



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

DEPUTY COMMISSIONER FOR VOCATIONAL AND EDUCATIONAL SERVICES FOR INDIVIDUALS WITH DISABILITIES
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TO: District Superintendents
Superintendent of Schools
Presidents of Boards of Education
Superintendents of State-Operated and State-Supported Schools
Executive Directors of Approved Private Schools
New York City Board of Education
Organizations, Parents and Individuals Concerned with Special Education
Commissioner's Advisory Panel for Special Education Services
SETRC Project Directors and Professional Development Specialists
Regional School Support Centers
Impartial Hearing Officers
Mediators
Other State Agencies

FROM: Rebecca H. Cort 

SUBJECT: Burden of Proof for an Appeal in an Impartial Due Process Hearing

Chapter 583 of the Laws of 2007 (attached) was enacted to provide that the burden of proof in an impartial due process hearing pursuant to §4404(1) of Education Law to challenge the recommendation of a Committee on Special Education (CSE) or Committee on Preschool Special Education (CPSE), or otherwise challenge actions or omissions relating to the provision of a free appropriate public education (FAPE) to a student with a disability, is generally placed on the school district (or State agency) providing special education to the student. The law creates an exception for impartial hearings in which the parent seeks tuition reimbursement for a unilateral placement in a private school. Chapter 583 takes effect 60 days from August 15, 2007.

To ensure dissemination to appropriate individuals within a school district, I ask Superintendents to please share this memorandum with other individuals such as Building Principals, Directors of Special Education, School Psychologists, CSE and CPSE Chairpersons, Guidance Counselors and Directors of Pupil Personnel. Questions regarding this memorandum may be directed to the Special Education Policy Unit at 518-473-2878.

Attachment



LAWS OF NEW YORK, 2007

CHAPTER 583

AN ACT to amend the education law, in relation to the burden of proof for appeal procedures for children with handicapping conditions

Became a law August 15, 2007, with the approval of the Governor.
Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph c of subdivision 1 of section 4404 of the education law, as amended by chapter 352 of the laws of 2005, is amended to read as follows:

c. Individuals so appointed by a board of education or a state agency shall be selected from a list of available impartial hearing officers who have successfully completed an impartial hearing officer training program conducted by the department according to a rotation selection process prescribed in regulations of the commissioner; except that a city school district of a city having a population of more than one million inhabitants shall be exempt from such regulations to the extent it maintains its rotational selection process in effect prior to July first, nineteen hundred ninety-three. A record of proceedings before the impartial hearing officer shall be maintained and made available to the parties, and the hearing shall be conducted in accordance with the regulations of the commissioner. 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. The decision of the impartial hearing officer shall be binding upon both parties unless appealed to the state review officer. The commissioner shall establish a department training program which shall be completed to the satisfaction of the commissioner as a condition of certification. Impartial hearing officers shall have the qualifications specified in subsection (f) of section fourteen hundred fifteen of title twenty of the United States code, the implementing federal regulations and the regulations of the commissioner. The commissioner shall promulgate regulations to ensure that no individual employed by a school district, school or program serving students with disabilities placed by a school district committee on special education acts as an impartial hearing officer and that no individual employed by such schools or programs serves as an impartial hearing officer for two years following the termination of such employment. The commissioner shall promulgate regulations establishing procedures for the suspension or revocation of impartial hearing officer certification for good cause. The commissioner shall establish maximum rates for the compensation of impartial hearing officers subject to the approval of the director of the division of the budget.

§ 2. Subdivision 1 of section 4404 of the education law, as amended by

chapter 311 of the laws of 1999, is amended to read as follows:

1. If the recommendation of the committee on special education is not acceptable to the parent or person in parental relationship of a student, or if the committee or board of education or trustees fails to make or effectuate such a recommendation within such periods of time as may be required by regulations of the commissioner, such parents or persons in parental relationship shall notify the board of education of this situation and the board shall appoint an impartial hearing officer to hear the appeal and make a determination within such period of time as the commissioner by regulation shall determine, provided that the board of education or trustees shall offer the parent or person in parental relationship the option of mediation pursuant to section forty-four hundred four-a of this article as an alternative to an impartial hearing. Individuals so appointed by a board of education shall be selected from a list of available hearing officers who have successfully completed a hearing officer training program conducted by the department according to a rotation selection process prescribed in regulations of the commissioner; except that a city school district of a city having a population of more than one million inhabitants shall be exempt from such regulations to the extent it maintains its rotational selection process in effect prior to July first, nineteen hundred ninety-three. A record of proceedings before the hearing officer shall be maintained and made available to the parties. 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. The decision of the hearing officer shall be binding upon both parties unless appealed to the state review officer. The commissioner shall establish a department training program which shall be completed to the satisfaction of the commissioner as a condition of certification. The commissioner shall develop and implement a plan to ensure that no individual employed by a school district, school or program serving students with disabilities placed by a school district committee on special education acts as an impartial hearing officer and that no individual employed by such schools or programs serves as an impartial hearing officer for two years following the termination of such employment. Such plan shall be fully implemented no later than July first, nineteen hundred ninety-six. The commissioner shall promulgate regulations establishing procedures for the suspension or revocation of impartial hearing officer certification for good cause. The commissioner shall establish maximum rates for the compensation of impartial hearing officers subject to the approval of the director of the division of the budget. The commissioner shall promulgate regulations establishing procedures and timelines for expedited hearings in cases involving: (a) review of a decision that a student with a disability's behavior was not a manifestation of such student's disability, or (b) review of an interim alternative educational setting or other placement to the extent required under federal law, or (c) a request by the school district for a determination that maintaining the current educational placement of the student is substantially likely to result in injury to the student or to others.

§ 3. This act shall take effect on the sixtieth day after it shall have become a law and shall apply to impartial hearings commenced on or

after such effective date; provided, however, that the amendments to paragraph c of subdivision 1 of section 4404 of the education law made by section one of this act shall be subject to the expiration and reversion of such subdivision pursuant to section 22 of chapter 352 of the laws of 2005, as amended, when upon such date the provisions of section two of this act shall take effect.

The Legislature of the STATE OF NEW YORK ss:

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

JOSEPH L. BRUNO
Temporary President of the Senate

SHELDON SILVER
Speaker of the Assembly
