



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

JUL -9 2008

Mr. Stephen H. Surovic
Executive Director
The ARC of Pennsylvania
Suite 8 - Executive House
101 South Second Street
Harrisburg, PA 17101

Dear Mr. Surovic:

This letter is in response to your March 10, 2008 letter to Dr. Alexa Posny, former Director of the Office of Special Education Programs (OSEP). In your letter, you seek review of our prior decision not to conduct an investigation of the Pennsylvania Department of Education (PDE)'s due process complaint resolution system. Your letter also takes issue with the PDE's Bureau of Special Education Complaint Investigation Report, dated January 16, 2008, regarding the Due Process Hearing System in Pennsylvania.

Members of my staff have carefully reviewed the additional information submitted with your letter of March 10, 2008. Our conclusion is the same as that communicated to you in prior correspondence from this Office. OSEP declines your request to conduct an investigation of the PDE with respect to the matters set out in your letters of January 16, 2007, May 11, 2007, and March 10, 2008. When OSEP receives correspondence from parents, as well as organizations or individuals, containing allegations that a State, or a public agency within the State, has violated a requirement of Part B of the Individuals with Disabilities Education Act (IDEA) or the Part B regulations, OSEP routinely refers that correspondence to the relevant State educational agency (SEA) and requests that agency to handle the matter under the State complaint procedures applicable to Part B at 34 CFR §§300.151 through 300.153. Allegations regarding whether an SEA has violated a requirement of IDEA, which are often highly factual in nature, such as those contained in your letters, can be addressed more effectively through a State's complaint resolution procedures because the Part B regulations assign States the duty and responsibility to resolve all such complaints. 34 CFR §§300.151 through 300.153.

Under those regulations, States must adopt and implement procedures for resolving any complaint that meets the requirements of 34 CFR §300.153, alleging that a public agency has violated a requirement of Part B of the Act or the Part B regulations. Your complaint alleges that PDE is the public agency that has violated a requirement of Part B of IDEA and the Part B regulations with respect to Pennsylvania's due process hearing system. States are responsible for resolving any complaint, including complaints containing statewide allegations of a systemic nature, regardless of whether the complaint alleges that the State itself or one of the public agencies in the State has violated a requirement of Part B of the Act or the Part B regulations. This responsibility remains fully applicable even when a complaint contains allegations that require the State to investigate its own compliance with Part B. A State's responsibility to resolve State complaints is derived from the requirement that a State must exercise general supervision over all educational programs for children with disabilities administered in the State and must ensure that all such programs meet the

education standards of the SEA and Part B requirements. 34 CFR §300.149 and 20 U.S.C. 1412(a)(11).

In your letter, you express dissatisfaction both with the nature and scope of the investigation of the issues PDE investigated, as well as with PDE's failure to investigate two issues raised in your correspondence. It is not OSEP's practice to review final State complaint decisions. Under the prior regulation at 34 CFR §300.661(d), a party to a complaint had the right to request that the Secretary of Education review the State's final decision on the complaint. The prior regulation providing for Secretarial review was removed as of May 11, 1999. Even when Secretarial review was in effect, most requests were denied because they raised factual matters in individual cases that were unsuitable for the Department to evaluate. The removal of Secretarial review was intended to strengthen SEA responsibility for their complaint resolution systems, and OSEP remains responsible for ensuring that States appropriately implement their State complaint resolution procedures, consistent with 34 CFR §§300.151 through 300.153.

Regarding your concerns about the nature and scope of the PDE investigation, States have discretion in the manner in which they choose to resolve complaints, so long as they comply with the minimum State complaint procedures in 34 CFR §300.152. We would like to comment briefly on the two issues that the State declined to investigate. The PDE concluded it was not appropriate to investigate two allegations in your complaint and provided you with an explanation of its reasons by letter of November 29, 2007, from Masako Farrell of the Bureau of Special Education. In its letter to you of January 16, 2008, PDE determined that it was not required to resolve your allegation regarding its procedures for appointment and retention of impartial due process hearing officers based on ongoing litigation in *Stengle v. Office of Dispute Resolution* and provided as its reason that ". . . the *Stengle* lawsuit remains before the court." It is OSEP's position that if an issue in a complaint is also the subject of an ongoing judicial proceeding, it is reasonable for a State to decline to investigate that issue if it is substantially the same as the issue that is before the court. In its November 29, 2007 letter to you regarding its handling of your complaint, the PDE stated further it would not be investigating this allegation because it was "directly related to issues in the *Stengle* litigation."

You also question why the PDE declined to investigate your allegation regarding Pennsylvania's two-tiered due process system and that hearing officers and appeals panels render inconsistent decisions. In declining to investigate this allegation, the PDE asserted "there is no regulatory authority to do so." Under 34 CFR §300.514(a), a decision made in a local due process hearing is final unless, under State law, there is provision for appealing to the State, as is the case in Pennsylvania. Under 34 CFR §300.514 (a) and (d), the decision reached by the State review panel is final unless any party aggrieved by such decision appeals the decision by bringing a civil action under 34 CFR §300.516 in an appropriate State or Federal court. The statute and regulations provide a mechanism for parties aggrieved by final hearing decisions to appeal those decisions, and the PDE has no authority to alter or set aside a hearing officer or appeals panel decision through the State complaint process. See 34 CFR §300.152(c).

If a State has a two-tier due process system, 34 CFR §300.514(c) requires that the State conduct an impartial review, and ensure, among other matters, that an independent decision is issued upon completion of the review. 34 CFR §300.514(c)(2)(v). In its November 29, 2007 letter to you explaining why it was declining to investigate your allegation regarding Pennsylvania's two-tier due process system, the PDE stated that in Pennsylvania, appeals panels, not the PDE, "independently

conduct the SEA review.” In addition, based on prior OSEP monitoring of the PDE and the PDE’s State Performance Report and Annual Performance Plans, OSEP has no reason to believe that the PDE is improperly implementing the due process requirements in 34 CFR §§300.511 through 300.516.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

We hope you find this explanation helpful.

Sincerely,



William W. Knudsen
Acting Director
Office of Special Education
Programs

cc: Mr. John Tommasini