UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

January 7, 2015

Ms. Margaret O'Sullivan Kane
Kane Education Law
1032 Grand Avenue, Suite 202
St. Paul, Minnesota 55105

Dear Ms. Kane:

This letter is in response to your correspondence addressed to Secretary Arne Duncan, United States Department of Education (Department), requesting guidance and assistance regarding "special education administrative hearings" in Minnesota. Upon review by Secretary Duncan's office, your correspondence was forwarded to the Office of Special Education Programs (OSEP), Office of Special Education and Rehabilitative Services, within the Department, for reply. We carefully reviewed and considered all of the information that you provided.

OSEP is responsible for administering the Individuals with Disabilities Education Act (IDEA), which provides assistance to State educational agencies (SEAs), and through SEAs, to local educational agencies (LEAs), to help meet the unique educational needs of eligible children with disabilities, as defined in 34 CFR §300.8 of the Federal regulations implementing Part B of IDEA (Part B). Among the Part B provisions is one ensuring that a parent or a public agency may file a due process complaint to request a due process hearing on any of the matters described in 34 CFR §300.503(a)(1) and (2) relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE (free appropriate public education) to the child, and on matters described in 34 CFR §300.532 related to discipline procedures. The requirements for due process complaints and due process hearings are found in 34 CFR §§300.507-300.518.

In your letter you identified two issues, as follows, and asked the Department to review these issues: (1) "Location of Administrative Hearing as [a] Jurisdictional Bar to [an] Administrative Hearing"; and, (2) "Time Limit Restrictions on Special Education Hearings". OSEP's responses and analyses follow.

Issue 1

Regarding the first issue, you state your objections to the conclusions in OSEP's letters dated October 4, 2010 and February 9, 2012 to Amy Goetz and Atlee Reilly. As noted in OSEP's letters, Minnesota State law requires that the due process hearings conducted by the State be held in the local educational agency (LEA) responsible for the provision of FAPE to the child at the time the hearing is conducted. See Minn. Stat. §125A.091. As OSEP further stated in the February 9, 2012 letter, the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) has concluded that, due to this State statute, if "a student changes school districts and does not request a due process hearing, his or her right to challenge prior educational services is not preserved." *Thompson v. Bd. of Special Sch. Dist. No 1,* 144 F.3d 574, 579 (8th Cir. 1998).

As you note, in the February 9, 2012 letter, OSEP concluded that the Minnesota statute - as interpreted by the Eighth Circuit Court of Appeals to deny parents the right to file a due process

complaint against an LEA that their child previously attended, provided that the violation occurred within two years of the date when the parents file the complaint - limits the parents' rights under the IDEA and is inconsistent with the provisions of 34 CFR §§300.507-300.518. OSEP also believes that the section of the State Department of Education's Notice of Procedural Safeguards[1]

> is . . . not consistent with the IDEA. However, decisions by the Eighth Circuit Court of Appeals are controlling on this point in the State of Minnesota. Accordingly, since this section of the State's Notice of Procedural Safeguards appears to be consistent with the Eighth Circuit precedent, this office cannot require the Minnesota State Department of Education to amend its Notice of Procedural Safeguards or otherwise require the State to amend its statute.

In your inquiry you cite to decisions from a number of other courts rejecting the Eighth Circuit's reasoning in the *Thompson* decision. However, as you are aware, decisions from Federal appellate and district courts outside of the Eighth Circuit are not binding on Minnesota. Further, we have conducted research on Eighth Circuit and Supreme Court decisions issued since our February 9, 2012 letter to Amy Goetz and Atlee Riley, and have not identified any controlling decisions overruling the holding in *Thompson*. Therefore, OSEP finds no basis to alter our position on this matter.

You also call our attention to two prior OSEP letters to former New Jersey Commissioner of Education William L. Librera, dated May 26, 2004 and December 20, 2004. In those letters, OSEP required New Jersey to change a provision of a contractual arrangement that would have precluded parents whose children were publicly-placed in certain New York State school districts from using New Jersey's due process procedures. These letters are examples of situations where OSEP has required a State to take specific actions when OSEP determined that the State's laws or policies were inconsistent with Part B where there was no controlling case law covering New Jersey's procedures. This situation is different from the one in Minnesota, however, where there is controlling case law. Therefore, the situation prompting OSEP's responses to former Commissioner Librera is easily distinguishable from the circumstances giving rise to your inquiry and the prior inquiries from Amy Goetz and Atlee Riley.

We do note, however, that under IDEA Section 615(l), children with disabilities and their parents are not restricted or limited in the rights, procedures and remedies available under the Constitution, the Americans with Disabilities Act of 1990 (ADA), title V of the Rehabilitation Act of 1973 (Section 504), or other Federal laws protecting the rights of children with disabilities, except that IDEA's administrative procedures must be exhausted before filing a civil action seeking relief that is also available under the IDEA. For the students noted in your letter, because Eighth Circuit case law denies them all relief under the IDEA by denying them a hearing, administrative exhaustion under the IDEA would not be required. Therefore, if timely,

---

[1] Minnesota's Procedural Safeguards Notice provides in relevant part:

> Loss of Right to a Due Process Hearing
> NOTE: Due to an interpretation of state law by the 8th Circuit Court of Appeals, if your child changes school districts and you do not request a due process hearing before your child enrolls in a new district, you may lose the right to have a due process hearing about any special education issues that arose in the previous district.
> http://education.state.mn.us/MDE/SchSup/ComplAssist/ProcSafe/

these students and their parents may be able to file a civil action seeking appropriate relief under the above-referenced Federal laws and the Constitution.[2]

ISSUE 2

The second issue identified in your letter relates to a "best practice" suggested by Minnesota's Office of Administrative Hearings, which states that, "[i]n all but exceptional circumstances, evidentiary hearings should be concluded within three hearing days of six hours each." You described in your letter a hearing during which the Administrative Law Judge (the impartial hearing officer) informed participants in advance of the hearing and at regular intervals throughout the hearing that each party would be granted nine hours of hearing time to present testimony and conduct cross-examination. You allege that the effect of the time limitation to eighteen hours (total) was that parents were deprived of the opportunity to present testimony in support of their claims and counsel was not permitted to cross-examine any of the other party's witnesses.

Any party to a hearing conducted pursuant to 34 CFR §§300.507-300.513 or §§300.530-300.534 has the right to present evidence and confront, cross-examine, and compel the attendance of witnesses. 34 CFR §300.512(a)(2). The SEA is responsible for ensuring that impartial due process hearings are conducted in a manner that is consistent with these requirements. 34 CFR §§300.121 and 300.149. The IDEA is silent on procedures related to the timing for presentation of evidence and regarding confrontation, cross-examination, and compelling the attendance of witnesses in a due process hearing. In general, hearing officers have authority to determine procedural matters not specifically addressed in Part B and its implementing regulations, consistent with a party's enumerated rights and general due process requirements. States also have some flexibility in establishing rules for conducting due process hearings, as long as the State's rules are consistent with Part B and the requirements of due process.

We note that the guideline you cite appears, on its face, to be consistent with the requirements of Part B because it permits a hearing officer to extend the 18-hour time limitation for evidentiary hearings under exceptional circumstances. Further, if a party to a hearing believes that their hearing rights have been violated, the party has the right to appeal the decision to court. Minnesota implements the IDEA through a one-tier due process system. This means that an aggrieved party has the right to bring a civil action with respect to the due process hearing complaint brought under §§300.507 through 300.513 or §§300.530 through 300.534, in a State court of competent jurisdiction or in a district court of the United States. 34 CFR §300.516(a). On appeal, IDEA, section 615(h)(2)(C) and 34 CFR §300.516(c) provide that the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate. Therefore, in the situation that you describe in your letter, an appropriate course of action would be to appeal the matter to a court, challenging the hearing officer's decision that allegedly limited the parent's ability to present evidence and cross-examine witnesses because it was inconsistent with the IDEA's due process protections.

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.

---

[2] For a discussion of the federal government's view of exhaustion, generally, *see* United States' Brief as Amicus Curiae in *Payne v. Peninsula Sch. District*, (9th Cir. 2011), available at http://www.justice.gov/crt/about/app/briefs/paynebr.pdf.

Thank you for sharing your concerns with Secretary Duncan. If this Office can be of any further assistance regarding this matter, or in the future, please feel free to contact Susan Murray, OSEP's Minnesota Part B State contact, at (202) 245-8247.

Sincerely,

/s/ Melody Musgrove

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

cc: Dr. Barbara Troolin, Minnesota Department of Education