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July 17, 2020

TO: New York City Impartial Hearing Officers
FROM: Louise DeCandia
SUBJECT: The Waitlist and Pendency

This memo is to make you aware of the Protocols being implemented for the cases awaiting an Impartial Hearing Officer Assignment (the “waitlist”). In order to ensure that cases are assigned as fairly as possible, in November 2019, the New York State Education Department (NYSED) directed the New York City Department of Education (NYCDOE) to assign cases by the date of the due process complaint filing, as a general rule, the oldest cases will get assigned first. However, within that general rule, in accordance with the requirements of federal and State law and regulations, there are prioritizations within the waitlist as follows:

- **Expedited Cases**, which have different procedural timelines than other special education due process hearings, will be prioritized on the waitlist in accordance with 8 NYCRR §201.11;
- **Remanded Cases**, which have already had hearings held and are usually directed to be remanded back to the same Impartial Hearing Officer (IHO) will be prioritized on the waitlist;
- **Potential Consolidation Cases**, in accordance with 8 NYCRR §200.5 (j)(3)(ii)(a)(2), are prioritized since combining two cases into one will eliminate a case from the wait list. When a new complaint has been consolidated with a pending complaint, the timeline for issuance of the decision is the same timeline as the earliest pending due process complaint. When considering whether to consolidate one or more separate requests for due process, the IHO must consider relevant factors, including those found in §200.5(j)(3)(ii)(a)(4). The IHO must issue a written order as to whether he/she will or will not consolidate a subsequent due process request into a pending case. If the cases are not consolidated, the most recently filed case will be placed on the waitlist by the date of the due process complaint filing.
- **Refiled Cases**, in accordance with 8 NYCRR §200.5(j)(6)(iv), a refiled case occurs when a due process complaint is withdrawn, and a subsequent complaint is received within 12 months of the withdrawn complaint. When this occurs, the district must consider whether the new request includes substantially similar claims as the one that was previously submitted and withdrawn. In the event school personnel are unclear regarding the similarity of the issues, the IHO appointment should go to the IHO who was appointed to the withdrawn request, who would then determine whether

the issues are substantially similar. In accordance with previously issued guidance from NYSED, a due process complaint seeking tuition reimbursement for a different school year should *not* be deemed to be "the same or substantially similar claim" as made for a prior school year, therefore requiring appointment of the same IHO.

Other Matters of Concern

Recusals: Recusals should be occurring much less often than previously because IHOs are no longer automatically appointed to cases, regardless of their availability to hear the case, which was how the previous system of appointment worked. Beginning in November 2019, if an IHO is unable to adjudicate a case because he/she is unavailable, the IHO should be taking himself/herself out of rotation, rather than accepting a case and recusing from it later. When a recusal occurs, it is to be for a valid reason. When a case is subject to a recusal, it will continue to be offered to IHOs until accepted. Finally, please note, when an IHO does not accept a potential consolidation, he or she should specifically state in the recusal "consolidation declined" so that accurate recusal information can be collected.

Pendency: The NYCDOE recently prepared a pendency form which it is requesting parents attach to their the due process complaint. The form asks that parents identify the student's pendency placement, program and/or services, if any, and identify the Individualized Education Program (IEP), Individualized Education Services Program (IESP), Finding of Facts and Decision (previous IHO decision or order), or other basis for that pendency entitlement. When there is a contested pendency matter, the New York City Impartial Hearing Office will appoint an IHO to schedule a pendency hearing. **Once pendency is determined however, the case will be placed back on the waitlist.** Therefore, we are asking your assistance to accept these cases for a limited time, so that a student's pendency may be assured while the parent awaits assignment of an IHO.

As explained above, these protocols are necessary while a waitlist remains in place to ensure that due process complaints are assigned in as fair and efficient a manner as possible, in accordance with federal and State laws and regulations pertaining to special education due process procedures. NYSED's Office of Special Education understands that working under the pressure of a waitlist is difficult. We thank you for your support and will continue to seek additional input and assistance from the IHOs as we seek to make changes to address the waitlist. If you have any questions regarding these protocols, please contact the due process unit at specedih@nysed.gov.

c: C. Williams

