TO: P-12 Education Committee

FROM: Ken Slentz

SUBJECT: Proposed Amendment of Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings

DATE: October 29, 2012

AUTHORIZATION(S):

SUMMARY

Issue for Decision

Should the Board of Regents adopt the revised 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?

Reason for Consideration

Review of policy to address both process and cost efficiencies in New York State's special education due process system and to ensure timely decisions by impartial hearing officers (IHOs).

Proposed Handling

The proposed amendment will be submitted to the P-12 Education Committee for recommendation and to the Full Board for action at the November 2012 Regents meeting.

Procedural History

Proposed regulations relating to special education impartial hearings were first discussed with the P-12 Education Committee in January 2012. A Notice of Proposed Rule Making was published in the State Register on February 1, 2012. Three public

hearings were conducted. Public comment was accepted for 45 days. The proposed rule was revised in response to public comment.

Revised proposed regulations were discussed with the P-12 Education Committee in June 2012. A Notice of Revised Rule Making was published in the State Register on July 11, 2012. Public comment was accepted for 30 days.

The proposed amendment was further revised in response to public comment. A Notice of Revised Rule Making was published in the State Register on September 19, 2012. Public comment was accepted for 30 days. No changes have been made to this revised rule.

Copies of the proposed amendment, an Assessment of Public Comment based on the revised amendments published in July, and an Assessment of Public Comment based on the revised amendments published in the State Register in September are attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

The Department is responsible for monitoring and enforcing compliance with the hearing procedures prescribed in Part 200 of the Commissioner's Regulations. Additionally, pursuant to its investigatory authority granted under Education Law section 4404(1) and section 200.21 of the Commissioner's Regulations, the Department may investigate an IHO's failure to issue a decision in a timely manner pursuant to regulatory authority. In September, the U.S. Department of Education, Office of Special Education Programs, notified the State that it determined that New York State (NYS) "Needs Assistance" in part, because New York's 2010 data reflects only 84 percent compliance with the timeliness of impartial due process hearing decisions. As a result, NYS must review and revise its policies and procedures and improvement activities as appropriate to address this noncompliance issue. Accordingly, this proposed amendment would further align this State's timeline requirements for issuing decisions to the federal requirements; address factors leading to delays in the completion of impartial hearings; and would address other issues relating to the manner in which an impartial hearing is conducted.

Proposed Policy

The proposed amendment will promote the timely issuance of hearing decisions by providing a more efficient and expeditious process for conducting hearings, in consideration of various causes of delay that have been identified by the Department over the past few years. The proposed rule addresses the following procedural issues relating to impartial hearings:

1. Certification and appointment of IHOs
2. Consolidation of multiple due process requests for the same student
3. Prehearing conferences
4. Impartial hearing record

5. Decision of the IHO
6. Timeline to render a hearing decision
7. Extensions to the timelines for an impartial hearing decision
8. Withdrawals of due process complaints

Overall, the proposed amendment will streamline the process for conducting hearings, which will in turn, facilitate a more efficient and expeditious hearing. This improved process will promote timely due process decisions and is likely to result in cost savings to districts.

The Department received extensive public comment on the proposed amendment from a variety of stakeholders, including but not limited to parents, advocacy organizations, IHOs, individual attorneys and attorney organizations, school districts, professional organizations, members of the legislature and disability organizations. The proposed amendment was substantially revised twice to address public comment. The assessment of public comment on the first proposed amendment was discussed at the P-12 Education Committee at the June 2012 Regents meeting. An Assessment of Public Comment based on the revised amendments published in July and an Assessment of Public Comment based on the revised amendment, which was published in the State Register on September 19, 2012, are attached.

Despite claims to the contrary, the proposed rule does not allow or require a party to present its case at a prehearing conference, nor does it alter the burden of proof requirements established in the Education Law. The proposed changes are consistent with state law and federal requirements. Following is a summary of the proposed rule followed by a summary of the revisions previously made to the proposed rule in response to public comment:

Certification and appointment of IHOs [new sections 200.1(x)(4)(vi) and 200.5(j)(3)(i)(c)]:

The proposed rule would require an individual certified by the Commissioner as an IHO to be willing and available to accept appointment to conduct impartial hearings, and would provide for the rescinding of an IHO's certification if he or she is unavailable or unwilling to accept an appointment within a two-year period of time, unless good cause is shown.

The proposed rule would also prohibit an IHO from accepting appointment as an IHO if he or she is an attorney involved in a pending due process complaint involving the same school district, or has, within a two-year period of time, served in the same district as an attorney in a due process complaint, or if he or she is an individual with special knowledge or training with respect to the problems of children with disabilities who has accompanied and advised a party from the same school district in a due process complaint.

Since discussion with the Regents in June 2012, the following substantial revisions were made to this section of the proposed rule in response to public comment:

- The proposed amendment to section 200.5(j)(3)(i)(c) was revised to delete the term "individual who has provided direct special advocacy."

- The proposed amendment was revised to replace the above term with "an individual with special knowledge or training with respect to the problems of children with disabilities who has accompanied and advised a party from the same school district in a due process complaint within a two-year period." (Existing regulations section 200.5(j)(3)(vii) authorizes the parties to an impartial hearing to be accompanied and advised by such an individual.)

Consolidation of multiple due process requests for the same student [new section 200.5(j)(3)(ii)(a)]:

In the interests of judicial economy and in furtherance of the student's educational interests, the proposed rule would establish procedures for the consolidation of multiple pending due process hearing requests filed for the same student, including the factors that must be considered in determining whether to consolidate separate requests for due process.

Since discussion with the Regents in June 2012, the following substantial revisions were made in response to public comment to the proposed amendment to section 200.5(j)(3)(ii)(a):

- The proposed amendment was revised to add that the IHO must consider relevant factors as indicated in the regulations in determining whether to consolidate more than one due process complaint.

- The proposed amendment was revised to remove subclauses (1) and (4), which were added in the original proposed amendment, and which had provided, respectively, that in determining whether to consolidate one or more separate requests for due process, the IHO must consider the similarity of the issues in the due process complaints and whether the parties had sought mediation with regard to a due process complaint notice.

- The proposed amendment was revised to clarify the rules regarding appointment of an IHO when there are multiple due process hearing requests for the same parties and student with a disability.

- The proposed amendment was further revised to delete the proposed language relating to consolidation of additional hearings, noting that the provision, as written, was unclear and would more appropriately be addressed through guidance.

- The proposed amendment was revised to add that the IHO's decision to consolidate or deny consolidation shall be by written order; and clarify that the timeline for the issuance of a decision for consolidated complaints shall be the timeline in the earliest pending due process complaint.

Prehearing conferences [section 200.5(j)(3)(xi)]:

The proposed rule would require that IHOs conduct prehearing conferences for all due process requests received on or after January 1, 2013, and that the IHO issue a prehearing order to address certain procedural matters and to identify the factual issues to be adjudicated at the hearing. These requirements will provide IHOs with the tools to move the hearing forward in a smooth, orderly fashion, and to render decisions in an efficient and expeditious manner.

Since discussion with the Regents in June 2012, the following substantial revisions were made to this section of the proposed rule in response to public comment:

- Section 200.5(j)(3)(xi) was revised to amend the proposed date by which IHOs are required to conduct prehearing conferences from on or after July 1, 2012 to on or after January 1, 2013.

- The proposed amendment to section 200.5(j)(3)(xi)(d) was revised to add that both parties must be given an opportunity to render objections to the prehearing order.

- The proposed amendment to section 200.5(j)(3)(xi)(e) was revised to add that the notice to the parties of the prehearing order must be included in the hearing record.

- Proposed subparagraph 200.5(j)(3)(iii) was revised to clarify that it is the mandatory prehearing conference and not the hearing that must be convened within 14 days after one of the events specified in regulation.

- Proposed subparagraph 200.5(j)(3)(xi) was revised to delete ”upon commencement of the hearing” and to add that a prehearing conference is conducted to facilitate a fair, orderly and expeditious hearing.

- Proposed subclause 200.5(j)(3)(xi)(a)(4), relating to the purpose of a prehearing conference, was revised to replace “to identify the number of witnesses” to “discussing witnesses”.

- Proposed subclause 200.5(j)(3)(xi)(b)(5) was revised to remove the requirement that a written prehearing order identify the deadline date for final disclosure of the identification of witnesses expected to provide testimony at the hearing since this information would be provided through the requirement for final disclosure of all evidence.

- Proposed clause 200.5(j)(3)(xi)(c) was revised to remove the provision that with the consent of all parties, an IHO may, in his or her discretion, dispense with the parties’ presence at a prehearing conference and rely upon alternative methods of communication regarding matters set forth in this subparagraph since section 200.5(j)(3)(xi) provides that a prehearing conference may be conducted by telephone.

- Proposed clause 200.5(j)(3)(xi)(f) was renumbered (e) and revised to clarify that an IHO is prohibited from conducting a prehearing conference prior to the date in which the party has a right to a hearing pursuant to 34 CFR section 300.511(a), provided that an IHO may conduct a prehearing conference if necessary to meet a federal requirement. Additionally, the IHO may conduct additional conference following the initial conference to aid in the disposition of the hearing.

Impartial Hearing Record [section 200.5(j)]

The proposed rule defines the required contents of the 'record' for purposes of an impartial hearing and addresses the IHO's responsibility to provide the record to the school district.

Decision of the IHO [section 200.5(j)(4)]

The proposed rule clarifies that the authority of the IHO to render a decision is limited to those issues in the due process complaint notice or amended due process complaint notice and that, in so-ordering a settlement agreement, the IHO may only so-order on the issues raised before him in the due process complaint.

Since discussion with the Regents in June 2012, the following substantial revision was made to this section of the proposed rule in response to public comment:

- Proposed subparagraph 200.5(j)(4)(iii) was revised to add "or amended due process complaint."

Extensions to the due date for rendering the impartial hearing decision [section 200.5(j)(5)]:

The proposed amendment further reinforces the importance of granting extensions for only limited purposes, while addressing the practical concerns IHOs may face in conducting a hearing when the parties attempt to engage in settlement negotiations. The amendment would expressly prohibit an IHO from soliciting extensions for purposes of his or her own scheduling conflicts; prescribe additional considerations an IHO must consider in granting an extension; prohibit an IHO from granting an extension after the record close date; and require the IHO to set forth the facts relied upon for each extension granted.

Since discussion with the Regents in June 2012, the following substantial revisions were made to this section of the proposed rule in response to public comment:

- The proposed amendment to section 200.5(j)(5)(ii) was revised to remove subsection (e) whether the reasons for the delay were foreseeable and subsection (f) whether granting the extension is likely to contribute to reaching a final decision within the revised timeline or is likely to cause additional extension requests, from the factors the IHO must fully consider when considering granting a request for an extension.

- The proposed amendment to section 200.5(j)(5)(ii)(a) was revised to add that, in considering whether to grant a request for an extension of the hearing, the IHO should consider whether the delay of the hearing would adversely affect the child's educational interests or well-being.

- The proposed amendment to section 200.5(j)(5)(iii) was revised to delete the proposed provision that would have authorized an IHO to grant only one 30-day extension for the purposes of settlement discussions between the parties.

- Proposed clause 200.5(j)(5)(vi)(a) was revised to clarify that the reference to "any response to the complaint" means such responses as required pursuant to paragraphs 200.5(i)(4) and (5) of the Commissioner's regulations.

Timeline to render a decision [section 200.5(j)(5)]:

To further align the State's timeline requirements for issuing decisions with the federal requirements, the proposed amendment would clarify that when a district files a due process complaint, the decision is due not later than 45 days from the day after the public agency's due process complaint is received by the other party and the State Education Department (SED); and when a parent files a due process complaint notice, the decision must be rendered 45 days after the date on which one of the following conditions occurs first: (1) the IHO receives the parties written waiver of the resolution meeting, (2) the IHO receives the parties written confirmation that a mediation or resolution meeting was held but no agreement could be reached, or (3) 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).

Since discussion with the Regents in June 2012, the following substantial revisions were made to this section of the proposed rule in response to public comment:

- Proposed paragraph 200.5(j)(5) was revised to conform the timelines for the due date of the IHO's decision with federal regulations and to delete the proposed amendments that would have required the IHO to submit an unredacted copy of the IHO's decision to the Office of Special Education of SED and to require, whenever possible, copies submitted to SED shall be transmitted by secure electronic document submission or in another electronic format.

- This section was also revised to replace the term "re-file" with "transmit" relating to the IHO's responsibility to give the record to the school district.

- The proposed amendment to section 200.5(j)(5) has been revised to add that, after a final decision has been rendered, the IHO must promptly return the record to the school district together with a certification of the materials included in the record.

Withdrawals of requests for due process hearings [new section 200.5(j)(6)]:

The proposed rule would address existing concerns regarding the withdrawal and subsequent resubmission of the same or substantially similar due process complaints by establishing procedures for the withdrawal of a due process complaint and requiring a withdrawal to be made on notice to the IHO if it is made after the commencement of the hearing. In particular, the amendment would require that a request for a withdrawal made after the commencement of the hearing must be on notice to the IHO and would be presumed to be without prejudice, provided, however, that the impartial hearing officer may, upon notice and an opportunity for the parties to be heard, issue a written decision finding that the withdrawal is with prejudice upon review of the balancing of the equities.

Since discussion with the Regents in June 2012, the following substantial revisions were made to this section of the proposed rule in response to public comment:

- Proposed subparagraph 200.5(j)(6)(i) was revised to replace 'Prior to the commencement of the hearing or prehearing conference….' with 'Prior to the commencement of the hearing….".

- Proposed subparagraph 200.5(j)(6)(ii) was revised to clarify that after the commencement of a hearing, the party requesting the hearing must notify the IHO and the other party of an intent to withdraw and the IHO must issue a notice of termination. Language was further revised to clarify that a withdrawal shall be deemed to be without prejudice except that the IHO may, upon notice and an opportunity for the parties to be heard, issue a decision that the withdrawal be with prejudice at the request of a party or upon the IHO's own initiative.

- Proposed subparagraph 200.5(j)(6)(iii) was revised to correct a cross citation to subparagraph 200.5(j)(1)(i).

- Proposed subparagraph 200.5(j)(6)(iv) was revised to replace the reference to "Part" with "section".

Overall, the proposed amendment will streamline the process for conducting hearings, which will in turn, facilitate a more efficient and expeditious hearing. This improved process will promote timely due process decisions and is likely to result in costs savings to districts.

Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: That subdivision (x) of section 200.1, paragraphs (3), (4) and (5) of subdivision (j) of section 200.5, and paragraph (9) of subdivision (h) of section 200.16 of the Regulations of the Commissioner of Education be amended, and that a new paragraph (6) be added to subdivision (j) of section 200.5 of the Regulations of the Commissioner, as submitted, effective January 1, 2013.

Timetable for Implementation

If adopted at the November Regents meeting, the proposed amendment will become effective on January 1, 2013.

Attachment

PROPOSED AMENDMENT OF SECTIONS 200.1, 200.5 AND 200.16 OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION PURSUANT TO EDUCATION LAW SECTIONS 207, 305, 3214, 4403, 4403 AND 4410 RELATING TO SPECIAL EDUCATION IMPARTIAL HEARINGS

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Revised Rule Making in the State Register on July 11, 2012, the State Education Department (SED) received the following comments on the revised proposed amendment.

Section 200.1(x) Impartial Hearing Officer (IHO) Certification

COMMENT:

Rescinding IHO certification for unwillingness or unavailability to serve within a two-year period is unnecessary; will cost more than it would save. There are other, less coercive means of addressing the cost issues. Exposes IHOs to arbitrary decisions without recourse. Two-year restriction will prevent many qualified attorneys from taking cases. Some have unique situations or roles that make them valuable participants in the training/certification process, but largely unavailable to hear cases. Create a class of inactive IHOs; allow for a retired status. Some felt that two years was too long and that SED should act to rescind certification after one year of unavailability or unwillingness to serve.

DEPARTMENT RESPONSE:

This rule is necessary to ensure that individuals certified and provided with IHO training by the State are available and willing to serve as IHOs. SED must maintain a list of certified IHOs adequate to meet the demand for requests for impartial hearings. When IHOs are on a list, but not available to serve, it may cause delays in the

appointment process and provide misleading data necessary to ensure sufficient numbers of IHOs. It is costly and inappropriate for the State to provide training and resources to individuals who will not provide this public service. Decisions affecting the certification of an IHO for unwillingness or unavailability to accept appointment will be made on a case-by-case basis, with an opportunity for the IHO to provide information to the Department to establish good cause for such unavailability, such as poor health, and why his/her certification should be continued.

COMMENT:

IHOs should be salaried.

DEPARTMENT RESPONSE:

Comment is not related to proposed amendment.

Section 200.5(j)(3)(ii) – Consolidation of Due Process Requests

COMMENT:

Consolidation will reduce the possibility of conflicting findings and duplicative evidence. Revised amendment allows appropriate exercise of IHO discretion; will serve both parties in having an efficient hearing or hearings by a person familiar with the case.

DEPARTMENT RESPONSE:

The comments are supportive; no response is necessary.

COMMENT:

If an IHO decides to consolidate the complaints the other side should have an opportunity to object and address the issues. If the IHO decides the due process complaints should proceed separately, it is unclear whether this same IHO presides over both due process hearings or whether the district appoints a new IHO to preside over the second due process hearing. If the IHO managing the first due process

hearing cannot accept further appointments, it is unclear whether the new IHO can choose to consolidate both cases despite the first IHO's availability to manage the first due process hearing. Clarify which timeline applies when two cases are consolidated.

DEPARTMENT RESPONSE:

The proposed amendment, as revised, clarifies the consolidation process, including the IHO's authority to consolidate cases and which timeline controls. Other questions that arise on this issue are more appropriately addressed through guidance.

Section200.5(j)(3)(xi) – Prehearing Conferences:

COMMENT:

Support revision that conferences may not be held until after the resolution period has ended.

DEPARTMENT RESPONSE:

Comment is supportive; no response is necessary.

COMMENT:

Consider requiring that the prehearing conference be conducted sooner than 14 days. Holding a prehearing conference during the resolution period should be the exception to the rule. There are instances when the IHO must conduct a limited prehearing conference during the resolution period (e.g., stay put or when the parent/LEA seeks the intervention of the IHO under 34 C.F.R. §§ 300.510(b)(4) and (5)). Provide an exception where a prehearing conference is necessary in order to resolve pendency disputes.

DEPARTMENT RESPONSE:

To ensure that the IHO has appropriate discretion to conduct a prehearing conference as necessary to meet a federal due process requirement, the proposed

amendment to paragraph (e) has been revised to clarify that an IHO may not conduct a prehearing conference prior to the date the parties have a right to a hearing except as may be necessary to meet certain federal requirements.

COMMENT:

Parents should have the right to go directly to a hearing after expiration of the resolution period without a conference in the interest of a timely decision.

DEPARTMENT RESPONSE:

Use of a prehearing conference is expected to facilitate an efficient and expeditious decision on the issues in the due process complaint, rather than cause any delay in the issuance of such decision.

COMMENT:

This proposal will give school districts a forum to intimidate and discourage parents from going forward with a hearing in the first place or to settle the case. Mandate a dialogue between the parties in which the district can raise questions about the scope and meaning of the factual issues raised in the complaint and the complainant can choose to respond, or not, as he/she sees fit. Proposed language is drafted in the negative and will invite unnecessary misinterpretation and litigation. The issues raised cannot be clarified by the IHO because parents and districts have the right to define the issues they wish resolved in the due process complaint notice. Proposed regulation will require the parents to “present their case including the issues, their witness list, and evidence to a hearing officer prior to the actual hearing” thereby violating the burden of proof law.

DEPARTMENT RESPONSE:

The Department does not anticipate that mandatory prehearing conferences will intimidate or discourage parents from proceeding with an impartial hearing. To the contrary, for an unrepresented party, in particular, the prehearing conference is an opportunity to provide the parent with procedural information on the hearing process and to define and narrow the issues at hearing. The prehearing conference should be used to facilitate productive discussions of the issues. It is not intended to be used to force any party to disclose their entire case. Federal regulations require the subject matter of the hearing to be limited to those matters identified in the due process complaint notice or the amended due process complaint and the party requesting the hearing is not allowed to raise other issues at the hearing, unless the other party otherwise agrees. Managing the issues is critical to effective and efficient management of the hearing process. When the issues are clear, the parties can prepare for the hearing and the IHO can determine if he or she has jurisdiction over the issues. Clarity of the issues may also help to facilitate a resolution or settlement of the matter. New York State IHOs have received training on the purpose and the appropriate conduct of pre-hearing conferences. Nothing in the proposed amendment should be construed to allow or require a party to "present its case" at a prehearing conference nor does it alter the burden of proof requirements in New York State.

COMMENT:

A written pre-hearing order is unnecessary and burdensome. There is no need in many cases to have a written order at all-it can be done on the record the first day of hearing. Clarify that the prehearing order itself should also be included in the hearing record. It is unclear what provision has been made when both parties oppose the written prehearing order. The requirement to change the order each time extensions

are granted and changes are made is an exercise in paperwork and not an effective way of running a hearing. It is unclear what the distinction between a “written summary of the prehearing conference” and the reference to a “written prehearing order” is and whether a “transcript” can substitute for a prehearing order.

DEPARTMENT RESPONSE:

A pre-hearing order is standard legal practice. It confirms the matters agreed-upon by the parties at the conference, and will enable the IHO to move the hearing forward in a smooth, orderly fashion, and render decisions in an efficient and expeditious manner. The proposed rule requires that parties be given an opportunity to object to the pre-hearing order. Rulings on objections to pre-hearing orders are best left to the discretion of individual IHOs to rule on a case-by-case basis. If necessary, the Department may consider issuing guidance on these matters.

A "transcript" is a verbatim recording of what occurred at the pre-hearing conference for inclusion with the hearing record and it is distinct from the IHO's "written pre-hearing order" which confirms and/or identifies the matters resolved at the pre-hearing conference, as specified in 200.5(j)(3)(xi)(b)(1) through (7). A "written summary" is a flexible, less formal method of documenting what occurred during the pre-hearing conference. An IHO has the discretion to decide whether a pre-hearing conference shall be transcribed or if a written summary is sufficient. If the written summary option is selected, the IHO has the discretion to include the written summary as part of the written pre-hearing order, or to issue the written summary as a separate document.

COMMENT:

Insofar as it is now clear that these conferences may not take place until after the conclusion of the resolution period, there is no reason any longer to refer to them as pre-hearing conferences, and doing so only creates confusion about when and how the hearing commences. The name should be changed to ‘scheduling conference’.

DEPARTMENT RESPONSE:

The term pre-hearing conference has been retained since a pre-hearing conference must be conducted prior to the first hearing date and its purpose is broader than scheduling.

COMMENT:

The pre-hearing conference should include a court reporter and the record should be entered into the impartial hearing record on the first day of the hearing if the case does not settle.

DEPARTMENT RESPONSE:

Decisions on whether to record the pre-hearing conference in either a transcript prepared by a court reporter or in a written summary prepared by the IHO are best left to the discretion of the IHO to determine in each particular case.

COMMENT:

It is unclear why the witness list is not disclosed at the same time the final disclosure of all evidence intended to be offered (at least 5 business days prior to the first scheduled date of the hearing). Having a substantive discussion with the parties related to which witnesses (even if limited to titles) are expected to testify (albeit with the understanding that the list is subject to change by the 5-business day deadline) and the nature of their testimony affords the IHO an opportunity to better gauge how much time is needed for the conduct of the hearing and set expectations on which witnesses would have to be heard from in order to decide an issue in the due process complaint.

DEPARTMENT RESPONSE:

The requirement of the IHO to issue a written pre-hearing order which confirms and/or identifies the deadline date for final disclosure of all evidence intended to be

offered at the hearing, which must be no later than at least five business days prior to the first scheduled date of the hearing would, consistent with federal guidance, include the names of the witnesses to be called and the general thrush of their testimony (see 211 IDELR 166 Letter to Bell).

COMMENT:

Proposed language seems to imply that the IHO has no discretion to permit a party to participate in the prehearing conference by alternative means. Participation by alternative means should not be conditioned on the party that is able to appear in person consenting to allowing the other party to participate by alternative means.

DEPARTMENT RESPONSE:

The Department agrees with this comment and this language has been deleted in the proposed amendment, as revised.

Timeline for Commencing the Hearing:

COMMENT:

Pre-hearing conferences should be mandatory as soon as possible. All IHOs have received training on standard, legal practices to conduct these conferences. Consider requiring the conference for any cases filed within 30 calendar days of the effective date of the proposed regulations.

DEPARTMENT RESPONSE:

Pre-hearing conferences cannot be mandatory until the proposed amendment is adopted. It is anticipated that the proposed amendment, as revised, will be adopted at the October Regents meeting, but will not take effect until January 1, 2013. Given that the revised rule will not take effect until January 1, 2013, sufficient notice to all parties of this new requirement has been provided.

Section 200.5(j)(4)(iii) – Settlement Agreements

COMMENT:

IHO's should only order settlement agreements on issues raised in the due process complaint or amended due process complaint.

DEPARTMENT RESPONSE:

The comment is supportive; no response is necessary.

COMMENT:

There is nothing in the relevant law that would bar an IHO from issuing a Finding of Fact to the effect that the parties had entered into a settlement agreement of specified content, even when that agreement includes matters not in the Complaint. There is no reasonable policy to justify barring an IHO from so-ordering a settlement agreement of specified content, whether or not that agreement includes matters in the complaint. Limitations on the content of settlement agreements infringe on parties' due process rights. When the parties reach an agreement on the issues raised in the due process complaint and the school district further agrees to pay reasonable attorneys' fees, it is unclear whether the IHO can so order the settlement agreement despite a request by the parties because attorneys' fees would not be a matter that would be "before" the IHO. A so-ordered determination is a finding of fact and a remedy, not an inquiry by the IHO into the merits of the settlement.

DEPARTMENT RESPONSE:

There is nothing in the proposed rule that is hostile to or establishes limitations on settlement agreements between the parties. The regulations provide for many opportunities for the parties to reach agreement on the issues, including resolution sessions and extensions to continue use of mediation. Each of these processes results

in a written settlement agreement that is enforceable in court. However, when a party requests an impartial hearing, the authority of the IHO is limited to those matters before him/her in a due process complaint or amended complaint. The IHO may not order attorney fees.

Section 200.5(j)(5) – Submission of IHO Decisions

COMMENT:

Clarify the purpose of the redacted copy being sent to SED since these cases are not published.

DEPARTMENT RESPONSE:

SED posts redacted IHO decisions on its website and receives many Freedom of Information Law requests for such documents.

Section 200.5(j)(5) - Timeline to Render a Decision

COMMENT:

Support setting a reasonable timeline for submission of the hearing decision, possibly based on the length of the hearing.

DEPARTMENT RESPONSE:

It would be inconsistent with federal requirements to establish different timelines for an IHO to issue and provide copies of decisions based on the length of the hearing.

COMMENT:

Conditioning the timeline from when the IHO “receives” the waiver or agreement that no agreement can be reached is inconsistent with the Individuals with Disabilities Education Act (IDEA) which mandates that the timeline starts the day after the date each was entered.

DEPARTMENT RESPONSE:

The proposed amendment has been revised to conform the timeline requirements relative to such a waiver or agreement to IDEA.

COMMENT:

Parties should be permitted to request case extensions to obtain transcripts, write and submit memoranda and review the record and write an appropriate decision based on the record.

DEPARTMENT RESPONSE:

Nothing in the proposed rule would prohibit a party from requesting an extension to submit its memorandum of law or other information to the IHO. The IHO determines when the record has been closed. A record is closed when any post-hearing submissions and the transcript are received by the IHO.

Section 200.5(j)(5) – Impartial Hearing Record

COMMENT:

What is “notice” and what is the required content? Include response sent to the parent when the district has not sent a prior written notice to the parent regarding the subject matter contained in the parent’s due process complaint.

DEPARTMENT RESPONSE:

Proposed section 200.5(j)(5)(iv) has been revised to clarify that ‘notice’ refers to the prior written notice and other party response as required by sections 200.5(j)(4) and (5). It has also been revised to replace the term ‘motions’ with “requests for an order” since formal motion practice is not frequently utilized in these hearings and to delete ‘orders of discovery’ since such orders, if made, would be included and covered under clause (c). The rule has also been revised to clarify that this list of documents is not restrictive and any other documentation deemed necessary by the IHO to be included in

the Record should be included. This includes any motions, if made, or discovery orders, if issued.

COMMENT:

Proposed rule relating to the record will maintain greater confidentiality for all parties.

DEPARTMENT RESPONSE:

The proposed rule does not make any particular amendments to provisions affecting the confidentiality of records and therefore no response is necessary.

COMMENT:

District should maintain the copy of record/exhibits in addition to the IHO; a newly appointed IHO can receive the complete record from the district without any delays for the parties. Require a specific timeline for the submission of the record (e.g., five days). Language refers to 'returning' the record to the school district, without any prior reference to the district having ever previously possessed it.

DEPARTMENT RESPONSE:

Proposed rule has been revised to replace the word "return" with "transmit". While the proposed rule does not impose a timeline for transmittal of the record from the IHO to the district, IHOs would be expected to comply with this requirement in a timely manner.

Section 200.5(j)(5)(i)-(iv) - Extensions to the Due Date for Rendering the Impartial Hearing Decision

COMMENT:

Same 'good cause' principle that applies to extensions sought by the parties should apply to IHO initiated extensions.

DEPARTMENT RESPONSE:

Federal regulations do not allow for IHO initiated extensions.

COMMENT:

Restore the proposed one-time 30 day extension for settlement negotiations. Require same considerations and procedures as all other extensions.

DEPARTMENT RESPONSE:

The proposed amendment that would have allowed only one 30-day extension for purposes of settlement discussions between the parties was removed because it would have imposed stricter restrictions on the IHO's authority to grant extensions for such purposes. Under current regulation, there is no limit on the number of extensions, provided that the IHO has made the appropriate considerations required in regulation as for all extension requests and has determined that there is a compelling reason or a specific showing of substantial hardship to grant the extension request.

Section 200.5(j)(3) – Withdrawals of Requests for Due Process Hearings

COMMENT:

Provision comports with State Review Office decisions. Revised proposal does not alter the statute of limitations timelines for bringing a complaint is appropriate.

DEPARTMENT RESPONSE:

Comments are supportive; no response is necessary.

COMMENT:

Clarify that before an IHO can find that a withdrawal is with prejudice, the IHO should notify the parties of the intended ruling and give the parties the opportunity to decide whether to proceed to hearing or withdraw with prejudice. Language suggests IHO would not have discretion to refuse to a withdrawal request. Consider requiring the

withdrawing party to file a motion with the IHO and allowing the IHO to determine whether to allow the withdrawal and whether the withdrawal would be with or without prejudice.

DEPARTMENT RESPONSE:

Proposed rule has been revised to clarify that after the commencement of a hearing, the party requesting the hearing must notify the IHO and the other party of an intent to withdraw and the IHO must issue an order of termination. Language was further revised to clarify that a withdrawal shall be deemed to be without prejudice except that the IHO may, upon notice and an opportunity for the parties to be heard, issue a decision that the withdrawal be with prejudice at the request of a party or on the IHO's own initiative. However, we do not agree that the IHO should have the discretion to force the parties to proceed with the hearing when a withdrawal request has been made.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 207, 305, 3214, 4403, 4404 and 4410.

1. Subdivision (x) of section 200.1 of the Regulations of the Commissioner of Education is amended, effective January 1, 2013, as follows:

(x) Impartial hearing officer means an individual assigned by a board of education pursuant to Education Law, section 4404(1), or by the commissioner in accordance with section 200.7(d)(1)(i) of this Part, to conduct a hearing and render a decision. No individual employed by a school district, school or program serving students with disabilities placed there by a school district committee on special education may serve as an impartial hearing officer and no individual employed by such schools or programs may serve as an impartial hearing officer for two years following the termination of such employment, provided that a person who otherwise qualifies to conduct a hearing under this section shall not be deemed an employee of the school district, school or program serving students with disabilities solely because he or she is paid by such schools or programs to serve as an impartial hearing officer. An impartial hearing officer shall:

(1) …

(2) …

(3) …

(4) be certified by the commissioner as an impartial hearing officer eligible to conduct hearings pursuant to Education Law, section 4404(1) and subject to suspension or revocation of such certification by the commissioner for good cause in accordance with the provisions of section 200.21 of this Part. In order to obtain and

retain such a certificate, an individual shall:

(i) …

(ii) …

(iii). . .

(iv) possess knowledge of, and the ability to understand, the provisions of Federal and State law and regulations pertaining to the Individuals with Disabilities Education Act and legal interpretations of such law and regulations by Federal and State courts; [and]

(v) possess knowledge of, and the ability to conduct hearings in accordance with appropriate, standard legal practice and to render and write decisions in accordance with appropriate standard legal practice[.]; and

(vi) be willing and available to accept appointment to conduct impartial hearings. Notwithstanding the provisions of section 200.21 of this Part, unless good cause has been provided to the commissioner including, but not limited to, cause resulting from poor health as certified by a physician, active military services or other similar extenuating circumstances, the certification of an impartial hearing officer shall be rescinded upon a finding that the impartial hearing officer was not willing or available to conduct an impartial hearing within a two-year period of time.

2. Paragraph (3) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended, effective January 1, 2013, as follows:

(3) Initiation of an impartial due process hearing. Upon receipt of the parent's due process complaint notice, or the filing of the school district's due process complaint notice, the board of education shall arrange for an impartial due process hearing to be conducted in accordance with the following rules:

(i) [Appointment] Except as provided in subparagraph (ii) of this paragraph and paragraph (6) of this subdivision, appointment from the impartial hearing officer list must be made in accordance with the rotational selection process established in section 200.2(e)(1) of this Part and the administrative procedures established by the board of education pursuant to section 200.2(b)(9) of this Part.

(a) ….

(b) ….

(c) The impartial hearing officer shall not accept appointment if he or she is serving as the attorney in a due process complaint in the same school district or has served as the attorney in a due process complaint in the same school district within a two-year period of time preceding the offer of appointment; or if he or she is an individual with special knowledge or training with respect to the problems of children with disabilities who has accompanied and advised a party from the same school district in a due process complaint within a two-year period.

(ii) The board of education or trustees shall immediately appoint an impartial hearing officer to conduct the hearing. A board of education may designate one or more of its members to appoint the impartial hearing officer.

(a) Consolidation and multiple due process hearing requests. For a subsequent due process complaint notice filed while a due process complaint is pending involving the same parties and student with a disability:

(1) Once appointed to a case in accordance with the rotational selection process established in section 200.2(e)(1) of this Part, the impartial hearing officer with the pending due process complaint shall be appointed to a subsequent due process complaint involving the same parties and student with a disability, unless that impartial

hearing officer is unavailable.

(b) The impartial hearing officer may consolidate the new complaint with the pending complaint or provide that the new complaint proceed separately as an individual complaint before the same impartial hearing officer.

(c) Consolidation of such complaints or the denial of such consolidation shall be by written order.

(2) When considering whether to consolidate one or more separate requests for due process, in the interests of judicial economy and the interests of the student, the impartial hearing officer shall consider relevant factors that include, but are not limited to:

(i) the potential negative effects on the child's educational interests or well-being which may result from the consolidation;

(ii) any adverse financial or other detrimental consequence which may result from the consolidation of the due process complaints; and

(iii) whether consolidation would:

(a) impede a party's right to participate in the resolution process prescribed in paragraph (2) of this subdivision;

(b) prevent a party from receiving a reasonable opportunity to present its case in accordance with subparagraph (xiii) of this paragraph; or

(c) prevent the impartial hearing officer from timely rendering a decision pursuant to paragraph (5) of this subdivision.

(3) If the due process complaints are consolidated, the timeline for issuance of a decision in the earliest pending due process complaint shall apply.

(4) Nothing in this section shall be construed to preclude a parent from filing a

due process complaint on an issue separate from a due process complaint already filed.

(iii) Timeline for commencing the [hearing [or]pre-hearing conference. Unless an extension is granted pursuant to subparagraph (5)(i) of this subdivision:

(a) when a school district files a due process complaint notice, the [hearing or] pre-hearing conference shall commence within the first 14 days after the date upon which the impartial hearing officer is appointed.

(b) when a parent files a due process complaint notice, the [hearing or a] pre-hearing conference shall commence within the first 14 days after:

(1). . . .

(2) . . . .

(3) . . . .

(4) . . . .

(iv) . . . .

(v) . . . .

(vi) . . . .

(vii) . . . .

(viii) . . . .

(ix) . . . .

(x) . . . .

(xi) [A] The impartial hearing officer shall conduct a prehearing conference with the parties [may be scheduled] to facilitate a fair, orderly and expeditious hearing. Such conference may be conducted by telephone. A transcript or a written summary of the prehearing conference shall be entered into the record by the impartial hearing officer.

(a) A prehearing conference [is] shall be held for the purposes of:

[(a)] (1) simplifying or clarifying the factual issues in dispute;

[(b)] (2) establishing dates for [the completion of] conducting and completing the hearing and for rendering the impartial hearing officer's decision;

[(c)] (3) identifying evidence to be entered into the record;

[(d)] (4) discussing witnesses expected to provide testimony; and/or

[(e)] (5) addressing other [administrative] matters as the impartial hearing officer deems necessary to complete a timely, efficient and fair hearing.

(b) Upon the conclusion of the prehearing conference, the impartial hearing officer shall promptly issue and deliver to the parties, or their legal representative, a written prehearing order which confirms and/or identifies the:

(1) time, place, and dates of the hearing;

(2) factual issues to be adjudicated at the hearing;

(3) relief being sought by the parties;

(4) deadline date for final disclosure of all evidence intended to be offered at the hearing, which must be no later than at least five business days prior to the first scheduled date of the hearing;

(5) the briefing schedule, if applicable;

(6) the date by which the final decision of the impartial hearing officer shall be issued; and

(7) any other information determined to be relevant by the impartial hearing officer.

(c) If a party does not participate in the prehearing conference, the impartial hearing officer may proceed with the conference and issue the written prehearing order

in conformity with clause (b) of this subparagraph, provided that both parties are given an opportunity to render objections to the prehearing order.

(d) The impartial hearing officer shall include the notice to the parties of the prehearing order and any amendments thereto in the hearing record.

(e) The impartial hearing officer shall not conduct a prehearing conference prior to the date the parties' right to an opportunity for an impartial due process hearing is invoked pursuant to 34 CFR section 300.511(a) (Code of Federal Regulations, 2009 edition, title 34, section 300.511(a), Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001; 2009 – available at the Office of Counsel, New York State Education Department, Room 148, State Education Building, 89 Washington Avenue, Albany, NY 12234), except as may otherwise be deemed necessary by the impartial hearing officer to meet the requirements of 20 U.S.C. section 1415 and the federal regulations implementing such statute. The impartial hearing officer shall be authorized to conduct additional conferences following the initial prehearing conference to aid in the disposition of the hearing.

(xii) ….

(xiii) ….

(xiv) ….

(xv) ….

(xvi) ….

(xvii) ….

3. Paragraph (4) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended effective January 1, 2013, as follows:

(4) Decision of the impartial hearing officer. (i) In general. Subject to

subparagraph (ii), a decision made by an impartial hearing officer shall be made on substantive grounds based on a determination of whether the student received a free appropriate public education.

(ii) ….

(iii) Settlement agreements. An impartial hearing officer shall not issue a so-ordered decision on the terms of a settlement agreement reached by the parties in other matters not before the impartial hearing officer in the due process complaint or amended due process complaint. Nothing in this subdivision shall preclude a party from seeking to admit a settlement agreement or administrative decision into evidence.

4. Paragraph (5) of subdivision (j) of section 200.5 of the Regulations of the Commissioner of Education is amended, effective January 1, 2013, as follows:

(5) Timeline to render a decision. Except as provided in section 200.16(h)(9) of this Part and section 201.11 of this Title, if a school district files the due process complaint, the impartial hearing officer shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents[,] and to the board of education[, and to the Office of Special Education of the State Education Department,] not later than 45 days from the [date required for commencement of the impartial hearing in accordance with subparagraph (3)(iii) of this subdivision] day after the public agency's due process complaint is received by the other party and the State Education Department. Except as provided in section 200.16(h)(9) of this Part and section 201.11 of this Title, if the parent files the due process complaint notice, the decision is due not later than 45 days from the day after one of the following events, whichever shall occur first: (a) both parties agree in writing to waive the resolution meeting; (b) 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; (c) 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 or (d) the expiration of the 30-day resolution period. In cases where extensions of time have been granted beyond the applicable required timelines, the decision must be rendered and mailed no later than 14 days from the date the impartial hearing officer closes the record. The date the record is closed shall be indicated in the decision. After a final decision has been rendered, the impartial hearing officer shall promptly transmit the record to the school district together with a certification of the materials included in the record. The record of the hearing and the findings of fact and the decision shall be provided at no cost to the parents. Within 15 days of mailing the decision to the parties, the impartial hearing officer shall submit the decision to the Office of Special Education of the State Education Department. All personally identifiable information, in accordance with the guidelines provided by the commissioner, shall be deleted from the copy forwarded to the Office of Special Education.

(i) An impartial hearing officer may grant specific extensions of time beyond the periods set out in this paragraph, in subparagraph (3)(iii) of this subdivision, or in section 200.16(h)(9) of this Part at the request of either the school district or the parent. The impartial hearing officer shall not solicit extension requests or grant extensions on his or her own behalf or unilaterally issue extensions for any reason. Each extension shall be for no more than 30 days. Not more than one extension at a time may be granted. The reason for each extension must be documented in the hearing record.

(ii) The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

(a) [the impact on] whether the delay in the hearing will positively contribute to, or adversely affect, the child's educational interest or well-being [which might be occasioned by the delay];

(b) [the need of a party for additional time to prepare or present the party's position at the] whether a party has been afforded a fair opportunity to present its case at the hearing in accordance with the requirements of due process;

(c) any adverse financial or other detrimental consequences likely to be suffered by a party in the event of delay; [and]

(d) whether there has already been a delay in the proceeding through the actions of one of the parties.

(iii) Absent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, settlement discussions between the parties, avoidable witness scheduling conflicts or other similar reasons. [Agreement] The impartial hearing officer shall not rely on the agreement of the parties [is not a sufficient] as a basis for granting an extension. No extension shall be granted after the record close date.

(iv) The impartial hearing officer shall promptly respond in writing to each request for an extension and shall set forth the facts relied upon for each extension granted. The response shall become part of the record. The impartial hearing officer may render an oral decision to an oral request for an extension if the discussions are conducted on the record, but shall subsequently provide that decision in writing and include it as part of the record. For each extension granted, the impartial hearing officer shall set a new date for rendering his or her decision, [and] notify the parties in writing of

such date, and as required, revise the schedule of remaining hearing dates set forth in the written prehearing order issued pursuant to subparagraph (ix)(c) of this paragraph to ensure that the impartial hearing officer's decision is issued by the revised decision due date.

(v) . . . .

(vi) For purposes of this section, the record shall include copies of:

(a) the due process complaint notice and any response to the complaint pursuant to paragraphs (4) and (5) of subdivision (i) of this Part;

(b) all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer;

(c) all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order and an order granting or denying an extension of the time in which to issue a final decision in the matter;

(d) any subpoenas issued by the impartial hearing officer in the case;

(e) all written and electronic transcripts of the hearing;

(f) any and all exhibits admitted into evidence at the hearing, including documentary, photographic, audio, video, and physical exhibits;

(g) any other documentation deemed relevant and material by the impartial hearing officer; and

(h) any other documentation as may be otherwise required by this section.

5. Section 200.5(j) of the Regulations of the Commissioner of Education is amended by adding a new paragraph (6), effective January 1, 2013, as follows:

(6) Withdrawal of a Due Process Complaint. A due process complaint may be withdrawn by the party requesting a hearing as follows:

(i) Prior to the commencement of the hearing, a voluntary withdrawal by the party requesting the hearing shall be without prejudice unless the parties otherwise agree.

(ii) Except for withdrawals in accordance with subparagraph (i) of this paragraph, a party seeking to withdraw a due process complaint shall immediately notify the impartial hearing officer and the other party. The impartial hearing officer shall issue an order of termination. A withdrawal shall be presumed to be without prejudice except that the impartial hearing officer may, upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice upon:

(a) a request from a party that the withdrawal be with prejudice, or

(b) the impartial hearing officer's own initiative.

(iii) The withdrawal of a due process complaint does not alter the timeline pursuant to paragraph (1)(i) of this section for requesting an impartial hearing.

(iv) If the party subsequently files a due process complaint within one year of the withdrawal of a complaint that is based on or includes the same or substantially similar claims as made in a prior due process complaint that was previously withdrawn by the party, the school district shall appoint the same impartial hearing officer appointed to the prior complaint unless that impartial hearing officer is no longer available to hear the re-filed due process complaint.

(v) Nothing in this section shall preclude an impartial hearing officer, in his or her discretion, from issuing a decision in the form of a consent order that resolves matters in dispute in the proceeding.

6. Section 200.16(h)(9) is amended, effective January 1, 2013, as follows:

(9) Impartial due process hearings. Impartial due process hearings shall be conducted in accordance with section 200.5(j) of this Part, provided that the decision of the impartial hearing officer shall be rendered, in accordance with section 4410 of the Education Law, not later than 30 days after the time period pursuant to section [200.5(j)(3)(iii)] 200.5(j)(5) of this Part [or after the initiation of such hearing by the board].

PROPOSED AMENDMENT OF SECTIONS 200.1, 200.5 AND 200.16 OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION PURSUANT TO EDUCATION LAW SECTIONS 207, 305, 3214, 4403, 4403 AND 4410 RELATING TO SPECIAL EDUCATION IMPARTIAL HEARINGS

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Revised Rule Making in the State Register on September 19, 2012, the State Education Department (SED) received the following comments on the revised proposed amendment.

Section 200.1(x) - Impartial Hearing Officer (IHO) Certification

COMMENTS:

The amendment will promote efficiency by discouraging continued unwillingness of IHOs to accept an appointment without good cause; will protect the integrity of the rotational selection process and eliminate delays in selecting IHOs and eliminate the appearance of partiality and impropriety which could possibly jeopardize the integrity of the process.

DEPARTMENT RESPONSE:

Comments are supportive; no response is necessary.

COMMENTS:

Revise to clarify that there is no presumption of nonavailability based simply on failure to have been assigned to or have conducted a hearing within two years; allow consideration of other possible hardships in addition to the medical hardship mentioned in the proposed regulations. To take away an IHO's certification based upon an arbitrary time-line is too harsh and may impose a hardship on IHOs. Instead of

debarring IHOs who cannot take cases for 2 years, SED should place them in inactive status.

DEPARTMENT RESPONSE:

The proposed amendment allows good cause to be established as to why an IHO had not accepted an appointment within a two-year period and does not limit cause to the reasons provided in the proposed amendment. The determination of whether an IHO has been unwilling or unavailable to accept appointments within a two-year period would be made on a case-by-case basis.

COMMENTS:

The proposed regulation does not go far enough. Limiting the disqualification to attorneys or non-attorney advocates who have been involved in an actual impartial hearing in the same district during the prior two years does not take into account other representations of parties by the attorney or non-attorney advocate which create the same appearance of partiality and impropriety as actually appearing within a hearing.

DEPARTMENT RESPONSE:

It would be inappropriate to further restrict an IHO's appointment based on his/her representation of the parties in other matters. Many IHOs have other employment responsibilities and the purpose of the rule is only to further ensure that the IHO does not have a professional conflict of interest with the school district in which he/she presides as an IHO. A party retains the right to challenge the appointment of an IHO based on concerns of impartiality. An IHO also has a professional responsibility to decline appointment or recuse him/herself if the IHO has a personal or professional interest that would conflict with his or her objectivity in the hearing. The State certifies and provides annual update training to IHOs with the expectation that they are available

to serve in this capacity. Unless an IHO has good cause for declining appointments over an extended period of time, it is not in the best interests of the State or the parties to retain the individual on the rotational list of IHOs.

Section 200.5(j)(3)(ii) – Consolidation of Due Process Requests

COMMENTS:

The revised proposed amendment streamlines the factors considered by IHOs in determining whether to consolidate the complaints and allows for an appropriate exercise of IHO discretion; removes the potential for abuse and the inevitable unnecessary time and expense districts incur when required to select a new IHO.

DEPARTMENT RESPONSE:

Comments are supportive; no response is necessary.

COMMENTS:

Consolidation should be prohibited if the subsequent due process complaint is filed within five days of commencement of the hearing unless the other party consents in writing. Without this exception a party could circumvent section 200.5(i)(7)(i)(b) of the regulations governing amendments of hearing requests.

DEPARTMENT RESPONSE:

No revisions of the proposed rule have been made to add a prohibition to the consolidation of complaints filed within five days of the hearing as such a limit may not be in the interests of judicial economy and further the student's educational interests. The IHO has the discretion to determine the appropriateness of the consolidation. Section 200.5(i)(7)(i) allows a party to amend its due process complaint notice only if (a) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a resolution meeting; or (b) the IHO grants permission,

except that the IHO may only grant such permission at any time not later than five days before an impartial due process hearing commences. Allowing consolidation of multiple due process requests does not circumvent the limits imposed by regulation on the IHO's authority to grant permission for an amended due process complaint notice.

COMMENTS:

The proposal should limit a party's ability to file subsequent due process complaints regarding alleged actions that such party knew or should have known about at the time that the initial hearing request was filed.

DEPARTMENT RESPONSE:

Nothing in the proposed rule is intended to further limit a party's right to submit a due process complaint notice on separate issues. The statute of limitations would apply such that a party may request an impartial due process hearing within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint (with exceptions as provided in section 200.5(j)(1)(i)).

COMMENTS:

Mandatory consolidation should be limited to disputes relating to the same school year, but permitting discretionary consolidation of hearing requests relating to a second school year if the parties consent or, if on application of one party, it is demonstrated that common factual and legal issues exist and the interests of judicial economy and fairness to the parties would be substantially advanced by consolidation.

DEPARTMENT RESPONSE:

The proposed rule relating to consolidation and multiple due process complaint notices would be applicable as long as the original complaint is still pending. All

consolidation requests are discretionary on the part of the IHO, applying the consideration factors in the proposed rule.

COMMENTS:

There is a lack of clarity regarding the phrase “while a due process proceeding is pending." What if the case is at SRO? Is it still “pending” thus requiring the appointment of the same IHO if another hearing request is filed? Same question if it is in federal court.

DEPARTMENT RESPONSE:

The proposed language “while a due process proceeding is pending” applies solely to the impartial hearing and not to any appeal resulting from the IHO’s decision in the impartial hearing.

COMMENTS:

Requiring consolidation of such additional hearing requests filed during the time that a hearing request is already pending, while furthering the goal of judicial economy, nonetheless provides a party with an inappropriate opportunity to select the IHO who will preside over disputes involving issues in such subsequent years by manipulating the timing that the subsequent hearing request is filed. Add that mandatory consolidation be limited to disputes relating to the same school year; permit discretionary consolidation of hearing requests relating to a second school year if the parties consent or, if on application of one party, it is demonstrated that common factual and legal issues exist and the interests of judicial economy and fairness to the parties would be substantially advanced by consolidation.

DEPARTMENT RESPONSE:

The meaning of the first comment above is unclear. Under the proposed rule, consolidation is not mandatory. The IHO would determine whether to consolidate one or more separate requests for due process in consideration of the proposed factors, regardless of whether or not the due process complaint involves disputes involving issues in subsequent years. It is unclear why the commenter believes this would result in an opportunity for a party to select the IHO. If a subsequent due process complaint is filed on a student while a hearing is already pending before an IHO on the same student, the new due process complaint would be forwarded to said IHO for him or her to determine to whether to consolidate the cases. Thus, only if a hearing is pending, would a new subsequent complaint be forwarded to the same IHO. Otherwise, an IHO would be selected from the rotational list. Thus, it is not anticipated that an IHO be continuously appointed in subsequent school years. Further and significantly, impartial hearings should be resolved in a short period of time (45 days), making it the exception for a decision relating to one school year to be pending when a new due process request for a subsequent school year is filed.

COMMENTS:

Delete the proposed provision that states “Nothing in this section shall be construed to preclude a parent from filing a due process complaint on an issue separate from a due process complaint already filed”, as such language does not promote judicial economy. Add a limitation to a party’s ability to file subsequent due process complaints regarding alleged actions that such party knew or should have known about at the time that the initial hearing request was filed.

DEPARTMENT RESPONSE:

It would be inconsistent with 34 C.F.R. 300.513(c) to limit a party's ability to file subsequent due process complaints on an issue separate from a due process complaint already filed.

COMMENTS:

Leaving the decision to the district alone regarding the assignment of an IHO for a subsequently filed impartial hearing request lends itself to claims of IHO shopping. There should be some process/procedure for parents to challenge the assignment of cases filed subsequent to a decision to the same IHO issuing that prior decision.

DEPARTMENT RESPONSE:

If a due process proceeding is pending and another due process complaint notice is received for the same student involving the same parties, the school district would be required, without further discretion, to appoint the same IHO (unless that IHO is unavailable to take the case). The IHO would then determine whether to consolidate the case. There is nothing in the proposed rule that would require that, once a hearing decision has been rendered by an IHO, that the same IHO be appointed for additional due process requests for the same student.

<u>Section 200.5(j)(3)(xi) – Prehearing Conferences:</u>

COMMENTS:

Use the language of a prior proposal that prohibited a hearing officer from scheduling a prehearing conference before the conclusion of the resolution period.

DEPARTMENT RESPONSE:

The prior proposal was revised to ensure that the IHO has appropriate discretion to conduct a prehearing conference as necessary to meet a federal due process requirement.

COMMENTS:

The proposed regulation would allow IHOs to require parties to identify their evidence and witnesses much earlier than the five-day disclosure deadline contained in IDEA and its implementing regulations. The IHO should have discretion to permit the exchange of additional documents not available at the time of the original disclosure at least five business days prior to the hearing date at which such additional documents will be used.

DEPARTMENT RESPONSE:

The proposed rule establishes that one purpose of the prehearing conference is to discuss witnesses expected to provide testimony. The written prehearing order would establish the deadline date for final disclosure of all evidence intended to be offered at the hearing, which must be no later than at least five business days prior to the first scheduled date of the hearing. This is consistent with 34 C.F.R. 300.512(b)(1) and (2) which states that (1) at least five business days prior to a hearing…, each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing; and (2) a hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

COMMENT:

The proposal will eliminate the need to hold prehearing conferences for those cases that can be settled during a resolution session and will not waste participants' valuable time and resources. This proposal will establish with specificity the factual

issues to be determined at the hearing and is a very positive step that will substantially promote judicial economy.

DEPARTMENT RESPONSE:

Comments are supportive; no response is necessary.

COMMENT:

Requiring prehearing conferences will pose a hardship for parents who are hoping to resolve an issue without an attorney or with as few hearing dates as possible. Mandating prehearing conferences and requiring IHOs to issue detailed prehearing orders in every case will make these proceedings more difficult for parents, specifically unrepresented parents, and will increase the costs of hearings significantly and unnecessarily at a time when so many services are threatened by budget cuts. The mandatory prehearing conference proceduralizes the impartial hearing process and makes it more cumbersome and intimidating for the pro se parent. The proposed regulations significantly impact parents of children with disabilities with limited means, education and/or experience. This proposal is particularly problematic for pro se parents, who may not fully understand that an IHO has narrowed, eliminated or mischaracterized some of their claims in a written prehearing order. The addition of another required step in the process will operate as an unnecessary burden on parents, especially in cases where the parent is appearing pro se. It will give school districts a forum to intimidate and discourage parents from going forward with a hearing in the first place. The proposed regulation does not include a notice requirement and prehearing conferences may be held with little or no notice to the parties. Add that the IHO must provide the parties with at least 5 business day's notice of the proposed prehearing

conference date and that the proposed prehearing conference date be scheduled at a convenient time for all parties.

DEPARTMENT RESPONSE:

The prehearing conference, particularly for a pro se parent, provides an opportunity to provide the parent with procedural information on the hearing process and to assist the parent to clearly identify the issues in dispute. When the issues are clear, the parties can prepare for the hearing. Nothing in the proposed rule would authorize the IHO to narrow, eliminate or mischaracterize the issues in dispute in an impartial hearing, except where the IHO does not have jurisdiction over the issues raised. The effect of the prehearing conference order that confirms and/or identifies the time, place and dates of the hearing and other administrative matters (such as identifying the issues to be adjudicated, relief being sought, the deadline date for disclosure of evidence, the briefing schedule and the date by which the final decision of the IHO is to be issued) should assist the parties, including the parents, in planning for hearing sessions and should assure the parent that the matter regarding the student will be resolved in an expeditious and fair manner. With regard to the suggestion for a notice requirement for a prehearing conference, current regulations require that the hearing be conducted at a time and place which is reasonably convenient to the parent and the student involved and the same would apply to the prehearing requirement. Further a prehearing conference could, at the discretion of the IHO, be conducted by telephone and, in the event a party cannot participate, the IHO may proceed with the conference, provided that the absent party has the opportunity to render objections to the prehearing conference.

COMMENT:

The proposed mandatory prehearing conferences are an inefficient use of resources which will significantly increase the cost of hearings. A prehearing conference would be an unnecessary and costly procedural hurdle, particularly considering that the vast majority of complaints now settle before hearing without a prehearing conference. The imposition of a prehearing conference in cases in which the IHO does not believe it to be of value or use, not only adds unnecessary cost and time burdens, it makes the entire enterprise less collaborative and more formal. The imposition of these requirements is going to tax an already overly burdened system. The requirement to essentially pre-litigate the case at a prehearing conference is unrealistic and will drive up the cost of litigation. This will require an additional day of hearing, totally unnecessary in most cases and constituting additional unwarranted expense to school districts on tight budgets. The proposed amendment may inhibit possible settlements and undermine cooperation between school districts and parents; will add unnecessary procedural steps to many cases, and will result in more cases being out of compliance.

DEPARTMENT RESPONSE:

A prehearing conference cannot be used to pre-litigate a case, nor will prehearing conferences require an additional day of hearing. A prehearing conference is for the purpose of simplifying or clarifying the factual issues in dispute; establishing dates for conducting and completing the hearing and for rendering the IHO's decision; identifying evidence to be entered into the record; discussing witnesses expected to provide testimony; and/or addressing other matters as the IHO deems necessary to complete a timely, efficient and fair hearing. A prehearing conference is expected to result in fewer hearing sessions and more timely decisions, thereby reducing, not

increasing costs. The proposed rule would require a prehearing conference only for those cases that are beyond the resolution period and must, by law, be initiated.

COMMENT:

The amendment as written is confusing because it suggests that a prehearing conference could be held before a party invokes due process. It is not clear what is meant by new language in this proposal which states that "[t]he impartial hearing officer shall not conduct a prehearing conference prior to the date the parties' right to an opportunity for an impartial due process hearing is invoked pursuant to 34 CFR section 300.511(a) . . . except as may otherwise be deemed necessary by the impartial hearing officer to meet the requirements of 20 U.S.C. section 1415 and the federal regulations implementing such statute."

DEPARTMENT RESPONSE:

By federal regulation, a party does not have a right to an impartial hearing until the day after one of the following events occurs: (1) the school district has not resolved the due process hearing within 30 days of the receipt of the due process complaint; or (2) both parties agree in writing to waive the resolution meeting; or (3) 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 (4) 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. The proposed rule includes an exception provision in consideration of the possibility that an IHO may find it necessary to conduct a prehearing conference to resolve administrative matters relating to a decision that must be rendered prior to the parties right to a hearing, such as a pendency determination.

COMMENTS:

Requiring a mandatory prehearing conference ignores the possible settlement that may come from discussions during the resolution period and could therefore be a waste of time. It does not encourage resolution and discourage litigation. This amendment seems to actually serve to force parties into a litigation that may not be necessary. It would force an IHO to schedule hearing dates, etc. 14 days after the close of the resolution process regardless of the status of settlement discussions. The proposed language that "forces" a matter to hearing, regardless of the circumstances, improperly eliminates an IHO's discretion to grant the parties the additional time they need to resolve their differences. Revise the rule to clarify that if, upon a party's request, an IHO determines at the informal conference that it is warranted to grant an adjournment of the hearing to allow additional time for the parties to resolve their underlying complaint, nothing in the proposed language would require the IHO to simultaneously proceed to hearing. By forcing costly prehearing conferences in thousands of cases that are destined to settle, the proposals diminish the current discretion of IHOs to initiate such conferences only when needed. This language appears to preclude IHOs from ordering adjournments in those cases where the IHO concludes that it is in the interests of the parties to do so, but mandates that within 14 days following the close of resolution, or other events should they occur earlier, the parties prepare for hearing regardless of the circumstances.

DEPARTMENT RESPONSE:

The requirement that the IHO initiate the hearing within 14 days is an existing requirement and has not been proposed for amendment in this rulemaking. The 14-day rule was established in response to court action upon a finding that there were long

delays by IHOs in initiating hearings. Parties that wish to continue resolution discussions may agree, in writing, to continue the mediation after the 30-day period. In this case, the timeline to initiate the hearing would be delayed. Once the party has the right to the hearing, it is the IHO's responsibility to move that hearing forward in an expeditious manner. In the event that one or both parties request an extension, the IHO may, upon a finding that there is a compelling reason or a specific showing of substantial hardship, grant an extension to the timeline to render a decision.

COMMENT:

Commenters, including a member of the Legislature, expressed concern that the regulation should not result in a shift in the burden of proof. Comments included that the mandatory prehearing conference has the capacity to directly thwart the allocation of burden of proof in New York State; a mandatory prehearing conference will force parents to undertake a presentation of the case placing the burden of proof on the parents; the proposal is directly contrary to a specific and unambiguous act of the Legislature (Ch. 583 of the Laws of 2007) giving school districts the burden of proof in special education hearings; the proposal would force parents to effectively assume the burden of proof for impartial special education hearings under the guise of a prehearing format and force parents to essentially present their entire case, its framework, their evidence and their witness list in a formal proceeding before the school district and in the presence of an IHO, and that the orders resulting from mandatory conferences may contradict federal and state law regarding procedural and evidentiary timelines, and burden of proof. By mandating that IHOs 'simplify and clarify' the issues raised in the due process complaint notice or amended notice, the proposals violate the State

Education Law requirement that the initial burden of proof be to the school district in all cases.

DEPARTMENT RESPONSE:

Nothing in the proposed amendment should be construed to allow or require a party to "present its case" at a prehearing conference nor does it in any way alter the burden of proof requirements established in NYS law. A prehearing conference does not require full disclosure of a party's case. Rather, the proposed rule requires the prehearing conference, and accordingly the prehearing order, identify the time, place and dates of the hearing; the factual issues to be adjudicated at the hearing; relief being sought by the parties; the deadline date for final disclosure of evidence; the briefing schedule, if applicable; the date by which the IHO will issue his/her decision; and any other information determined to be relevant by the IHO. There is already a requirement that the due process complaint notice submitted by a parent or other party must, by federal regulation, identify the issues so that the school district has an opportunity to resolve the dispute. Resolution of an issue is more likely when the parties have clarity on the issues in dispute. While in some cases, clarity on the issues may be resolved by an IHO through a challenge to the sufficiency of the due process complaint notice, in other cases where a challenge has not been initiated, the prehearing conference may be the point when clarity of issues needs to be resolved. An IHO must conduct the prehearing conference in a manner that is consistent with federal and State law, including the State law relating to burden of proof, and with a parent's or district's right to a timely due process hearing. To clarify, the State's burden of proof law does not place the burden of proof to school districts in all cases; rather it states that "The board of education or trustees of the school district or the state agency responsible for

providing education to students with disabilities shall have the burden of proof, including the burden of persuasion and burden of production, in any such impartial hearing, except that a parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement." Existing regulations which authorize an IHO to conduct a prehearing conference include the provision that "A prehearing conference is for the purpose of … simplifying or clarifying the factual issues in dispute…."

COMMENT:

It would be inappropriate to require parties to appear at a pendency hearing with information about all the topics contemplated for discussion at the proposed prehearing conferences. The prehearing conference is useless unless the school district is required to respond with particularity to the specific allegations contained within the parents' request for due process. It will result in IHOs conducting conferences and issuing orders without the participation of all affected parties. The proposed requirement that the IHO identify the factual issues in a prehearing order would give the IHO authority to rephrase and even limit the petitioner's claims for relief, thus depriving petitioners of their right to state their own claims. The attempt to streamline will give rise to disputes as to what is or is not permissible to litigate at hearing. It is unrealistic to expect the parties to commit to a date when all witnesses will be heard at the time of the prehearing conference as this would diminish their right (and obligation) to present their case fully and fairly. Requiring the IHO to simplify or clarify the factual issues in dispute usurps the rights of the parties, both district and parent, to present their case in accordance with the requirements of due process.

DEPARTMENT RESPONSE:

Federal regulations require the subject matter of the hearing to be limited to those matters identified in the due process complaint notice or the amended due process complaint and the party requesting the hearing is not allowed to raise other issues at the hearing, unless the other party otherwise agrees. Managing the issues is critical to effective and efficient management of the hearing process. Nothing in the proposed amendment should be construed to allow or require a party to "present its case" at a prehearing conference. A party should, however, be able to articulate the issues at dispute and, the IHO should, as necessary, seek clarification to ensure that the IHO and both parties have a clear understanding of the issues to be resolved at the hearing.

Timeline for Commencing the Hearing:

Section 200.5(j)(4)(iii) – Settlement Agreements

COMMENTS:

The regulations unnecessarily bar IHOs from issuing orders in which the remedy so-ordered is a settlement agreement that includes an agreement with respect to matters not included in the original or amended Complaint. If the parties are in agreement on the terms of settlement, there appears to be no reason to limit an IHO, with the agreement of both parties, to order terms in matters not before the IHO. Remove any limits on IHO authority in the settlement process not imposed under federal law.

DEPARTMENT RESPONSE:

The Department does not agree that this regulation is unnecessary. While the parties may reach agreement on issues others than those raised in the due process

complaint, the IHO is limited in his/her jurisdiction to the issues raised in the due process complaint and cannot use his/her appointment as the IHO in a due process complaint to order remedies on other issues not raised in the due process complaint notice or amended due process complaint notice.

COMMENTS:

If an IHO were to order settlement terms on issues not set for in the complaint, a party could attempt to assert prevailing party status. Parties still retain the option of including non so-ordered items in a separate settlement agreement which may be contested in a judicial forum, if needed. If the district agrees to terms not specifically addressed in the complaint, there is nothing in law or regulation to prevent such a settlement.

DEPARTMENT RESPONSE:

Nothing in the proposed rule would affect a party's right to assert "prevailing party status" in another administrative or court proceeding. Other comments are supportive and no response is necessary.

COMMENT:

Support the provision that allows admission of a settlement agreement into evidence irrespective of whether the stipulation is so ordered.

DEPARTMENT RESPONSE:

Comment is supportive; no response is necessary.

COMMENTS:

Clarify whether the proposed rule would preclude parties from including mutually agreed upon relief that was not specifically identified in a hearing request in their settlement agreement. Limiting the remedial powers of the IHO in this manner arguably

violates Federal law; it surely is not mandated by it. By limiting the contents of settlement orders the proposed amendments make settlement harder to achieve and less likely to occur.

DEPARTMENT RESPONSE:

Nothing in the proposed rule would limit the contents of settlement orders. The parties may reach a written agreement on issues that were not identified in dispute in the due process complaint notice or amended due process complaint notice. However, the IHO's authority is limited to those matters that are before him or her in a due process complaint notice.

Section 200.5(j)(5) - Timeline to Render a Decision

COMMENTS:

The concept of "due process" has been abandoned and given way to an allegedly more important imposition of a timetable. Competent judges are better able to determine when judicial process has been delayed than those who favor a mathematical counting of days over the need to achieve a just and proper result.

DEPARTMENT RESPONSE:

We do not agree that anything in the proposed rule would result in a hearing that does not afford due process or that 'favors' completion of the hearing within the required number of days. In fact, the parties have a federal right to a fair due process hearing conducted in an efficient and effective manner. When a party requests a due process impartial hearing, he/she is entitled to a timely resolution of the matter. Federal law imposed a timeline on the conduct of these IDEA administrative hearings, and when a parent and district cannot resolve the matter through mediation or resolution sessions, it

is incumbent upon the IHO to conduct the hearing in a fair, orderly and expeditious manner.

Section 200.5(j)(5) – Impartial Hearing Record

COMMENT:

Requiring IHOs to redact personally identifiable information before forwarding a decision to the State has increased the cost of hearings to districts. Districts should be authorized, and be given the option of completing the redactions and forwarding a redacted copy to the State, as federal law contemplates.

DEPARTMENT RESPONSE:

The requirement that IHOs submit a redacted copy of the IHO decision to the State is a long-standing requirement and is based on federal regulations that require the findings and decision, after deleting any personally identifiable information, be made available to the public. The State believes this responsibility is most appropriately placed with the IHOs.

COMMENT:

Requiring the IHO to produce and certify the record post hearing will alleviate unnecessary delays and cost to the district.

DEPARTMENT RESPONSE:

The comment is supportive; no response is necessary.

COMMENT:

The provision should include a specific timeline for the submission of the record such as five days from the date of the decision.

DEPARTMENT RESPONSE:

While the proposed rule does not impose a timeline for transmittal of the record from the IHO to the district, IHOs would be expected to comply with this requirement in a timely manner.

Section 200.5(j)(5)(i)-(iv) - Extensions to the Due Date for Rendering the Impartial Hearing Decision

COMMENT:

The amendment will accelerate the hearing process.

DEPARTMENT RESPONSE:

Comment is supportive; no response is necessary.

COMMENTS:

It is unrealistic and likely prejudicial to statutorily mandate that the attorneys for either of the parties can control the schedules or the vacations of the witnesses. It is, perhaps, worse to hold the IHO responsible for the nonattendance of a witness on a given date. Extensions and adjournments should be granted at the discretion of the IHO and in the interest of protecting the parties' due process rights. Prohibiting extensions because of vacations, scheduling conflicts, witness unavailability, attorney unavailability, or other similar reasons will interfere with the fundamental right to be heard. Severely limiting the right to grant extensions contributes to a denial of due process as it constricts the ability to make an effective presentation. The “actual engagement of” counsel should be an acceptable reason for an adjournment, as it is with other judicial forums. Settlement negotiations are a very legitimate ground for requesting an adjournment and the IHO should not be prohibited from granting an

adjournment for that purpose. Allowing settlement discussions in the context of an ongoing hearing, overseen by the IHO with respect to timing and productivity, adds both shelter and beneficial pressure to the prospect of a non-adversarial resolution. Under federal law, IHOs have authority to grant extensions upon a party's request without any further limits on that authority. Remove regulations that limit an IHO's discretion in granting extensions that are not specifically imposed under federal law, particularly where the request is based on the IHO's determination, in response to a request from a party that good faith settlement discussions should be allowed to proceed. Compelling a hearing to move forward when the parties are actively working towards a resolution undermines that intention and also results in the loss of time and expense. By denying IHOs discretion, where appropriate, to extend the compliance date of a hearing in order to further a jointly expressed desire to engage in settlement discussions, the proposals disempower the parties and disfavor nonadversarial dispute resolution. The Department's earlier proposal, which would have allowed one 30-day extension for settlement discussions, should be reinstated. The proposed amendments undermine cooperation and collaboration between school districts and families, take away the discretion of hearing officers to work towards settlement and the interests of the child which the IDEA was meant to further, are counter to the letter and spirit of Federal and State statutes, discourage the resolution of litigated disputes via settlement and have consistently worked against nonadversarial outcomes in litigated special education disputes.

DEPARTMENT RESPONSE:

Federal regulations provide discretion to states to establish the procedures for the conduct of impartial hearings. The State's restrictions of the granting of extensions

were enacted several years ago resulting from a court case in this State relating to the lack of timeliness in IHO decisions. SED has not proposed to amend existing provisions specifically relating to the IHO's authority to grant extensions made at the request of a party for reasons of vacations, lack of availability resulting from the parties' and/or representatives' scheduling conflicts, settlement discussions between the parties. Current regulations provide authority for the IHO to grant an extension for these reasons where there is a compelling reason or specific showing of substantial hardship and where the IHO has considered the cumulative impact of factors affecting the child's educational interest or well-being, the party's fair opportunity to present its case at the hearing; prior delays in the proceeding and any financial or other detrimental consequences likely to be suffered by a party in the event of delay. The prior proposed rule that would have authorized only one 30-day extension for settlement purposes may have imposed greater restrictions on the IHO's authority to grant extensions for compelling reasons and, for that reason, the proposed rule was revised to exclude this language.

Section 200.5(j)(3) – Withdrawals of Requests for Due Process Hearings

COMMENTS:

The proposal is particularly problematic for pro se parents who may find themselves overwhelmed by the intricacies of prosecuting a claim under IDEA and may wish to withdraw in order to obtain legal counsel. Giving IHOs authority to dismiss claims with prejudice creates significant disincentives for settlement negotiations and contradicts basic principles of preclusion and res judicata. Claims should not be precluded in future proceedings when they are withdrawn prior to adjudication on the merits. There should be criteria established for when the withdrawal could be

considered “with prejudice.” The regulation should incorporate a specific timeline by which the order of termination may be issued and by which the parties are required to respond to the IHO notice. The defending party should be permitted to make an application to require that the withdrawal be deemed with prejudice. Language should be added affording a party a reasonable opportunity to respond to the notice of withdrawal prior to the IHO issuance of an order of termination.

DEPARTMENT RESPONSE:

In the proposed rule, withdrawals of a due process request prior to the commencement of the hearing is presumed to be without prejudice, meaning that the party is not precluded from refilling his/her claim. After the hearing has been initiated, the withdrawal is presumed to be without prejudice unless a party requests that it be with prejudice or the IHO determines, upon notice and an opportunity for the parties to be heard, that the withdrawal should be with prejudice. There may be compelling reasons why a case should be dismissed with prejudice. For example, where there has been extensive development of the hearing record, i,e., testimony taken and documentary evidence admitted into evidence; or when withdrawal of the hearing without prejudice would be inconsistent with the intent of the Individuals with Disabilities Education Act (IDEA) to provide expeditious and inexpensive methods of dispute resolution. There are federal and State decisions which support that IHOs have the authority to dismiss cases with prejudice in certain circumstances. The decision of the IHO that a case be dismissed with prejudice may be appealed.

COMMENT:

The term “order of termination” is vague and should be clarified.

DEPARTMENT RESPONSE:

An order of termination is a written decision by the IHO that the case has been withdrawn by the party, either with or without prejudice.