



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK

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April 9, 2014

Dr. Melody Musgrove, Director  
Office of Special Education Programs  
United State Department of Education  
400 Maryland Ave., S.W.  
Washington, DC 20202-7100

Dear Dr. Musgrove:

The New York State Education Department (NYSED) requests that it be considered a candidate for a compliance agreement in accordance with §457 of the General Education Provisions Act (GEPA), 20 USC § 1234(f). NYSED's Office of State Review (OSR), which is the second tier in New York's two-tier special education due process system, has been in noncompliance since April 2012 with the 30-day decision timeline prescribed in federal regulations (34 CFR §300.515), which requirement is replicated in State regulations, (8 NYCRR §200.5 [k][2]). The number of appeals filed with the OSR has increased exponentially in recent years causing the OSR to render decisions later than the prescribed 30-day timeline. Specifically, in 2010, 130 appeals were filed with the OSR. In 2011 the appeals filed with the OSR increased to 165. In 2012 the appeals increased substantially to 239. That amount has remained consistent in 2013 wherein 238 appeals were filed. During the first three months of 2014, 44 appeals were filed - a slightly lower number than in 2012 and 2013, but one that still extrapolates to a high number of appeals on an annual basis. We also have reason to anticipate, based on a spike in the number of impartial hearing requests in the New York City school district this past fall that the number of appeals will not decrease in the future. As of April 1, 2014 the OSR had 199 appeals pending that will not be decided timely.

In response, NYSED has doubled the staffing of the OSR during the period of noncompliance and has taken or is in the process of taking other measures to address the timeliness of decisions which I have outlined below. Despite those efforts, NYSED will be unable to correct this noncompliance within one year for several reasons.

Now that a backlog of this magnitude exists, the task facing the OSR is daunting. Subject to applicable extensions of time requested by a party, a decision must be rendered within 30 days of the receipt of the petition. To meet the 30 day time line for rendering decisions on appeal, while affording the parties a reasonable opportunity to be heard consistent with due process, decisions in newly filed appeals must be rendered within a very narrow window. Under the OSR's procedural regulations, once a petition is served upon the opposing party, the respondent is given 10 days to serve an answer to the petition, and 2 additional days to file the answer with the OSR (8 NYCRR §279.5). If the answer raises any procedural defenses, the petitioner is given 3 days to serve a reply and 2 days to file the reply with the OSR (8 NYCRR §279.6), and if the respondent's answer includes a cross-appeal, the petitioner has 10 days to serve an answer to the

cross-appeal, and 2 days to file it with the OSR (8 NYCRR §279.4[b]). As you can see, the OSR is not presented with a complete set of arguments upon which to render a decision until well into the 30 day period. Accordingly, if the OSR is to eliminate the backlog by rendering decisions in older cases and still keep current on newly filed appeals, so that the backlog does not continue to grow, it must do so over an extended period of well over a year. The sheer volume of cases that are being filed with the OSR and the size of the backlog of late appeals that developed while additional resources have been obtained to address the issue indicate that compliance in less than a year is not feasible.

Further complicating the situation is the continuing growth in the complexity of appeals before the OSR in recent years. A high proportion of the appeals to the OSR involve cases in which parents seek tuition reimbursement for a unilateral parental placement in a private school. Currently, tuition reimbursement appeals from the New York City school district alone account for approximately 73 percent of the cases pending before the OSR. Because of the nature of the analysis required under the U.S. Supreme Court decisions in the Burlington and Carter cases, under which the appropriateness of the school district's recommended placement, the appropriateness of the parent's unilateral placement and equitable factors must all be assessed, the records in those cases tend to be very lengthy and complex, with multiple days of testimony often producing 1,000 or more pages of transcript and hundreds of exhibits. Although we fully recognize that the complexity or size of the case is not an excuse for rendering a late decision, the practical effect of an increase in complexity of appeals is to make it more difficult to turn around appeal decisions quickly, particularly where there is a backlog of late appeals. Adding to the complexity of these appeals is New York State's two year statute of limitations applicable to due process complaints which results in cases that involve tuition reimbursement over two or more years, and the stay-put disputes that arise when tuition reimbursement is claimed repeatedly over time.

The backlog is also resulting in other demands on the OSR that are hampering its ability to come into compliance. The late appeals have resulted in multiple litigations in both federal and State court challenging the OSR's failure to render timely decisions. The OSR must divert time and resources to help respond to those litigations. It must also devote time and resources to the development and implementation of changes in procedures and administrative measures such as enhanced tracking and reporting of appeal decisions that are needed to address the backlog of late decisions. In both instances, OSR has support from other parts of our agency, but there is always work involved that can only be done by the office administering the appeals process.

Finally, there is no quick fix that would result in compliance in less than a year. As new staff is added, or existing staff lost through turnover are replaced, our agency must comply with our state's civil service laws and obtain hiring approval from our control agencies, which takes time. Once hired, new staff must be trained to apply the law governing special education and in the skills required to draft appeal decisions. Because of the complexity of the issues involved, there is a definite learning curve, and it takes time for newly hired staff to become fully productive in drafting decisions. The measures that we have already taken or are in the process of implementing will take time to bear fruit. For example, one initiative we are taking to address the backlog is to establish a backlog elimination team (BET), who will be a team of independent contractors having expertise in special education appeals to assist with preparing decisions for the backlogged appeals. However, to fully initiate the BET takes time because of the constraints

imposed by New York State's procurement requirements. With the exception of one individual, the BET will not be able to begin work until July 2014 due to numerous required State-level approvals. It should be noted that NYSED is authorized to hire up to 10 independent contractors for the BET and has recently received 17 responses to a request for qualifications. The OSR is currently reviewing the bids to award the contracts.

NYSED has already initiated numerous measures to address the backlogged cases at the OSR as well as the underlying causes of the backlog. We recognize that through the compliance agreement process we will need to determine a date by which NYSED will come into compliance and establish benchmarks as we move toward compliance. We are confident that the improvement initiatives that we have undertaken and will undertake in the future will, over time, address the reasons for New York State's noncompliance with the timelines for rendering decisions at the OSR and bring significant improvements to New York State's systems to resolve disputes between parents and local educational agencies (LEAs). Some of the measures implemented and being considered are as follows:

- 1) Backlog Elimination Team (BET): As discussed above, NYSED has received preliminary State-level approvals to hire up to 10 independent contractors to draft proposed decisions for the backlogged appeals. With the exception of one attorney, who has already been preparing draft decisions for the OSR, it is expected that these contractors will be able to begin working for the OSR sometime in July 2014 after the bidding is complete and the remaining State-level approvals are finalized.
- 2) New Electronic Filing System: NYSED is beginning the process of finding an appropriate vendor who can quickly and efficiently implement an appellate case management system/electronic filing system for the OSR. It is envisioned that use of such system, which, although simpler, will be somewhat similar in concept to that used by both the New York State and federal court systems, will reduce inefficiencies attendant to the current paper filing system, which will be replaced with a modern streamlined appellate filing and record management system that ensures timely and proper notification to all parties regarding procedural timeframes and any other necessary filing requirements.
- 3) Increase staffing in the OSR: OSR is staffed with educators and attorneys who work as a team to examine the evidence in each case and prepare draft decisions under the guidance of and direction of a State Review Officer (SRO). In September 2010 the OSR was comprised of 21 full-time employees including one SRO. Since that time, the OSR has *doubled* the number of its employees which now includes three SROs. While the OSR consistently has a need to fill openings that arise due to normal employee attrition and/or promotion, NYSED is working closely with the New York State Division of Budget to ensure that the OSR is staffed to an appropriate level so that attrition will not disproportionately affect the office's productivity and that the office is always appropriately staffed so that it can render decisions in accordance with the timelines prescribed in State and federal law and regulations.
- 4) Undertaking internal and external office efficiency reviews: The OSR has conducted an internal review of its current processes and has identified recommendations to streamline

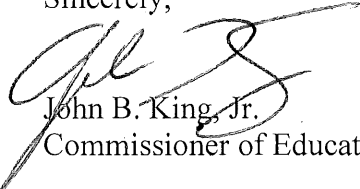
and modify procedures for the appeal process in order to assist it to better comply with the prescribed 30-day timeline. Work has begun on implementing some of these changes. NYSED is considering regulatory changes to provide further efficiencies in the appeal process. In addition, NYSED is hiring an independent contractor to conduct an external review of the OSR to review the efficiency and procedural recommendations and to identify other options that the internal review did not identify. This independent contractor will also compare the procedures of NYSED's OSR to those of the eight remaining states that continue to maintain a two-tier due process system.

- 5) External Study of New York's Due Process System: NYSED is also contracting for an independent study of NYS's two-tier structure to inform the State of alternative options for moving from a two-tier to a one-tier system and their implications. Proposals in response to a Request for Proposal are currently under review and this study will be completed within six months of the date of the award.
- 6) Implementation of Alternative Dispute Resolution Systems: NYSED is committed to bringing alternative dispute resolutions, beyond those required by the Individuals with Disabilities Education Act (IDEA), to New York State. It has established 14 Special Education Parent Centers throughout the State that provide parent to parent assistance. In addition, NYSED is initiating a program of Individualized Education Program (IEP) facilitation to be piloted in New York City and Long Island, which are the two regions of the State with the highest rates of requests for due process hearings. NYSED has been benchmarking with other states over the last several months and is working closely with the Center for Alternative Dispute Resolution in Special Education (CADRE) on the IEP Facilitation process. Meetings were held this past week with Long Island and NYC stakeholders to review the State's proposed process resulting in strong consensus and support to initiate this process in New York State. New York State will use its IDEA discretionary funds to pay for the IEP facilitation during the years of the pilot project.
- 7) Outreach with New York City Department of Education (NYCDOE): As of March 3, 2014, 234 cases were pending before the OSR and 170 or 73 percent of those cases involves a New York City parent's claim for tuition reimbursement for a unilateral placement. Given the dense population center in New York City and the resulting high percentage of students that either attend or reside in the New York City school system, it is extremely likely that NYCDOE will continue as the LEA with the highest volume of special education due process hearings, and a major focal point in the State's overall two-tier due process system. NYCDOE has taken a number of steps to directly address this, including the establishment of a new due process unit that will, among other things, be studying issues and trends in due process requests in order to better inform their improvement initiatives. NYSED has approved a plan proposed by NYCDOE that is designed to improve NYCDOE's special education process. We have also engaged them directly regarding improvement initiatives that would address their high per capita rate of requests for due process hearings and strengthen parent and district relations. I will be meeting with NYCDOE's administration in the near future to address these due process issues.

- 8) Improvements in the First Tier: Over the past several years, NYSED has undertaken a series of actions to improve the quality and timeliness of decisions rendered in the first tier of its two-tier special education due process system. Although data is not formally collected, traditionally, the SRO has overturned, in whole or in part, a relatively significant number of tier 1 decisions that were appealed (approximately 60 percent). We are also seeing an increase in the numbers of appeals initiated by the LEAs. While NYSED has always provided regular update training to its impartial hearing officers (IHOs), within the past four years, NYSED has significantly increased the frequency and improved the quality of mandated IHO training. Through use of its IDEA funds, NYSED has a contract for IHO training with some of the most nationally recognized experts in the field of special education impartial hearings (Perry Zirkel, Lyn Beekman and Deusdedi Merced). In addition, NYSED has revised its regulations to address procedural matters to provide clear authority to IHOs to address procedural matters in a timely, efficient and effective manner. As a result, the SRO is beginning to receive cases with higher quality decisions rendered by IHOs, which should, over time, ease the review process because more cases have been appropriately vetted in the first tier upon well-developed hearing records. NYSED is also initiating a process to evaluate the work of the IHOs.
- 9) Monitoring: NYSED has already begun tracking the OSR's docket on a monthly basis and updating a monthly comparison chart documenting the number of appeals filed with the OSR each month, the number of decisions issued, the number of appeals withdrawn and the number of pending appeals. Once NYSED has entered into a compliance agreement with the Office of Special Education Programs (OSEP), it will monitor its compliance progress regularly and submit such reports as deemed necessary to OSEP.

NYSED will work collaboratively with OSEP to develop an agreement to resolve this noncompliance in as timely a manner as possible and in a way as to ensure future compliance with IDEA. Further, NYSED agrees to the procedures for entering into a compliance agreement as specified in §457 of GEPA, 20 USC §1234f and looks forward to assistance from OSEP. Finally, NYSED's contact for compliance agreement discussions with OSEP will be our Counsel and Deputy Commissioner for Legal Affairs, Richard J. Trautwein (518) 474-6400; rtrautwe@mail.nysed.gov) and in his absence, Associate Attorney Louise DeCandia (518) 474-8869; ldecandi@mail.nysed.gov).

Sincerely,

  
John B. King, Jr.  
Commissioner of Education

c: Beth Berlin  
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