



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

THE ASSISTANT SECRETARY

JAN 15 2009

Mitchell D. Chester, Ed.D.
Commissioner of Education
Massachusetts Department of Elementary
and Secondary Education
350 Main Street
Malden, MA 02148-5023

Dear Dr. Chester:

This is in response to your letter to Secretary Margaret Spellings, dated October 7, 2008, regarding the structure for special education hearings in Massachusetts. Your letter was forwarded to the Office of Special Education and Rehabilitative Services for a response.

In your letter, you indicate that, in Massachusetts, special education hearing officers and mediators are employees of the Bureau of Special Education Appeals (BSEA) within the Massachusetts Department of Elementary and Secondary Education (MASSDE), are members of a collective bargaining unit, and report to an administrator of the MASSDE. In a 1991 monitoring report on Massachusetts's compliance with Part B of the Individuals with Disabilities Education Act (IDEA), the Office of Special Education Programs (OSEP) found that Massachusetts's practice of using State educational agency (SEA) employees as IDEA hearing officers was inconsistent with the applicable Part B regulations, which prohibited employees of the SEA, a public agency involved in the education of children with disabilities, from serving as impartial hearing officers. In response to this report, in 1992, MASSDE executed an interagency agreement with the University of Massachusetts at Boston (UMass Boston), a public agency not involved in the care or education of children with disabilities. Under this agreement, the dean of UMass Boston's Graduate College of Education was to provide direct supervision to the Director of the BSEA and evaluate the performance of the BSEA Director. OSEP approved this interagency agreement.

You explain in your letter, however, that "[in] the intervening sixteen years, this interagency agreement has fallen into disuse for several structural and pragmatic reasons." You indicate that the agreement has been difficult to manage and that MASSDE and UMass Boston are no longer physically proximate to one another. Although this interagency agreement has lapsed, you believe that "the system in Massachusetts for due process hearings and mediations has been and is operating in an impartial manner," and that "[n]either the Commissioner nor anyone else in the Department, outside of the BSEA, reviews or tries to influence in any way decisions of individual hearing officers or mediators in ongoing cases." You therefore ask for guidance regarding whether the current practice of MASSDE with respect to hearing officers and mediators meets the requirements of the IDEA and its implementing regulations, and seek advice from OSEP regarding any changes that should be considered in the event your current practice is not consistent with the IDEA.

OSERS appreciates your bringing this matter to our attention and your request for our views on how Massachusetts can operate its due process system in a manner consistent with the IDEA. The IDEA continues to have an unambiguous requirement that SEA employees not serve as mediators or hearing officers. The current regulations for Part B of the IDEA prohibit an employee of the SEA or an LEA [local educational agency] involved in the education or care of the child from being a hearing officer. 34 CFR §300.511(c)(1)(i)(A) provides that, at a minimum, a hearing officer may not be an employee of the SEA or the LEA that is involved in the education or care of the child. *See also* 34 CFR §300.506(c)(1)(i), prohibiting an employee of the SEA or the LEA that is involved in the education or care of the child from being an impartial mediator. Additionally, hearing officers and mediators may not have a personal or professional interest that would conflict with the person's objectivity in the hearing or mediation. 34 CFR §300.511(c)(1)(i)(B) and 34 CFR §300.506(c)(1)(ii).

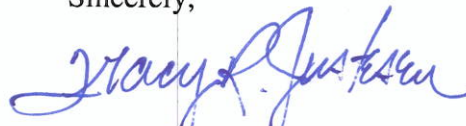
OSERS notes that Massachusetts is not disputing that the IDEA requirements, cited above, apply to its due process system, and that you are seeking guidance on what steps the State can take to ensure the impartiality of its due process system. You may wish to consider the following suggestions in this regard.

Although the IDEA prohibits hearing officers and mediators from being employees of the SEA, there is nothing in the IDEA that prohibits due process hearing officers or mediators from being State employees. For example, Massachusetts could, consistent with the practice of other States, create a BSEA in a State office that houses administrative law judges who conduct other State administrative hearings. Another alternative would be for the BSEA to become a State office independent of the SEA. There may be other alternatives that you may wish to consider to ensure that Massachusetts's due process system complies with the requirements in the IDEA.

In order to correct this situation, OSERS requests that, within 90 days of the date of this letter, MASSDE provide OSEP with a plan setting out the specific steps it will take to ensure the impartiality of its dispute resolution system in a manner that complies with the IDEA. If it would be helpful to have a conference call to discuss your plan, prior to submission to OSEP, please feel free to contact Dr. Ken Kienas, your OSEP State Contact, at 202-245-7621, or Dr. Deborah Morrow, Special Assistant to the Monitoring and State Improvement Planning Division Director, at 202-245-7456.

We look forward to your response and appreciate your desire to ensure that Massachusetts's due process system complies with the IDEA.

Sincerely,



Tracy R. Justesen

cc: Marcia Mittnacht