



TO: P-12 Education Committee

FROM: Angelique Johnson Dingle *Angelique Johnson Dingle*

SUBJECT: Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings

DATE: July 3, 2024

AUTHORIZATION(S): *Sam M. G. Bennett*

SUMMARY

Issue for Decision

Should the Board of Regents adopt the proposed amendment of section 200.5 of the Regulations of the Commissioner of Education relating to special education due process hearings?

Reason(s) for Consideration

Review of policy.

Proposed Handling

The proposed amendment is presented to the P-12 Education Committee for discussion and to the Full Board for adoption as an emergency rule at the July 2024 Regents meeting. A copy of the proposed rule (Attachment A) and a statement of facts and circumstances justifying emergency action (Attachment B) are attached.

Procedural History

If adopted as an emergency rule at the July 2024 meeting, a Notice of Emergency Adoption and Proposed Rule Making will be published in the State Register on July 31, 2024, for a 60-day public comment period. Supporting materials are available upon request to the Secretary of the Board of Regents.

Background Information

Update and Summary

This item follows-up on a proposal submitted to the Board of Regents for discussion at its May 2024 meeting. Based on feedback from the Board and stakeholders, the Department has developed a new proposal to clarify the kinds of disputes that fall outside the scope of the (State) entitlement to an impartial due process hearing.

Additionally, to provide predictability for the upcoming 2024-2025 school year, the Department proposes the adoption of this regulation on an emergency basis. Thus, beginning this year, disputes over the rates at which service providers will be paid or reimbursed must be filed as State complaints or pursued at the local level with the New York City Department of Education (NYCDOE).

Background Material (largely from the May 2024 Board of Regents Item)

The Individuals with Disabilities Education Act (IDEA) requires that states, as a condition of funding, provide parents with an opportunity to request an administrative hearing concerning their child's right to special education. As State regulations currently indicate, "[a] parent or school district may file a due process complaint with respect to any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education (FAPE) to such student" (8 NYCRR 200.5 [i] [1]; see 20 USC § 1415 [b] [6] [A]).

Under IDEA, parentally placed nonpublic school students do not have "an individual right to receive some or all of the special education and related services that the[y] ... would receive if enrolled in a public school" or the right to a due process hearing (34 CFR 300.137 [a]).¹ Instead, the IDEA requires that an "equitable" share of each school district's IDEA funds be used to provide services to students with disabilities attending nonpublic schools (34 CFR 300.138). School districts must locate, evaluate, and provide nonpublic school students with a "services plan that describes the specific special education and related services that the [district] will provide to the child in light of the services that [it] has determined ... it will make available to parentally placed private school children with disabilities" (34 CFR 300.138 [b] [1]). In New York, this document is called an Individualized Education Services Plan (IESP) (Education Law § 3602-c [2] [b] [1]). New York State law exceeds the IDEA by providing that an IESP must be developed in the same manner, and with the same contents as, an individualized education program (Education Law § 3602-c [2] [b] [1]).

New York State also exceeds federal requirements by providing the parents of parentally placed nonpublic school students with disabilities the ability to file due process

¹ See also Education Law § 3602-c [b] [1] ["committee[s] on special education shall assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district"]; *Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K.*, 14 NY3d 289, 293 [2010].

complaints in certain instances. Education Law § 3602-c [2] (b) (1) authorizes a due process hearing for the “[r]eview [of] the recommendation of [IESP services made by a] committee on special education” and Education Law § 3602-c (2) (c) authorizes a due process complaint “relating to compliance of the school district of location with child find requirements, including evaluation requirements.”²

In the City of New York, many parents who parentally place their child with a disability in a nonpublic school file due process complaints each year seeking payment for IESP services that the NYCDOE has not delivered. In these complaints, parents seek payment for services that they unilaterally obtained. Typically, the district does not contest that it recommended the services at issue.

Parents can, and should, expect implementation of the services identified on their children’s IESPs. As such, the Department has repeatedly informed the NYCDOE that parents should not be required to file a due process complaint to obtain payment for IESP services that the district did not provide directly. For example, in a May 27, 2020, letter to the NYCDOE, the Department’s Senior Deputy Commissioner for P-20 Education wrote: “In addition to the administrative burdens, a request to proceed to due process after a parent finally obtains a provider is an [unnecessary] burden placed on the parents of students with disabilities.”

However, a due process hearing is not the appropriate forum for such implementation disputes. As stated above, Education Law § 3602-c does not grant a parent the right to file a due process complaint to dispute whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. Parents deserve to be made whole if a school district does not implement IESP services through direct and timely reimbursement from their school district. If this does not occur, parents are entitled to pursue administrative or judicial remedies—but not a due process hearing.

School districts that provide payment for IESP services obtained by parents, however, are entitled to impose internal controls to ensure that requests for services were requested by the student’s family, that payments are only made to providers who possess appropriate certification, and that rates accurately represent the cost of the service provided (i.e., fair market value). These controls are essential to prevent fraud, waste, abuse, and mismanagement.

A review of recent hearing transcripts from the past year has revealed instances of questionable practices. For example,

- A nonpublic school “hired a private financial consultant and changed the cost of their services from a tuition-based model to an hourly fee service model” for the school year at issue. This, according to the hearing officer, “increased the cost of the student’s placement from \$150,000 per year to approximately \$425,000 for the requested school year.”

² Federal and State law authorize the filing of a due process complaint notice concerning the provision of “a free appropriate public education (FAPE) to such student.” As indicated above, both federal and State law indicate that parentally-placed students with disabilities only have a right to “equitable” services.

- An agency requested a reimbursement rate of \$250 per hour, even though the provider only charged \$120 per hour. A “case manager” for the provider “appeared at the ... hearing and in response to questions from the [NYC]DOE, could not provide any detailed or credible testimony regarding the provider’s training and experience, the amount, type and form (if any) of supervision provided, when [the] [s]tudent began receiving services and in what frequency, nor ... explain in detail how the remainder of the \$250 rate [wa]s allocated ...”
- A parent sought reimbursement for a related service where the contract between the parent and the provider: (1) did not identify the relevant service to be provided; (2) contained no information regarding duration and frequency; and (3) was signed over four months after services initially began.
- A parent of a child with a disability, who also owned the agency that allegedly provided services to her child, was unable to prove that the agency provided any services to her child whatsoever.

In each case, the hearing officers found these concerns sufficiently compelling that they reduced or denied the requested payment for the services involved.

Proposed Amendment

The Department proposes to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. The Department proposes that any due process complaint filed on or after July 16, 2024 concerning these issues shall be dismissed on jurisdictional grounds. Further, it is the Department’s position that going to a due process hearing under such circumstances unfairly imposes administrative and financial burdens on parents. The Department seeks to ensure that parents whose IESP services were not implemented receive prompt reimbursement at the local level.

NYCDOE has advised the Department that on or before the effective date of the rule clarification—and well in advance of the start of the 10-month school year—NYCDOE will provide guidance as to how the clarification will impact families’ experiences in securing services for their student. The guidance will address how the process will work under the revised rule, and, more importantly, the steps NYCDOE is taking to ensure appropriate services are available and offered to all students who need them. The guidance will also explain how cases that might have previously been filed as due process complaints in past years will be processed going forward. The NYCDOE Office of the General Counsel (OGC) is standing up a new unit, called the Enhanced Rate Equitable Services Unit (ERES Unit). ERES will receive and process all requests for enhanced rate equitable services where a parent or their representative has filed a parental notice of intent (PNI). More detailed information will follow in the guidance, but at this stage the public should know that it can communicate with the ERES Unit at this email address: EquitableServicesAssistance@schools.nyc.gov.

The Department will continue to work with the NYCDOE to ensure that it meets its obligations under the IDEA to provide equitable services to students with disabilities who are so entitled, including those parentally placed in nonpublic schools.

Related Regents Items

January 2012: [Proposed Amendment of Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings](https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/January2012/112p12d3.pdf)
(<https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/January2012/112p12d3.pdf>)

June 2012: [Proposed Amendment of Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings](https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/June2012/612p12d1.pdf)
(<https://www.regents.nysed.gov/common/regents/files/documents/meetings/2012Meetings/June2012/612p12d1.pdf>)

March 2020: [Proposed Amendments to Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearing Officers and the Special Education Due Process System Procedures](https://www.regents.nysed.gov/common/regents/files/320p12d4.pdf)
(<https://www.regents.nysed.gov/common/regents/files/320p12d4.pdf>)

July 2020: [Proposed Amendments to Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearing Officers and the Special Education Due Process System Procedures](https://www.regents.nysed.gov/common/regents/files/720brd4revised.pdf)
(<https://www.regents.nysed.gov/common/regents/files/720brd4revised.pdf>)

October 2020: [Proposed Amendments to Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearing Officers and the Special Education Due Process System Procedures](http://www.regents.nysed.gov/common/regents/files/1020p12d1revised.pdf)
(<http://www.regents.nysed.gov/common/regents/files/1020p12d1revised.pdf>)

March 2021: [Proposed Amendments to Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearing Officers and the Special Education Due Process System Procedures](https://www.regents.nysed.gov/common/regents/files/321p12a4.pdf)
(<https://www.regents.nysed.gov/common/regents/files/321p12a4.pdf>).

February 2023: [Proposed Amendments of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings](https://www.regents.nysed.gov/sites/regents/files/223p12d1.pdf)
(<https://www.regents.nysed.gov/sites/regents/files/223p12d1.pdf>).

May 2024: [Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings](https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf)
(<https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf>)

Recommendation

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

VOTED: That section 200.5 of the Regulations of the Commissioner of Education be amended, as submitted, effective July 16, 2024, as an emergency rule upon a finding

by the Board of Regents that such action is necessary for the preservation of the general welfare to provide predictability for the upcoming 2024-2025 school year regarding the kind of disputes that fall outside the scope of the (State) entitlement to an impartial due process hearing.

Timetable for Implementation

If adopted as an emergency rule at the July 2024 Regents meeting, the emergency rule will become effective July 16, 2024. It is anticipated that the proposed amendment will be presented for permanent adoption at the November 2024 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. Because the emergency action will expire before the November Regents meeting, it is anticipated that an additional emergency action will be presented for adoption at the September 2024 meeting. If adopted at the September 2024 meeting, the proposed amendment will become effective on September 25, 2024.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, 305, 3602-c, 4404, and 4410 of the Education Law.

1. Paragraph (1) of subdivision (i) of section 200.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(1) A parent or school district may file a due process complaint with respect to any matter relating to the identification, evaluation, or educational placement of a student with a disability, a student suspected of having a disability, or the provision of free appropriate public education to such student. This does not include disputes over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services; any due process complaint filed on or after July 16, 2024 concerning such issues shall be subject to dismissal on jurisdictional grounds. However, a school district may file such a complaint to challenge the propriety of a provider's rate that exceeds the current market rate or to challenge the licensure status of a provider. The party presenting the complaint, or the attorney representing such party shall provide a written due process complaint notice to the party, which shall include:

(i) ...

(ii) ...

(iii) ...

(iv) ...

(v) ...

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH
NECESSITATE EMERGENCY ACTION

The Department proposes to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP regarding the rate at which a provider shall be reimbursed. Further, it is the Department's position that going to a due process hearing for payment for IESP services obtained by the parent unfairly imposes administrative and financial burdens on parents. The Department seeks to ensure that parents whose IESP services were not implemented receive prompt reimbursement at the local level.

To provide predictability for the upcoming 2024-2025 school year, the Department proposes the adoption of this regulation on an emergency basis. Thus, beginning this year, disputes over the rates at which service providers will be paid or reimbursed must be filed as State complaints or pursued at the local school district level.

Since the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be adopted by regular (nonemergency) action after expiration of the 60-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5) would be the November 2024 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earliest effective date of the proposed rule, if adopted at the November meeting, would be November 20, 2024, the date the Notice of Adoption would be published in the State Register.

Therefore, emergency action is necessary at the July 2024 meeting, effective July 16, 2024, for the preservation of the general welfare to provide predictability for the

upcoming 2024-2025 school year regarding the kinds of disputes that fall outside the scope of the (State) entitlement to an impartial due process hearing.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at the November 2024 Regents meeting, which is the first scheduled meeting after expiration of the 60-day public comment period mandated by SAPA for state agency rulemaking. However, since the emergency action will expire before the November Regents meeting, it is anticipated that an additional emergency action will be presented for adoption at the September 2024 Regents meeting.