NYSASA
New York State Association of School Attorneys

Advocacy for Public Education, Leadership for School Attorneys
www.nysasa.org

October 19, 2012

Honorable Merryl Tisch
Chancellor
New York State Education Department
89 Washington Avenue
Albany, New York 12234

Re: ***NYSASA Comments on the Revised Proposed Amendment to the Regulations of the Commissioner of Education Relating to Special Education Impartial Due Process Hearings***

Dear Chancellor Tisch:

Please accept this letter on behalf of the New York State Association of School Attorneys ("NYSASA") which is the state wide organization made up of school attorneys who represent school districts, BOCES and their boards throughout New York State. Many of our members serve as counsel in impartial hearings and have practical experience and insight into how these regulations work on a day to day basis. We appreciate the opportunity to comment on the Regents' proposed changes to the existing regulations, and it is our hope that our suggestions will further your attempt to streamline the impartial hearing process and reduce both the fiscal and emotional costs associated with it.

Certification and Appointment of Impartial Hearing Officers
8 NYCRR 200.1 and 200.5 (j)(3)(i)

Support in part

The New York State Association of School Attorneys supports this provision in part. Hearing officers who are on the list should be willing and able to accept appointments to conduct impartial hearings or their appearance on the list serves no useful purpose. Absent good cause shown, if an individual hearing officer has not accepted a case within a two-year period, that hearing officer should be removed in order to protect the integrity of the rotational selection process and to eliminate delays in selecting hearing

officers. We support that part of the proposed regulation which bars impartial hearing officers from accepting appointments in school districts where he or she has been serving as the attorney in a due process complaint or has served as the attorney in a due process complaint within the two years preceding the offer of appointment. Accepting an appointment and serving as an impartial hearing officer, under these circumstances, would have the appearance of partiality and impropriety and, thus, jeopardize the integrity of the process. It is also likely that the hearing officer has gleaned some information about the school district from the prior due process hearing that would be outside the record of the current hearing, which may lead to a biased or improper decision. We further support that portion of this section that disqualifies non-attorney advocates from accepting an appointment as impartial hearing officer if he or she has "accompanied and advised a party from the same school district in a due process complaint within a two-year period". Serving as a hearing officer under these circumstances would likewise have the appearance of partiality and impropriety.

However, we believe that 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. For example, an attorney or advocate who appears on behalf of parents at contested CSE meetings, or in connection with a State complaint, or has represented the parent before the OCR or within a court proceeding involving the same school district would appear to be equally partial or predisposed against the school district.

Accordingly, we strongly recommend that the State Education Department consider adding the following language to the proposed regulation:

> "Nothing herein shall prevent a party from raising an issue regarding the impartiality of a hearing officer who has appeared or advocated on behalf of a client in or against the same school district with regard to any claims, disputes, or other contested matters."

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Consolidation of Multiple Due Process Requests for the Same Student
8 NYCRR 200.5(j)(3)(ii)(a)

Support, in part

NYSASA supports that part of the proposed regulation that would require consolidation of multiple hearing requests involving the same parties and student with a disability relating to issues in the same school year. However, hearings can be lengthy and can spill over from one school year to the next. 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 hearing officer who will preside over disputes involving issues in such subsequent years by manipulating the timing that the subsequent hearing request is filed. We would propose that mandatory consolidation 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.

NYSASA opposes the proposed language providing that "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. We would propose language limiting 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.

Prehearing Conferences
8 NYCRR 200.5 (j)(3)(xi); 200.5 (j)(3)(xi)(a)(4); 8 NYCRR 200.5 (j)(3)(xi)(b)(4) and (5); 200.5 (j)(3)(xi)(c); 200.5 (j)(3)(xi)(d); 200.5 (j)(3)(xi)(e)

Support, in part

NYSASA generally supports the regulatory changes making prehearing conferences mandatory. Moreover, establishing with specificity the factual issues to be determined at the hearing is a very positive step that will substantially promote judicial economy. The proposed changes appear to

include the establishment of a firm date by which all "5 day" disclosure must be exchanged. NYSASA views this as a generally positive change, but would recommend the addition of language that would provide the hearing officer with discretion to permit the exchange of additional documents that were not available at the time of the original disclosure based upon a demonstration by the proponent of good cause at least five business days prior to the hearing date at which such additional documents will be used.

Decision of the IHO
8 NYCRR 200.5(j)(4)(iii)

Support

NYSASA supports this provision. If an impartial hearing officer were to so order settlement terms on issues not set forth in the complaint, a party could attempt to assert prevailing party status. Parties retain the option of including non so-ordered items in a separate settlement agreement which may be contested in a judicial forum, if needed.

We also support the admission of a settlement agreement into evidence irrespective of whether the stipulation is so ordered.

Timeline to Render a Decision and Extensions to the Due Date for Rendering
the Impartial Hearing Decision
8 NYCRR 200.5(j)(5); 200.5 (j)(5)(i-iv)

Support in part

We support the limitation on time for issuing decisions. However, we oppose the regulation to the extent it precludes the impartial hearing officer from extending the deadline in instances where the parties can demonstrate reasonable efforts to consummate a settlement. The clear intention of Federal and State law and regulations is to foster a working relationship between the parties and encourage them to reach consensus on a resolution. 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.

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Impartial Hearing Record and Submission of IHO Decisions
8 NYCRR 200.5(j)(5)

Support

We support the provision which requires impartial hearing officers to promptly submit a certified record to a district after a final decision is rendered. Under the current system, a district is responsible for procuring and certifying all of those documents upon an appeal to the SRO. However, a hearing officer typically maintains the master evidentiary list and may possess exhibits the district does not have. This can lead to unnecessary delays and cost to the district. Requiring the hearing officer to produce and certify the record post hearing will alleviate that issue.

Withdrawals of Requests for Due Process Hearings
8 NYCRR 200.5(j)(6)

Oppose

We oppose the provision that a voluntary withdrawal of a hearing request shall be without prejudice absent agreement. A party may be forced to commit significant resources to respond to a hearing request, prepare for the hearing and engage in other necessary pre-hearing activities. This is particularly noteworthy where a party has submitted the same hearing request and withdrawn it on multiple occasions. The defending party should be permitted to make an application to require that the withdrawal be deemed with prejudice. To do otherwise permits a party to continuously file hearing requests and withdraw those requests in an effort to procure a hearing officer of choice or otherwise force the expenditure of the other party's resources. To this end, (6)(i) should be deleted along with the first portion of 6 (ii) which states "except for withdrawals in accordance with subparagraph (i) of this paragraph."

If such proposed revision is not accepted and voluntary withdrawal is deemed to be without prejudice, then we would support that portion of the regulation that requires the appointment of the same hearing officer to a case where the hearing request is re-filed within a year on the same or substantially similar claims. As stated above, otherwise a party could continue to submit hearing requests and withdraw them without prejudice,

until such time as a hearing officer of preference is appointed. This would undermine the impartiality sought to be secured through the rotational system.

Thank you for your time and consideration of these comments.

Very truly yours,

Thomas M. Volz

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cc: Dr. John B. King, Jr.
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