UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

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James P. DeLorenzo
Assistant Commissioner
New York State Education Department
Office of Special Education
89 Washington Avenue, Room 309 EB
Albany, New York 12234

Dear Assistant Commissioner DeLorenzo:

I am writing in reference to New York's compliance with section 615(g) of the IDEA, its implementing regulations, and the proposed class action settlement of *U.A. et al v. The Board of Education of the City School District of New York City et al.* (hereafter "proposed settlement"). It is our understanding that a class has been provisionally certified in the case, and that the proposed settlement is intended to address allegations regarding the State of New York's systemic noncompliance with the requirements of Part B of the Individuals with Disabilities Education Act (IDEA) related to State-level review decisions. The Office of Special Education Programs (OSEP) of the U.S. Department of Education (Department) finds that New York is currently out of compliance with section 615(g) of the IDEA (20 U.S.C. § 1415(g)) and 34 C.F.R. §§ 300.514(b) and 300.515(b) and has serious concerns with this proposed settlement.

As you know, for States like New York that do not conduct an impartial due process hearing and issue a decision in the first instance, section 615(g) of the IDEA requires that they conduct an impartial review of the initial hearing decision and issue an independent decision based on that review. *See also*, 34 C.F.R § 300.514(b). New York's review decision must be issued within thirty (30) days of the appeal unless a specific extension of time is requested by a party and granted by the reviewing official. 34 C.F.R. § 300.515(b). Based on our review, it appears that the proposed settlement would allow members of the class to proceed to court by treating the initial hearing decision as the final decision and not requiring a State-level review decision. This would allow New York to avoid compliance with the long-standing statutory mandate to conduct impartial State-level reviews and to issue independent decisions. We note that the IDEA allows a State to adopt a hearing system in which the State conducts the initial hearings itself, but that also is not required in the proposed settlement. New York must be in compliance with these fundamental procedural safeguards. It appears that proceeding under the terms of the proposed settlement will not ensure this outcome. We elaborate on our concerns below.

Background

In December of 2013, this case and initial draft settlement proposal were brought to the Department's attention. Based on a subsequent letter to OSEP from the New York City Department of Education (NYCDOE) regarding the proposed settlement, staff from OSEP and our Office of the General Counsel (OGC) conducted a telephone conference in February with

NYCDOE representatives and their counsel to gather additional information. NYCDOE explained that they were no longer a party to the case and summarized concerns with the settlement. NYCDOE subsequently provided information regarding a pending legislative proposal and data that support the allegations in the case that the New York State Education Department (NYSED)'s Office of State Review (OSR) is not in compliance with the timelines for issuing State review decisions. Specifically, NYCDOE provided data that, as of July 19, 2013, there were approximately 238 overdue OSR decisions, with at least one decision being 412 days overdue. The data indicate that the yearly percentage of timely OSR decisions over the three-year period from 2010 to 2012 varied from 78.4% for 2010 and 81.21% for 2011 to only 39.33% for 2012. While the 2013 data covered only a six-month period, of the 134 appeals filed, only 28 OSR decisions were issued on time. In addition, NYCDOE informed OSEP that there is currently a State legislative proposal (Bill S6567-2013) that would track certain provisions in the proposed settlement by not requiring New York to conduct impartial reviews or issue independent decisions for every hearing decision that is appealed.

Based on the Department's review of the proposed settlement, it also is worth noting that: (1) Sections IV and V, addressing the disposition of pending and future cases, do not require that, for every hearing decision appealed, OSR must conduct an impartial State-level review or issue an independent decision, except for those cases where a "federal or state court has remanded a decision back to the OSR"; (2) the intended duration of the proposed settlement is four years, with an optional fifth year if plaintiffs can show that OSR remains noncompliant; (3) the proposed settlement does not appear to contain any incentives for OSR to come into compliance or meaningful penalties should OSR elect to remain noncompliant. We do note, however, that New York has preserved the right to amend the settlement if required by a directive from this Department.

On February 12, 2014, staff from OSEP and from OGC conducted a teleconference with your office and your attorneys to obtain NYSED's perspective on the proposed settlement. During that call, we expressed our concern that the proposed settlement does not include requirements that would bring New York into compliance with the IDEA in a timely manner; does not contain benchmarks for reducing the backlog of overdue OSR decisions or for establishing compliance prospectively; and appears to excuse and allow noncompliance with specific statutory and regulatory requirements. OSEP and OGC staff explained that the Department does not have authority to grant a waiver of the relevant statutory provisions or to otherwise amend the Congressionally-protected IDEA regulation establishing the 30-day timeline, 34 C.F.R. § 300.515(b). Staff also explained the requirement that New York come into compliance within one year of identification of noncompliance; the significance of the assurances contained in the State's IDEA Part B grant application; and the possibility of a compliance agreement under which New York, at a public hearing, could present evidence that it requires additional time beyond one year to come into compliance.

Statutory Requirements and Congressionally Protected Regulatory Timeline

One of the fundamental pillars of the original Education of the Handicapped Act (EHA, now the IDEA) was the procedural safeguards for students with disabilities and their parents. *Board of Educ. v. Rowley*, 458 U.S. 176, 205 (1982) ("When the elaborate and highly specific procedural

safeguards embodied in § [615] are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid.") The Supreme Court has consistently relied on Congress' carefully crafted due process system in which States can establish either a one-tier or two-tier system for administrative review by the State prior to proceeding to court. IDEA, § 615(b)(6), (f), and (g), 20 U.S.C. § 1415(b)(6), (f), and (g) ; *See Rowley,* at 194 and *Schaffer v. Weast*, 546 U.S. 49 (2005). Under this scheme, a State that conducts impartial due process hearings itself, is generally referred to as a one-tier State. IDEA, § 615(f), 20 U.S.C. § 1415(f). A two-tier State, like New York, does not conduct the impartial due process hearing in the first instance, but must conduct an impartial review of the hearing decision and issue an independent decision based on that review. IDEA, § 615(g), 20 U.S.C. § 1415(g); 34 C.F.R. § 300.514(b). This hearing scheme is so fundamental to the adjudication of certain federal rights that the statute requires that, before seeking relief that is available under both the IDEA and another federal law or the Constitution, the administrative hearing procedures in the IDEA generally must be exhausted. IDEA, § 615(l), 20 U.S.C. § 1415(l). Compliance with the IDEA's procedural safeguards for hearings and reviews also allows a reviewing court to give due weight to the State's expertise when applied at either the first tier or second tier. *See Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) and IDEA, § 615(i), 20 U.S.C. §1415(i).

The Department acknowledges a federal court's statutory authority to grant appropriate relief under section 615(i)(2)(c)(iii) of the IDEA (20 U.S.C. § 1415(i)(2)(c)(iii)) as well as the existence of judicial doctrines excusing exhaustion of administrative procedures (e.g., where a party can show that requiring exhaustion at the administrative hearing level would be futile, its failure to exhaust may be judicially excused). However, this proposed settlement is not based on any factual showing of futility for the provisional class. Moreover, if approved, the settlement would go far beyond what any other federal court has allowed under similar circumstances and essentially rewrite the IDEA's long-standing statutory requirements for either a one-tier or two-tier due process system-- the same due process system that the Supreme Court has consistently recognized as vital to this statutory scheme.

Turning to the timeline for conducting the impartial State reviews and issuing independent decisions, Congress has expressly given the 30-day timeline in the regulation specially protected status. In 1977, when interpreting the original EHA provisions, the responsible agency at the time, the Department of Health, Education and Welfare (HEW) issued final regulations that, among other things, established the 30-day timeline for issuing a State review decision for States, like New York, that use a two-tier system. 45 C.F.R. § 121a.512(b) (1977). This Department, now the responsible Federal agency, has kept the 30-day timeline unchanged. *See* 34 C.F.R. § 300.515(b). This is based, in part, on Congress' clearly expressed intent to protect and extend the regulatory protections that existed in 1983. In that year, Congress first enacted the provision prohibiting the Secretary of Education from "procedurally or substantively" lessening the regulatory protections for children with disabilities, "particularly ... timelines," embodied in the then-current regulations, absent "clear and unequivocal" Congressional intent "in legislation" to do so. *See* P.L. 98-199, §6; 97 Stat. 1359 (adding § 608 to the EHA; 20 U.S.C. 1407). This statutory provision remains in place today. IDEA, § 607(b), 20 U.S.C. § 1406(b). There is no evidence of any clear and unequivocal intent of Congress in legislation to change this 30-day timeline.

As discussed in the call, nowhere in the IDEA, the General Education Provisions Act (GEPA), or elsewhere is there authority for the Department to waive the requirements for conducting a State-level review and issuing a decision when required under 20 U.S.C. §1415(g) or to waive the 30-day timeline. The only waiver authorities that are available to the Department are limited by statute and do not extend to these requirements. *See e.g.*, IDEA, § 609(a)(2)(B) and (C), 20 U.S.C. § 1408(a)(2)(B) and (C) (expressly prohibiting waiver of civil rights requirements and of the procedural protections in section 615).

Assurances and Compliance

Under Part B of the IDEA, the Department, through OSEP, awards funds yearly to NYSED to assist in funding the provision of a free appropriate public education (FAPE) to all eligible children with disabilities residing in the State. IDEA, §612(a)(1), 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.101-300.108. To establish eligibility, New York is required to submit an annual application to OSEP, in which NYSED provides specific assurances in Section II.A that the NYSED's policies, including State statutes and regulations, are consistent with the relevant provisions in the Part B implementing regulations. Specifically, Section II.A.6, requires NYSED to provide the Department with an assurance that children with disabilities and their parents are afforded the procedural safeguards required by 34 C.F.R. §§ 300.500 through 300.536. Thus, every year, New York must provide the Department with the appropriate assurances that its policies for IDEA implementation are consistent with the various requirements, including the requirement that New York, because it has chosen a two-tier due process system, must conduct impartial reviews and issue independent decisions in a timely manner. 34 C.F.R. §§ 300.514(b) and 300.515(b). In the Department's view, proceeding under the terms of the proposed settlement would appear to undermine NYSED's ability to provide an assurance that its policies are consistent with these IDEA requirements. In addition, it is our understanding that if enacted, the current legislative proposal that appears to mirror the terms of the proposed settlement (Bill S6567-2013), also would undermine the State's ability to provide the necessary assurances for eligibility.

OSEP is also concerned that the intended duration of the proposed settlement is four to five years and that it contains no timelines or benchmarks designed to bring New York into compliance in a timely manner. As you are aware, on October 17, 2008, consistent with Part B of the IDEA and GEPA, OSEP issued Memorandum 09-02, clarifying States' obligation to identify noncompliance and, once identified, ensure correction as soon as possible, but in no case more than one year from the identification. OSEP also published a final regulation requiring timely correction in December 2008. 34 C.F.R. § 300.600(e). Both prior to and after the issuance of the memorandum and regulation, OSEP has consistently applied this same timeline to the correction of noncompliance identified at the State level. That is, generally the State has the same amount of time to correct noncompliance that a school district has.

Even if New York could demonstrate that the noncompliance would require more than a year to correct, the proposed settlement does not appear to require full compliance at any point. As was discussed during the call, if New York believes that compliance cannot be achieved within a year, the Department has available the option of a compliance agreement under section 457 of GEPA. 20 U.S.C. §§ 1234f and 1416(g). This approach, subject to a public hearing, would

allow continued IDEA Part B funding to New York based on a specific plan to come into full compliance with the applicable requirements as soon as feasible, but not later than three years. However, the proposed settlement also does not appear to require full compliance in three years or less.

OSEP staff recently received an email request from your staff seeking additional information regarding the specific requirements of a compliance agreement. OSEP staff will respond to that request under separate cover.

Conclusion

Based on the data submitted to OSEP, the Department finds that New York is currently out of compliance with section 615(g) of the IDEA (20 U.S.C. § 1415(g)) and 34 C.F.R. §§ 300.514(b) and 300.515(b). Proceeding under the terms of the proposed settlement in this case will not bring New York into compliance with these requirements. Instead, the terms of the proposed settlement appear to undermine fundamental and long-standing procedural safeguards embodied in Part B of the IDEA and its implementing regulations. Please be advised that we intend to monitor the case and to provide a copy of this letter to the Court prior to the April 17th status conference. We also intend to consider what actions may need to be taken to administratively enforce the requirements of the Act. We are prepared to work with New York on a plan to come into compliance with these IDEA requirements as soon as possible.

Sincerely,

Melody Musgrove, Ed.D
Director
Office of Special Education Programs