediation at the end of the 30-day resolution period.¹⁰

- B. PHC/Hearing Timeline. The timeline for the commencement of the pre-hearing conference or the hearing continues to be within the first 14 days after the IHO is appointed, if the school district filed the complaint.¹¹ Similarly, if the parent filed the complaint, the pre-hearing conference or the hearing must commence within the first 14 days of receipt by the IHO of the parties' written waiver of the resolution meeting, written confirmation that a mediation or resolution meeting was held but no agreement could be reached, or written notification that either party withdrew from mediation (after having agreed to continue mediation beyond the 30-day resolution period).¹² The pre-hearing conference or hearing must also commence within 14 days of the expiration of the 30-day resolution period, unless the parties agree in writing to continue mediation at the end of the 30-day resolution period.¹³

V. EXTENSIONS TO THE DECISION TIMELINE

- A. Authority to Grant Only. The IHO may grant a request to extend the decision timeline but only at the request of either the school

⁸ See 8 NYCRR § 200.5(j)(5), § 200.5(j)(3)(iii)(b) (2013).

⁹ 8 NYCRR § 200.5(j)(5) (2014).

¹⁰ See *id.*

¹¹ 8 NYCRR § 200.5(j)(5), § 200.5(j)(3)(iii)(a) (2014).

¹² 8 NYCRR § 200.5(j)(5), § 200.5(j)(3)(iii)(b) (2014).

¹³ *Id.*

district or the parent.¹⁴ The IHO does not have the authority to unilaterally extend the timeline or to solicit an extension.

1. Parties should be encouraged to submit their request to extend the decision timeline in writing.
- B. Considerations. In weighing whether to grant an extension to the decision timeline, the IHO must -
1. fully consider the *cumulative impact* of the factors outlined in section 200.5(j)(5)(ii).
 2. if the request to extend the decision timeline is predicated on vacations, scheduling conflicts of the parties' or their representatives', avoidable witness scheduling, or other similar reasons, establish that there is a *compelling reason* or specific showing of *substantial hardship*. In the absence of any particular definition to the terms "compelling reason" and "substantial hardship," the words should be accorded their presumed meaning. The meaning of "substantial hardship," therefore, would include, for example, a significant and demonstrable economic, legal, or other type of hardship to the affected person. A "compelling reason" would be one that is truly convincing, certain.
- Whether a compelling reason or specific showing of substantial hardship exists depends on the particular circumstances presented.
3. find *good cause* based on the likelihood that a settlement may be reached before granting the extension for settlement discussions between the parties. The parties, therefore, must present the IHO with adequate or substantial grounds or reason to allow the extension of the decision timeline. Whether good cause exists is dependent upon the circumstances presented. For example, good cause may exist if the parties have scheduled meetings to discuss settlement or have a date by which they are reasonably likely to finalize the settlement discussions.¹⁵

¹⁴ 8 NYCRR § 200.5(j)(5)(i) (2014).

¹⁵ See *Assessment of Public Comments to Proposed Amendment to Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education Relating [to] Special Education Impartial Hearings*, dated January 6, 2014. Web. 8 May 2014. <<http://www.regents.nysed.gov/meetings/2014/January2014/114p12a2.pdf>>.

To ascertain whether good cause exists, the IHO should seek to understand why the parties, or their representatives, require more time than what was afforded during the resolution period. Should the IHO grant the extension, the IHO –

- a. must establish (or revise) the hearing date(s) to ensure a timely decision prior to the expiration of the decision timeline; and
 - b. should schedule a status conference between the parties, or their representatives, prior to the start of the hearing or require of the parties specific written status reports in accordance with a predefined schedule.
- C. Written Order. The IHO must respond in writing to a request for an extension without delay.¹⁶ The order must include the facts relied upon, an analysis of the factors considered, and a discussion of the applicable standard.¹⁷ Should the IHO grant the request for an extension, the order should include the hearing dates (or any revisions to the hearing dates), as well as the new decision date.¹⁸
- D. Timeline. When an extension is granted, the decision must be rendered and mailed not later than 14 days from the date the IHO closes the record or not later than the last date of the extended timeline, whichever date comes first.¹⁹
- E. Record Close Date. The IHO determines when the record will be closed. No further extensions of the decision timeline can be granted after the record close date.²⁰
1. The IHO has the discretion to revise the record close date, provided good cause exists to do so. The revised record close date, however, cannot extend the date the decision is due.
 2. Good cause may exist, for example, when the IHO determines that additional clarification is required after the parties have submitted their post-hearing briefs or when an unanticipated event has prevented a party from submitting their written submission within the agreed upon timeline.

¹⁶ 8 NYCRR § 200.5(j)(5)(iv) (2014).

¹⁷ *See id.*

¹⁸ *Id.*

¹⁹ 8 NYCRR § 200.5(j)(5) (2014).

²⁰ 8 NYCRR § 200.5(j)(5)(iii) (2014).

3. The IHO should consider the following matters when setting the record close date:
 - a. The time required for a transcription of the hearing to be made available to the IHO.
 - b. Whether post-hearing written submissions are required to assist the IHO in understanding the legal arguments of the parties. It is within the discretion of the IHO whether to permit the parties to submit post-hearing memoranda of law.
 - c. The complexity of the issues that will be addressed in the parties post-hearing submissions.
 - d. The schedule for the submission of post-hearing memoranda of law (i.e., simultaneous submissions; sur-replies).

VI. IMPARTIAL HEARING RECORD

- A. The Record. Establishing an accurate record is one of the IHO's most important responsibilities. The record is extremely important if the decision is appealed. What makes up the record has been the subject of great debate. Following are best (and required²¹) practices for the IHO to consider.
- B. General Rules.
 1. The IHO should be mindful of problems that will adversely affect the record of the hearing being made, such as overlapping conversations, use of acronyms, proper spelling of names, questioners/witnesses referring to exhibits without citing to exhibit numbers, and the use of clarifying gestures.
 2. Endeavor to mark all items as an exhibit of a party or of the IHO (for ease of identification and reference).
 3. Do not mark up exhibits or legal memoranda. Instead, make copies and mark up the copies. The record should only include the unmarked submissions.

²¹ Requirements pursuant to the Regulations of the Commissioner of Education are identified as such in the footnotes and accompanying text.

4. Date stamp all documents received.²² This would assist with establishing timelines.
5. Should the IHO be unsure of what's in or not, the IHO should contact both parties in writing to clarify.
6. Requests for an extension of the 45-day timeline should be documented in writing, and the reasons given should be incorporated in the order, which must be in writing and made part of the record.²³ In addition to the good cause reason for the request, the written order should include the analysis required pursuant to 8 NYCRR § 200.5(j)(ii), (iii), as appropriate, and, if the request is granted, the new decision date.²⁴
7. Prior to the five-day disclosure deadline, review and organize the documents in the file with an eye towards providing the parties/counsel with a list of IHO exhibits, which may include all correspondence, pleadings, motions/requests, orders or other tangible items that have been submitted to date. Provide the parties/counsel with an advance copy of the IHO Exhibit List and advise that the list will be discussed at the start of the hearing.²⁵
8. Prior to the start of the hearing, and after discussing exhibits with the parties/counsel, review the IHO Exhibit List with the parties/counsel and address any concerns that are raised.
9. The record should not include documents or other tangible, non-documentary items that were not filed directly with the IHO.
10. The IHO decision must include a list identifying each exhibit admitted into evidence, providing the date, number of pages, and exhibit number or letter. The decision shall also include an identification of all other items the IHO has entered into the record.²⁶

²² Alternatively, append the forwarding email to any attached document(s) for submissions that are made by electronic mail.

²³ See 8 NYCRR § 200.5(j)(5)(i), (iv) (2014).

²⁴ *Id.*

²⁵ Even if this approach is not used, it is good practice to discuss with the parties/counsel prior to the start of the hearing what pre/post-hearing documents will be part of the record.

²⁶ 8 NYCRR § 200.5(j)(5)(v) (2014).

11. Items that are not admitted into the record, but which are to be made part of a separate record for purposes of an appeal, should be clearly marked and kept together (e.g., in a labeled envelope). Note in the IHO decision what proposed exhibits make up the separate record.
 12. Certify the record to the school district.²⁷
- C. Contents. The complete record should consist of the items identified in section 200.5(j)(5)(vi), as appropriate and as determined by the facts and circumstances of each case.²⁸
 - D. Certification. After a final decision has been rendered, the IHO must certify the record and transmit it to the school district.²⁹
 - E. Timeline. The record must be transmitted promptly to the school district.³⁰ The expectation is that the record will be provided to the school district within one week of the decision being provided to the parties.

VII. WITHDRAWALS

- A. Terminology. Section 200.5(j)(6) uses the terms “written order of termination” and “written decision” interchangeably.
- B. Timing. The timing of the request for withdrawal determines whether the IHO can exercise discretion to dismiss the complaint with prejudice. A voluntary withdrawal prior to the commencement of the hearing is without prejudice unless the parties otherwise agree.³¹ Commencement of the hearing is defined as the first date the hearing is held after the prehearing conference, if a prehearing conference was conducted.³² The order of termination must indicate that the dismissal of the complaint is without prejudice.³³

In contrast, a request for withdrawal after the commencement of the hearing is presumed to be without prejudice except that the IHO has the discretion to dismiss the complaint with prejudice at

²⁷ 8 NYCRR § 200.5(j)(5) (2014). See Sample Certification of the Record Form, attached.

²⁸ 8 NYCRR § 200.5(j)(5)(vi) (2014).

²⁹ 8 NYCRR § 200.5(j)(5) (2014).

³⁰ *Id.*

³¹ 8 NYCRR § 200.5(j)(6)(i) (2014).

³² *Id.*

³³ *Id.*

the request of the other party and upon notice and an opportunity for the parties to be heard.³⁴

- C. Definitions. A dismissal without prejudice allows the complainant to file a subsequent due process complaint notice within the required timeline for requesting an impartial hearing on the same facts that gave rise to the claim included in the initial complaint. Conversely, a dismissal with prejudice would bar the complainant from filing or maintaining a subsequent complaint on the same facts.
- D. Written Decision. The written decision (i.e., order of termination) of the IHO should include the timeline and a description of the circumstances that led to the request for withdrawal, and clearly identify the conditions of the withdrawal (i.e., with or without prejudice). The order of termination should also include an explanation of the decision reached, as well as a notice of appeal rights to the Office of State Review.³⁵

The order of termination must be provided to the parties prior to the conclusion of the 45-day timeline or any appropriate extended timeline, and must be included in the record. The effective date of the withdrawal is the date indicated in the order of termination.

- E. Process to Decide Whether to Dismiss with Prejudice. When a request for withdrawal is received after the commencement of the hearing, the IHO should –
1. inquire of the parties whether there is agreement between the parties on whether the dismissal should be without prejudice.
 2. grant the other party an opportunity to file a motion with the IHO explaining why the dismissal should be with prejudice when the parties are not in agreement on the conditions of the withdrawal.
 3. permit the complainant to file a response to the other party's motion. Alternatively, the complainant should be given the opportunity to go forward with the due process hearing rather than risk losing his or her right to have a hearing

³⁴ 8 NYCRR § 200.5(j)(6)(ii) (2014).

³⁵ *See id.*

simply for asking to be able to withdraw without prejudice.³⁶

4. review the written submissions and determine whether additional on-the-record discussions are necessary or whether to hold a limited hearing to establish a basis for from which to make an informed decision.
5. render a decision consistent with the requirements set forth in subparagraph “D” above.

NOTE: REDISTRIBUTION OF THIS OUTLINE WITHOUT EXPRESSED, PRIOR WRITTEN PERMISSION FROM ITS AUTHOR IS PROHIBITED.

THIS OUTLINE IS INTENDED TO PROVIDE WORKSHOP PARTICIPANTS WITH A SUMMARY OF SELECTED STATUTORY PROVISIONS AND/OR SELECTED JUDICIAL INTERPRETATIONS OF THE LAW. THE PRESENTER IS NOT, IN USING THIS OUTLINE, RENDERING LEGAL ADVICE TO THE PARTICIPANTS.

³⁶ See *Comments to Proposed Amendment to Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education Relating [to] Special Education Impartial Hearings*, dated January 6, 2014