New York
Monitoring and Support Visit Summary and Next Steps
September 28-30, 2016

Focus Area: Dispute Resolution	DMS Designation: Targeted

Background

In August 2014, the United States Government Accountability Office (GAO) issued a study entitled "Special Education-Improved Performance Measures Could Enhance Oversight of Dispute Resolution" examining the use of dispute resolution methods, including mediation and resolution meetings, since the 2004 reauthorization, in preparation for the next reauthorization of IDEA.[1] Based on its conclusions, GAO recommended that the Secretary of Education direct OSEP to revise its performance measure to collect information from States on the amount of time that extensions add to due process hearing decisions, in order to increase transparency regarding the timeliness of due process hearing decisions and better target its monitoring and technical assistance to States.

In response to this recommendation, OSEP has been conducting desk monitoring with States that reported 10 or more fully adjudicated hearings in a given year, where at least 75 percent of the decisions were issued within extended timelines. This includes States where the decisions were reported as extended under 34 CFR §300.515(c), as well as those reported as resolved beyond the 45-day timeline but without allowable extensions. OSEP reviewed States' section 618 data for the 2012-2013 and 2013-2014 reporting periods. OSEP identified New York (NY) as a State that reported 10 or more fully adjudicated hearings with at least 75 percent of decisions issued within an extended timeline for those reporting periods, thus requiring desk monitoring and a Targeted DMS designation for Dispute Resolution.

History

In a March 28, 2014 letter to the NY State Department of Education (NYSED), OSEP informed NYSED that it was not in compliance with section 615(g) of the IDEA and its implementing regulations (20 U.S.C. §1415(g) and 34 CFR §§514(b) and 515(b)), which require States, such as New York, in which impartial due process hearings are conducted by a public agency other than the SEA, to conduct an impartial review of the initial hearing decision and issue an independent decision based on that review within thirty (30) days of the appeal, unless a specific extension of time is requested by a party and granted by the reviewing official. New York was instructed to come into compliance with these requirements by March 28, 2015, unless NYSED entered into a compliance agreement with the U.S. Department of Education (Department) pursuant to section 457 of the General Education Provisions Act (GEPA) (20 U.S.C. §1234f). As part of these discussions, NYSED developed a Work Plan (draft dated November 14, 2014) to address its failure to issue State-level review decisions in a timely manner.

In an April 27, 2015 letter to NYSED, OSEP informed NYSED that, based on a review of data and information demonstrating that NYSED had made substantial progress towards coming into full compliance, the Department determined that it would not be appropriate to enter into a compliance agreement with NYSED. In the absence of a compliance agreement, the State was required to come into full compliance as soon as possible with the IDEA Part B requirements at 20 U.S.C. §1415(g) and 34 CFR §§300.514(b) and 300.515(b) to issue State-level review decisions for appeals of due process complaints within 30 days of receiving a request for review, and to submit data with its FFY 2015 IDEA Part B Application demonstrating progress toward full compliance. NYSED did submit data with its FFY 2015 IDEA Part B Application demonstrating that the State had come into full compliance with the

[1] http://www.gao.gov/products/GAO-14-390

applicable requirements, and was able to provide the assurance for Section II.A.6 in its FFY 2015 IDEA Part B application. The April 27, 2015 letter also required NYSED to provide the Department with quarterly reports covering a total reporting period of one year, from July 1, 2015 to June 30, 2016, to demonstrate continued compliance with these requirements.

Special Note

To address the recommendation made by the GAO to conduct targeted monitoring related to extensions of due process hearing decisions, OSEP conducted a conference call with NYSED on March 31 and May 17, 2016 to discuss the review process and to request hearing logs for due process hearing decisions at the first tier. The State submitted due process hearing logs and due process hearing decision files from the first tier to OSEP.

With regard to actions NYSED has taken to reduce the backlog of State-level review decisions to date: NYSED provided OSEP with quarterly reports that demonstrated continued compliance with the requirements in section 615(g) of the IDEA and its implementing regulations (20 U.S.C. §1415(g) and 34 CFR §§300.514(b) and 515(b)) to issue State-level review decisions within 30 days of receiving a request for a review. As a result, OSEP discontinued NYSED's quarterly reporting requirement for the FFY 2016 grant year, after NYSED submitted its final report to OSEP, due July 15, 2016, covering data through June 30, 2016, consistent with the requirements set out in the April 27, 2015 letter. The reports contained the appeal number for each of the appeals pending review at the close of that quarter, the date the appeal was submitted to NYSED, whether an extension had been granted under 34 CFR §300.515(c), and the decision due date.

Purpose of Monitoring Activity

The purpose of this monitoring activity was twofold: First, in order to conduct the targeted monitoring related to extensions of due process hearing decisions, it was important for OSEP to have an understanding of New York's entire two-tier due process system. Second, OSEP discussed the State's ongoing and completed activities to address the backlog of State-level review decisions, as described in the State's Office of State Review (OSR)/OSEP Work Plan, submitted on October 17, 2014, to better understand the strategies the State has in place to support continued compliance with State-level review decision timelines.

Visit Summary

OSEP met with representatives of the State to discuss the functions of the NY two-tier dispute resolution system. The NY State Officials that responded to questions from OSEP included staff from the NY Office of Counsel, NYSED, State Review Office (SRO) and the NYC Department of Education. We discussed the following topics:

Policies and Procedures of the Two-Tier Dispute Resolution System

NY operates a two-tier dispute resolution system. In New York's two-tier system, the public agency directly responsible for the education of the child conducts due process hearings. The determination of which entity conducts due process hearings is based on State statute, State regulation, or a written policy of the Sate education agency (SEA). 34 CFR §300.511(b). In a two-tier system, an aggrieved party has the right to appeal the public agency's decision to the SEA, which must conduct an impartial review of the findings and decision appealed. 34 CFR §300.514(b). A party dissatisfied with the decision of the State education agency's reviewing official has the right to bring a civil action in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. 34 CFR §§300.514(d) and 300.516(a).

The State reported that New York City (NYC) operates differently than districts in other parts of the State. NYC has an Impartial Hearing Office that administers the first-tier of the due process system, including appointing Impartial Hearing Officers (IHOs); arranging for rooms; and entering information into the data system. NYC's data system automatically uploads data to the SEA system two times per

day. At the end of the day, the data system transmits redacted copies of dispute resolution documents. In NYC, IHOs are automatically appointed for cases, without a mechanism to check the availability of the IHO. If IHOs are unavailable, they recuse themselves from the case. However, the State does not have a timeline by which IHOs must recuse themselves. If IHOs do not recuse themselves until after the expiration of the 45-day timeline for issuing due process hearing decisions in 34 CFR §300.515(a), then there is no process in place to address noncompliance with this requirement unless someone files a complaint. If IHOs consistently decline or recuse themselves in a two year period, the State may investigate the reasons. However, in rural areas of the State, some IHOs that consistently decline or recuse themselves are not contacted for more than two years. NYSED is considering establishing a policy where recusal must happen within a specific timeframe.

NYSED is responsible for oversight of the IHOs at the first tier; however, the State does not have procedures in place to ensure that IHOs are meeting IDEA requirements under 34 CFR §§300.508 – 300.515. NYSED acknowledged that it does not have a formal system of evaluation of IHOs. NYSED recently entered into a new five year contract to expand training and develop an evaluation system for IHOs. The State has increased the amount of mandatory IHO training to include one in-person training session and three webinars per year.

Policies and Procedures for Extension of Due Process Hearing (First-tier) Decisions (Focus of GAO Audit)

NYSED informed OSEP that there is no oversight from the State or Local Educational Agency (LEA) regarding whether an extension granted in a first tier due process hearing is consistent with IDEA requirements, unless a party files a complaint. When a procedural complaint is filed under State rules that an extension has not been granted in accordance with the requirement in 34 CFR §300.515(c), which permits a hearing officer to grant specific extensions of time beyond the 45-day required period at the request of either party, the SEA only investigates after the case is closed. While NYSED maintains a list of known reasons for extending due process hearings, it does not examine the reasons for hearing extensions to determine if such reasons are permissible. The majority of due process hearing decisions in the State are issued within an extended timeline. Some of the root causes for extensions, as identified by the State, include the volume of requests, scheduling difficulties, and nonconsecutive hearing dates. NYC has the greatest number of requests in the State for due process hearing decision timeline extensions.

Backlog of State-level Review (Second-tier) Decisions– Ongoing and Completed Activities

OSEP acknowledged NYSED's work in addressing the backlog of State-level review decisions cited in OSEP's March 28, 2014 letter to the State (see "History" section above). NYSED attributed their elimination of the backlog to the creation of a Backlog Elimination Team. The Team was staffed by contractors employed to address the issue of overdue State-level review decisions.

Findings of Noncompliance	Corrective Action Required
1. Based on interviews with State and local personnel, OSEP determined that the State does not ensure that a procedural safeguards notice is provided to parents at all the times specified under 34 CFR §300.504(a). Specifically, personnel from the New York City Department of Education stated that the procedural safeguards notice is not provided to the parent when the parent files the first due process complaint in a school year. Citation: Under 34 CFR §300.504(a), a copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents only one time a school year, except that a copy also must be given to the parents – (1) Upon initial referral or parent request for evaluation; (2) Upon receipt of the first State complaint under §§300.151 through 300.153 and upon receipt of the first due process complaint under §300.507 in a school year; (3) In accordance with the discipline procedures in §300.530(h); and (4) Upon request by a parent.	Within 90 days of the date of this letter, the State must provide documentation demonstrating that it has provided written guidance to all LEAs regarding the provision of the procedural safeguards notice consistent with 34 CFR §300.504(a).
2. Based on the State's reported 618 data for the 2012-2015 reporting years, the State has reported above 75% of fully adjudicated hearings with extended timelines. Further, based on the review of documents, analysis of data, and interviews with State and local personnel, OSEP determined the State does not have procedures in place to ensure that independent hearing officers are granting extensions consistent with 34 CFR §300.515(c). Citation: Under 34 CFR §300.500, each SEA must ensure that each public agency establishes, maintains, and implements procedural safeguards that meet the requirements of §§300.500 through 300.536. Under 34 CFR §300.515(c), a hearing officer may grant specific	Within 90 days of the date of this letter, the State must provide: (1) Documentation, including statewide procedures, demonstrating that the State ensures compliance with the requirement that hearing officers grant specific extensions of the 45-day timeline for issuing final decisions in due process hearings at the request of a party that specifies either the length of the extension or the new date by which the hearing officer must mail the decision to the parties; and (2) A copy of the memo to be issued to all hearing officers, LEAs, parent advocacy groups and other interested parties advising them of the Part B regulations at 34 CFR §300.515(c) that require that a hearing officer may only grant specific extensions of time beyond the 45-day timeline at the

extensions of time beyond the periods set out in 34 CFR §300.515(a) and (b) at the request of either party. In order to effectively monitor implementation of Part B of the IDEA, as required by IDEA sections 612(a)(11) and 616, 34 CFR §§300.149 and 300.600, and 20 U.S.C. 1232d(b)(3)(E), the State must ensure that it is in compliance with the requirement that hearing officers grant specific extensions of the 45-day timeline for issuing final decisions in due process hearings at the request of a party that specify either the length of the extension or the new date by which the hearing officer must mail the decision to the parties (34 CFR §300.515(a) and (c)).	request of either party.
3. Based on the review of documents, analysis of data, and interviews with State and local personnel, OSEP determined the State does not have procedures in place to ensure that independent hearing officers at the first tier are issuing due process hearing decisions within the 45-day timeline required by 34 CFR §300.515(a). In New York City, the independent hearing officers are automatically assigned cases without knowing the availability of hearing officers, and there is no imposed time limit for the hearing officer to recuse himself or herself for lack of availability. For example, if the hearing officer does not recuse himself or herself until after the 45-day timeline runs, the hearing officer would only be flagged if there was a complaint to the State regarding the IHO's conduct. This results in due process hearing decisions not being issued within the 45-day timeline because a new hearing officer is not appointed until the hearing officer automatically assigned to the case recuses himself of herself. In the rest of the State, it is incumbent upon the IHO to decline an offer of appointment if their schedule does not allow for the hearing to be convened within 14 calendar days of being contacted by the school district. Prior to offering an appointment, the school district must request the IHO to assure that his or her schedule is such that the hearing can be initiated within the 14 days and concluded within 45	Within 90 days of the date of this letter, the State must provide: (1) Documentation, including statewide procedures, demonstrating that the State ensures compliance with the requirement that hearing officers issue final decisions within the 45-day timeline or within specific extensions of time beyond the periods set out in 34 CFR §300.515(a) at the request of either party; and (2) A copy of the memo to be issued to all hearing officers, LEAs, parent advocacy groups and other interested parties advising them of the Part B regulations at 34 CFR §300.515 and State rules related to due process hearing timelines.

calendar days (30 calendar days for preschool hearings and 15 business days for expedited hearings) unless extensions are granted at the request of either party. However, the State does not have a process to ensure that IHOs are following this procedure unless a party files a complaint under State rules against the hearing officer. Furthermore, the State does not investigate until the due process case is closed. Therefore, the State is not exercising its general supervisory responsibility to ensure that hearing officers adhere to the 45-day timeline for issuing final decisions in due process hearings. Citation: Under 34 CFR §300.500, each SEA must ensure that each public agency establishes, maintains, and implements procedural safeguards that meet the requirements of §§300.500 through 300.536. In order to effectively monitor implementation of Part B of the IDEA, as required by IDEA sections 612(a)(11) and 616, 34 CFR §§300.149 and 300.600, and 20 U.S.C. 1232d(b)(3)(E), the State must ensure compliance with the requirement that hearing officers meet the 45-day timeline for issuing final due process hearing decisions under 34 CFR §300.515(a) or a properly granted extension under 34 CFR §300.515(c).	