*****Massachusetts Department of***

***Elementary and Secondary Education***

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| Jeffrey C. Riley  *Commissioner* |  |
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June 1, 2018

Ruth E. Ryder

Acting Director

Office of Special Education Programs

United States Department of Education

400 Maryland Avenue, S.W.

Washington, DC 20202-2600

Dear Ms. Ryder:

On behalf of Commissioner Jeffrey C. Riley, I am responding to the results of the differentiated monitoring and support (DMS) activities conducted by the United States Department of Education, Office of Special Education Programs (OSEP) during an on-site visit to the Massachusetts Department of Elementary and Secondary Education (DESE) on May 8-10, 2017. On February 8, 2018, DESE received a letter from you, dated February 2, 2018, documenting areas of noncompliance with regard to DESE’s dispute resolution system. OSEP granted an extension to June 1, 2018 for DESE to respond.

By way of this letter, DESE is reporting on corrective actions is it undertaking to address the identified findings of noncompliance. To summarize, DESE has amended internal policies, practices and procedures for communicating with the Bureau of Special Education Appeals/Division of Administrative Law Appeals (BSEA) regarding identified noncompliance, matters that are simultaneously the subject of a State complaint and a due process proceeding, and the issuance of hearing decisions. Additionally, both DESE and BSEA (the agencies) are coordinating changes to Hearing Rules for Special Education Appeals (“Hearing Rules”) as required by OSEP, and will release them for a 60-day public comment and hold at least one public hearing, consistent with the Individuals with Disabilities Education Act regulations at 34 CFR § 300.165 and M.G.L. c. 30A, the Massachusetts Administrative Procedures Act. Within 30 days after the close of the public comment period, BSEA and DESE will issue final updated rules.

Below, DESE has enumerated each required corrective action and identifies activities completed in response.

Extensions for Issuing Final Decisions

*Corrective Action Required: Within 90 days of the date of this letter, the State must provide documentation demonstrating that the State has established procedures to ensure 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 to the hearing, which must specify either the length of the extension or the new date by which the hearing officer must mail the decision to the parties. See 34 CFR §300.515(c).*

DESE Response: To address requirements under 34 CFR §300.515(c) regarding proper extensions of the 45-day timeline for issuing final decisions in a due process hearing, BSEA is proposing to revise Hearing Rule III.A. regarding postponement of a hearing to read as follows:

1. All requests for postponement of a hearing must be submitted in writing to the Hearing Officer and the opposing party. Except in extraordinary circumstances, a postponement request must be received at least five (5) business days before the scheduled hearing date. The request must set out the specific length of the extension requested, the reasons for the request, proposed alternate dates for the hearing and indicate that all parties have been notified.
2. A party may agree to or oppose a request to postpone a hearing in writing up to three (3) business days before the scheduled hearing date. Opposition to a request for postponement will be given serious consideration by the Hearing Officer.
3. A Hearing Officer may grant an extension of the 45-day timeline at the written request of a party and only for good cause. The Hearing Officer will issue a written ruling on the request, documenting the length of the extension or the new date by which the Hearing Officer will mail the decision to the parties and the basis for the ruling. 34 CFR §300.515(c).

Included here as Attachment A and Attachment B are the BSEA’s updated templates for the Scheduling Order and Ruling on Request for Postponement and Order reflecting these changes.

This proposed rule change will be released for a 60-day public comment period prior to finalization. Once approved, the DESE and BSEA jointly will issue a memorandum to all hearing officers, LEAs, parent advocacy groups, and other interested parties advising them that this rule was amended in order to be consistent with the federal regulations at 34 CFR §300.515(c). Upon issuance of this memorandum and publication of the revised Hearing Rules, DESE will notify OSEP in writing of these actions and provide OSEP with relevant documentation.

Timely Implementation of Hearing Officer Decisions

*Corrective Action Required: Within 90 days of the date of this letter, the State must provide documentation demonstrating that the State has established procedures to ensure that the public agency involved in the due process hearing implements the hearing officer’s decision in a timely manner. See 34 CFR §§300.511-300.514 and 34 CFR §§300.149 and 300.600*.

DESE Response: The DESE has updated its procedures to ensure that the public agency involved in the due process hearing implements the hearing officer’s decision in a timely fashion. Upon receipt from BSEA of each due process decision issued by a hearing officer, a liaison from the DESE Problem Resolution System office (PRS) issues a written notice to the public agency that was party to the action that details the specific activities ordered by the Hearing Officer, acceptable evidence of implementation of the order, and timelines for resolution. All PRS staff have received training about this procedure, which is included here as Attachment C.

Removal of Off-Calendar Rule

*Corrective Action Required: Within 90 days of the date of this letter, the State must provide:*

1. *Documentation demonstrating that the State has either removed Hearing Rule IV permitting a party to move a hearing off calendar or has revised Hearing Rule IV to ensure that it can be implemented in a manner that complies 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 that the State either has removed the offer calendar rule or has revised that rule to be consistent with the Part B regulations at 34 CFR §300.515(a) and (c).*

DESE Response: In response to this request, BSEA is proposing to eliminate current Hearing Rule IV regarding off calendar scheduling. This proposed change will be released for a 60-day public comment period prior to finalization. Once approved, the DESE and BSEA jointly will issue a memorandum to all hearing officers, LEAs, parent advocacy groups, and other interested parties advising them that this rule was eliminated in order to be consistent with the federal regulations at 34 CFR §300.515(a) and (c). Upon issuance of this memorandum and publication of the revised Hearing Rules, DESE will notify OSEP in writing of these actions and provide OSEP with relevant documentation.

Expedited Hearings

*Corrective Action Required: Within 90 days of the date of this letter, the State must provide:*

1. *Documentation demonstrating that the State has revised Hearing Rule II.C. on Expedited Hearings to ensure that: (i) any due process complaint meets the criteria described under 34 CFR §300.523(a) will be treated as a request for an expedited due process hearing in accordance with the requirements of 34 CFR §300.532(c); (ii) the SEA will not unilaterally determine whether a complaint that meets the requirements in 34 CFR §300.532(a) can be treated as an expedited due process hearing; (iii) the portion of Hearing Rule II.C. permitting a party to challenge the sufficiency or an expedited due process complaint will be removed; (iv) the moving party will no longer be permitted to request that a complaint involving matters described in 34 CFR §300.532(a) be moved from an expedited track to a regular track; and (v) the BSEA will ensure that hearing officers apply the timelines specified in 34 CFR §300.532(c)(2)-(3) to expedited due process complaints that meet the criteria described in 34 CFR §300.532(a) and will ensure that hearing officers will no longer grant specific extensions of the timelines specified in 34 CFR §300.532(c)(2) at the request of a party to the hearing.*
2. *A copy of the memo to be issued to all hearing officers, LEAs, parent advocacy groups and other interested parties advising them that the State has revised to expedited hearing rule to be consistent with the Part B regulations at 34 CFR §300.532, as described above.*

DESE Response: To address requirements under 34 CFR §300.532 regarding expedited due process hearings, BSEA under DESE’s general supervision is proposing to revise Hearing Rule II.C. to read as follows:

C. Expedited Hearings

1. Student Discipline: Hearings involving discipline are scheduled on an expedited timeline consistent with federal IDEA regulations.

Expedited status will be granted:

1. when a parent disagrees with a school district’s determination that the behavior leading to discipline was not a manifestation of the student’s disability; or
2. when a parent disagrees with a school district’s decision regarding a student’s placement in the discipline context; or
3. when a school district asserts that maintaining the current placement of the student during the pendency of due process proceedings is substantially likely to result in injury to the student or others.

2**.** Form of Expedited Hearing Request:

Requests for expedited hearings must be in writing and must conform to the requirements of Rule I. No specific form is required in order to request an expedited hearing. Failure to specifically request expedited status shall not preclude assignment of such status by a Hearing Officer as long as the hearing request sets forth grounds that meet the IDEA’s expedited criteria.

* 1. Expedited Hearing Schedule:
     1. A hearing on an expedited request will be held no later than fifteen (15) calendar days after the request is received by the opposing party.
     2. A response to the hearing request must be filed no later than five (5) calendar days after receipt of the hearing request by the non-moving party.
     3. The resolution meeting must occur within seven (7) calendar days of receipt of the hearing request.
     4. A conference call may be scheduled at the request of a party or at the discretion of the Hearing Officer.
     5. Copies of all documents to be introduced as evidence and a list of the witnesses to be called at the hearing must be exchanged by the parties and received by the hearing officer five (5) business days prior to the expedited hearing date unless a different schedule is allowed by the Hearing Officer.
     6. A decision on the expedited hearing will be issued no later than ten (10) calendar days after the hearing.
     7. When expedited status is requested, a Hearing Officer will consider which issues, if any, meet the criteria above, and will schedule only those issues on an expedited track. The remaining issues, if any, will proceed separately on a non-expedited track.
     8. If the parties agree to have the expedited hearing decided on documents only, they must inform the Hearing Officer, in writing, of their agreement.

4. Postponements/Advancements:

a. An expedited hearing may not be postponed.

b. A request to advance the hearing date will be granted only if the rescheduled date conforms to federal IDEA requirements with respect to the resolution session.

This proposed rule change will be released for a 60-day public comment period prior to finalization. Once approved, the DESE and BSEA jointly will issue a memorandum to all hearing officers, LEAs, parent advocacy groups, and other interested parties advising them that this rule was revised in order to be consistent with the federal regulations at 34 CFR §300.532. Upon issuance of this memorandum and publication of the revised Hearing Rules, DESE will notify OSEP in writing of these actions and provide OSEP with relevant documentation.

Advisory Opinion Process

*Corrective Action Required: Within 90 days of the date of this letter, the State must provide:*

1. *Documentation demonstrating that the State has revised Hearing Rule III.C. regarding the Advisory Opinion Process to ensure that if a hearing date has been established after a request for an Advisory Opinion has been made, the State has established procedures to ensure that the request for an Advisory Opinion is accompanied by a request from one or both parties for the hearing officer to grant a specific extension of the 45-day timeline for issuing a final decision in the due process hearing, and that after the Advisory Opinion has been issued, the hearing officer, and not the parties, is responsible for ensuring that a new hearing date is scheduled, unless a part withdraws the hearing request and a decision is issued within the required timeline in 34 CFR §300.515(a) and (c).*
2. *A copy of the memo to be issued to all hearing officers, LEAs, parent advocacy groups and other interested parties advising them that the State has revised Hearing Rule III.C. to be consistent with the IDEA Part B regulations, as described above.*

DESE Response: In response to this request, BSEA is proposing to eliminate current Hearing Rule III.C., the Advisory Opinion Process.

This proposed rule change will be released for a 60-day public comment period prior to finalization. Once approved, the DESE and BSEA jointly will issue a memorandum to all hearing officers, LEAs, parent advocacy groups, and other interested parties advising them that this rule was eliminated in order to be consistent with the federal regulations at 34 CFR §300.515(a) and (c). Upon issuance of this memorandum and publication of the revised Hearing Rules, DESE will notify OSEP in writing of these actions and provide OSEP with relevant documentation.

Setting Aside State Complaints

*Corrective Action Required: Within 90 days of the date of this letter, the State must provide:*

1. *Documentation demonstrating that the State has established (i) procedures to track when issues in a State complaint have been set aside because they are also the subject of a due process complaint, and (ii) a mechanism to ensure that the State resolves any remaining issues, when the hearing officer dismisses the due process complaint or does not rule on the substance of the due process complaint, using the 60-day time limit and procedures described in 34 CFR §300.152(a) and (b); and*
2. *An analysis of the number of State complaints filed within one year of the date of this report where the SEA has set aside issues in the State complaint because the parties were engaged in due process and the SEA did not ensure that the issues were resolved through the due process complaint and hearing procedures. The State must also inform OSEP of the specific actions it will take, or has taken, to ensure that those complaints are resolved in accordance with procedures in 34 CFR §300.152(a).*

DESE Response: The DESE has updated its procedures and practices to track when issues in a State complaint has been set aside because they are also the subject of a concurrent due process complaint, as required by 34 CFR §300.152. Beginning June 1, 2018, the BSEA will share case filing information on a regular basis with PRS to identify when matters are concurrently the subject of a State complaint and a due process hearing request. Where PRS identifies that a State complaint has been filed concurrently with a request for hearing, PRS will contact the Complainant in writing to notify them that federal law requires that the specific issues that are the subject of the State complaint and that are also the subject of the due process complaint must be set aside pending the outcome of the due process hearing, and that PRS will resolve any remaining issues – those not set aside – using the 60-day time limit and procedures described in 34 CFR §300.152(a) and (c). PRS will record this information in its State complaint tracking system. A copy of the letter template is included here as Attachment D. I have included here as Attachment E the relevant amendment to the PRS Procedures Guide related to set aside of State complaints.

The reporting from BSEA to DESE will include information regarding any change in status of a due process complaint. Upon notification by BSEA of an order in that matter, that the Hearing Officer has dismissed the due process complaint, or that the due process complaint has been withdrawn by the Complainant, PRS will reactivate the State complaint and will issue its decision on any remaining issues within the 60-day time limit described in the regulations. PRS staff will be trained about this procedure and its implementation. BSEA is training staff about these communication requirements and has identified a staff member who is responsible for submitting regular reports to DESE.

DESE identified thirteen State complaints filed within one year of the date of this report that were set aside because they had issues that were also the subject of a matter before the BSEA. PRS staff is contacting the BSEA and the parties in each of those matters to ensure that the issues were resolved through the due process complaint and hearing procedures, in accordance with procedures in 34 CFR §300.152(a).

Extension of State Complaint Timelines to Engage in Mediation

*Corrective Action Required: Within 90 days of the date of this letter, the State must provide:*

1. *Documentation demonstrating that the State has revised its State complaint procedures and practices so that if mediation is not successful in resolving a dispute, the State extends the 60-day timeline in 34 CFR §300.152(a) for complaint resolution only if the parties agree to extend the time to engage in mediation, consistent with 34 CFR §300.152(b)(1)(ii); procedures to track when a State complaint has been extended under 34 CFR §300.152(b)(1)(ii) when the parties are engaged in mediation; and a mechanism to ensure that when mediation is not successful in resolving the dispute, the complaint is resolved within 60 days after the complaint was filed, as specified in 34 CFR §300.152(a); and*
2. *The number of State complaints filed within one year of the date of this report where the SEA has set aside the State complaint because the parties were engaged in mediation and the SEA did not ensure the issues were resolved. The State must also inform OSEP of the specific actions it will take, or has taken, to ensure that those complaints are resolved in accordance with 34 CFR §300.152.*

DESE Response: To ensure compliance with requirements under 34 CFR §300.152(b)(1)(ii), DESE’s Problem Resolution System (PRS) has revised its procedures and practices to reflect that the 60-day timeline for complaint resolution is extended only upon agreement of the parties if the parties are engaged in mediation. As described above, beginning June 1, 2018, the BSEA will share case filing information on a regular basis with PRS to identify when matters are concurrently the subject of a State complaint and a mediation request. Where PRS identifies that a State complaint has been filed concurrently with a request for mediation, PRS will contact the Complainant in writing to notify them of the requirement that the State complaint will be set aside for the parties to engage in mediation only if all of the parties agree. PRS will record this information in its State complaint tracking system. At the conclusion of mediation, BSEA will send notice to PRS, and PRS will re-open the complaint, as needed. A copy of the letter template is included here as Attachment D. I have included here as Attachment E the relevant amendment to the PRS Procedures Guide related to set aside of State complaints.

The regular reporting from BSEA to DESE will include information regarding any change in status of a mediation request. Upon notification by BSEA that a mediation for which a State complaint has been set aside upon request of the parties has not been successful in resolving the dispute, PRS will reactivate the State complaint and will issue its decision within the 60-day time limit described in the regulations. PRS staff will be trained about this procedure and its implementation. BSEA is training its staff about these communication requirements and has identified a staff member who is responsible for submitting regular reports to DESE.

DESE identified thirteen State complaints filed within one year of the date of this report that were set aside because they had issues that were also the subject of a matter before the BSEA. PRS staff is contacting the BSEA and the parties in each of those matters to ensure that the issues were resolved through the due process complaint and hearing procedures, in accordance with procedures in 34 CFR §300.152(a).

Please do not hesitate to contact me or Teri Williams Valentine, Director of Special Education Planning and Policy, if you have any questions of if we can provide you with additional information.

Sincerely,

Russell D. Johnston

Senior Associate Commissioner

C: Dwight R. Thomas, II, Education Program Specialist

Teri Williams Valentine

Enc: Attachment A: Scheduling Order and Ruling on Request for Postponement

Attachment B: Order

Attachment C: PRS Procedure for handling BSEA Referral Cases

Attachment D: BSEA Extension/Set-Aside Letter

Attachment E: PRS Procedures Guide Pertaining to BSEA “Set-aside”