



Submitted: April 11, 2025

Honorable Judges of the Appellate Division
Superior Court of New Jersey/ Appellate Division
Hughes Justice Complex
25 W. Market St. P.O. Box 0006
Trenton, New Jersey 08625-0006

Re: In the Matter of New Jersey Department of Education Complaint
Investigation Report (Amended) C2024-6877
Docket No. A-2497-23

Honorable Judges of the Appellate Division:

Please accept this letter Reply Brief of Appellant Education Law Center
(ELC) in the above-captioned matter.

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REPLY TO COUNTERSTATEMENT OF FACTS

The Counterstatement of Facts proffered by the New Jersey Department of Education (NJDOE)'s Office of Special Education (OSE) fails to conform to its intended purpose (see N.J. Ct. R. 2:6-4). Instead of refuting the accuracy of ELC's facts or evidence (Ab²4-19), OSE relies on conclusory statements from its Amended Complaint Investigation Report (Report, Pa1-30). As will be addressed in the argument below, OSE does not point to its own factual findings or primary source documents in the record that counter the facts and evidence set forth by ELC.

In addition, OSE's Counterstatement includes multiple misstatements of law. Two relevant errors are: (1) an initial statement that an expedited hearing may be requested when the parent or school district "disagrees with the current special educational services or placement of a student," Rb3 (expedited hearings are limited to disciplinary matters under 20 U.S.C. § 1415(k)); and (2) a reference to a concept that doesn't exist – "a temporary order of emergent relief, distinct from a request for an emergent hearing," Rb4.

LEGAL ARGUMENT

- I. **ELC ISSUES 4, 5, 6 AND 7 ARE SUPPORTED BY MORE THAN SUFFICIENT FACTS AND EVIDENCE, AND THERE IS NO BASIS FOR OSE'S CLAIM THAT THE REMEDIES ELC SEEKS ARE UNREALISTIC OR VIOLATIVE OF LAW** (Pa15-17, Pa21-22, Pa24-27, Replying to Respondent's Point I.A, Rb22-30)

² Ab refers to Appellant's brief and Rb refers to Respondent's brief. Appellant will continue to use Pa to refer to Appellant's appendix (cited by OSE as Aa).

A. OSE's Brief Mischaracterizes the Relief Sought and its Own Obligations (Pa24-27)

OSE falsely claims that ELC is asking OSE to “retroactively remedy each individual matter where a violation was found” and to modify past Office of Administrative Law (OAL) decisions, Rb23, 25, 26, 28, 29, but no such request has been made. The OAL decisions are, rather, presented as examples of violations ELC requests OSE to address so that these violations do not recur. OSE’s oversight responsibility over New Jersey’s dispute resolution system demands that it do so.

Similarly, OSE’s allegation that ELC is demanding an “overhaul [of] its dispute resolution process and procedures when a mistake was made in a single matter,” is inaccurate. Rb23. ELC is neither asking for a complete overhaul of OSE’s dispute resolution system nor claiming violations based on a mistake in a single matter. Instead, each of the emergent relief (ER) decisions cited in ELC’s Statement of Facts contains multiple violations of the Individual Disabilities Education Act (IDEA), 20 U.S.C. § 1400-1482, and/or state requirements, with their combined effect illustrated in summaries of two of the matters. Ab15-19.

Nor is ELC claiming that OSE must guarantee “perfection” by OAL. Rb25. OSE is required, however, to have a robust oversight system that aims toward compliance by swiftly identifying and correcting noncompliance. OSE has failed to meet that standard here. Ab22-23.

OSE’s assertion in its brief that 34 C.F.R. § 300.152 and N.J.A.C. 6A:14-9.2

only require OSE to investigate an allegation “if warranted” and to issue any sort of corrective action “if needed,” Rb23, suggests that OSE (1) has significant if not total discretion to decide whether to conduct any investigation at all and (2) can refuse to order corrective action even if undisputed evidence and facts establish noncompliance. This is inconsistent not only with the plain meaning of the regulations but also with OSE’s general practice in responding to complaint investigation requests.

Complaint investigation requests by individuals or organizations must include a statement that there is a violation of a state and/or federal statute or regulations, the facts on which the statement is based, and the time period of the violation (not more than one year prior to the date by which the complaint is received). 34 C.F.R. § 300.153; N.J.A.C. 6A:14-9.2(b). Once a complaint is submitted, the state educational agency (SEA) must “review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of this part...” 34 C.F.R. § 300.152(a)(4); Ab18-19.

New Jersey’s state complaint regulations are even more specific regarding the response required when an SEA receives a complaint: “The Director of the Office or designee(s) **shall** be responsible for reviewing, investigating and taking action on **any** signed written complaint regarding the provision of special education and related services covered under this chapter.” N.J.A.C. 6A:14-9.2(a) (emphasis

added). As SEA, NJDOE has designated the responsibility for reviewing, investigating and taking action on any signed written complaint to OSE. See N.J.A.C. 6A:14-9.2(c)2 (listing elements of an investigation). State regulations also require that when noncompliance is found, a corrective action plan “**shall** be developed” and that the CAP “**shall** include, but not be limited to: 1. Objectives, strategies, and activities for correcting each noncompliance item cited, including resources needed to obtain the objectives; and 2. The dates by which the noncompliance will be corrected.” N.J.A.C. 6A:14-9.2(f) & (g) (emphasis added).

As for OSE’s contention that it is not “appropriate” for the SEA to review individual OAL decisions, there is neither legal authority nor logic to support this. Rb15. How can OSE exercise oversight of its dispute resolution system if it doesn’t review individual OAL decisions?³

B. OSE Failed to Establish that its Oversight Responsibility for its Dispute Resolution System is Limited to Systemic Violations (Pa24-27)

In its Report, OSE claimed that some violations concerning affidavits (ELC Issue 4), IDEA’s stay-put requirement (ELC Issue 6 and 7), removing a student for more than 45 days, and removing a student due to a “psychiatric crisis” were not “systemic” and thus didn’t require findings of noncompliance and development of a CAP. Pa24-27. To the contrary, SEA’s responsibilities with respect to complaint

³ NJDOE has the special education decisions issued by OAL and by law is required to post them on its website. N.J.S.A. 18A:46-1.2.

requests, whether brought by organizations or individuals, are not limited by statute, regulation or other legal authority to “systemic” issues. Ab21-24. OSE never refuted the legal authorities ELC cited concerning OSE’s oversight responsibilities, Ab21-23, other than to make a cursory reference to “unrelated compliance thresholds” for local educational agencies, Rb23.

OSE also never defined “systemic” in its Report but used multiple phrases in its brief to describe the violations it would address: “pattern or practice,” “occurred more than once or a few times,” “more than misapplication of law,” among others. Rb24-25. These varying and imprecise descriptions suggest no limit on OSE’s discretion to refuse to find itself noncompliant and issue a CAP. That cannot be correct.

C. The Violations Raised by ELC in its Opening Brief Concerning ELC Issue 4 (Point III A & D); Issue 5 (Point II); and Issues 6 and 7 (Point IV) are Supported by Sufficient Facts and Evidence, Requiring a Finding of Noncompliance by OSE and an Effective CAP (Pa15-17, Pa21-22, Pa24-27)

The Court need not reach the issue of whether OSE’s oversight responsibility is limited to systemic violations in this appeal, since the undisputed evidence and facts show that the violations with respect to ELC Issue 4 (Ab Point III A & D), Issue 5 (Ab Point II); and Issues 6 and 7 (Ab Point IV) are in fact systemic violations. See Ab14-18. The Miriam Webster Dictionary states that “systemic describes what relates to or affects an entire system,” a definition included in ELC’s brief, Ab62,

and undisputed by OSE. The violations at issue here are systemic in that they violate a fundamental intent of IDEA – to stop the exclusion of students with disabilities from school (except in the very limited circumstances set out in 20 U.S.C. § 1415).

The sheer number of violations presented to OSE, moreover, points toward a systemic problem impacting the removal of students with disabilities under any standard. Ab10-19. As discussed in Point II of ELC’s brief, Ab24-41, OSE refused to find itself noncompliant and develop a CAP for any of the violations raised in Issue 5 of its Complaint notwithstanding that *none of the eight ER decisions* cited by ELC applied the two correct legal standards in allowing a district to change the student’s placement. OSE’s answering brief does not dispute this evidence, nor does it dispute OSE’s refusal to find itself noncompliant where the facts demonstrated that the four Crowe factors were being unlawfully applied. Ab13-14. Rather, OSE claims that it was “more than sufficient” to require training on the burden of proof and evidentiary standard. Rb29. But training on these two issues, while important, will not ensure use of the two legal standards required by IDEA or lawful application of the Crowe factors.

In Point III of its opening brief, concerning affidavits, Ab43-50, ELC set out undisputed facts and evidence demonstrating that three ER applications lacked the required affidavits, and most affidavits did not contain the required expert qualifications or assert facts based on personal knowledge. Ab10-11. OSE’s brief

mistakenly asserts that there was only a single instance where an affidavit did not allege “personal knowledge.” Rb27, 28. To the contrary, of the affidavits submitted in seven cases, OSE’s Report included only one finding of an affidavit made by an individual claiming to have personal knowledge of the facts. Pa6, Fact 25; Ab11.

As for the absence of expert qualifications in any of the affidavits, OSE does not dispute that N.J.A.C. 1:6A-12.1(a) requires an affiant to set out their expert qualifications when giving an opinion, Report at Pa24, or that courts require more than an individual’s job title in determining a witness’s expertise. Ab49-50. Nor does OSE assert that the expertise needed to determine the likelihood of injury to a student or others or the appropriateness of an IAES as required by IDEA is a prerequisite for any of the job titles of the affiants. Rb13, 28; Ab48-50. Under these conditions, it is hard to understand OSE’s assertion that it was “reasonable” for affiants to give opinions on student removal based only on their job titles or certificated positions. Rb28, thereby ignoring the meaning of the regulation and applicable precedent.

As for Issues 6 and 7 of ELC’s Complaint (discussed in Point IV of ELC’s opening brief, Ab55-65), OSE claims that two state regulations and OSE’s Model Certification in Lieu of Affidavit, Pa187-188, which require use of the Crowe factors to determine and enforce a student’s stay-put, are not in conflict with IDEA’s stay-put and Third Circuit precedent because “there is nothing in N.J.A.C. 1:6A-12.1(e) or N.J.A.C. 6A-2.7(r) and (s) that suggests that a parent must seek emergent relief

to enforce stay-put.” Rb 30. This is a puzzling assertion since there is no other way to determine the stay-put placement or enforce stay-put at the administrative level. Further, OSE concedes in its Report that stay-put operates as an automatic preliminary injunction, meaning that there is no requirement to apply each of the four Crowe factors. Pa21-22.

As for OSE’s repeated claim that parents can appeal any decision by an ALJ (Rb6, 15, 23, 25-26, 28-29), OSE offers no authority for its suggestion that it has no oversight responsibility for its dispute resolution system because a parent could eventually appeal a final decision. In fact, as ELC set out in its opening brief and the United States Department of Education has made clear to OSE on more than one occasion, NJDOE indeed has oversight responsibility for its dispute resolution system. See, e.g., NJDOE’s “Revised Procedures for Determining a Student’s Status During a Special Education Due Process Hearing,” Pa189; Pa78 (issued “in response to a [federal] corrective action plan”). Moreover, parents can only appeal final decisions. Rb15, 28, 29. The violations ELC raises in its appeal concern emergent relief decisions which are interim, rather than final, decisions (which nonetheless can have devastating effects, see Pa13, Fact 43c). Furthermore, individual appeals would not correct regulations or model forms developed by OSE which conflict with IDEA, such as the violations ELC raises in its Issue 6.

D. OSE Fails to Point to Specific “Unrealistic” Remedies Sought by ELC with respect to its Issues 4, 5, 6 and 7 (Not raised below by Respondent)

ELC’s brief set out proposed remedies to correct the violations raised in Issue 4 (Ab54-55), Issue 5 (Ab42-43), and Issues 6 & 7 (Ab64-65), as did its Complaint, Pa90-99. Despite asserting that “the Remedies Sought Are Unrealistic,” Rb22, OSE never claimed in its Report, nor does it specify in its brief, which of ELC’s recommendations are “unrealistic” or why they are not achievable (with one limited and mistaken exception⁴). ELC respectfully disagrees with OSE’s characterization: the targeted and detailed corrective action requested is necessary to achieve compliance and protect the rights of New Jersey’s students with disabilities.

II. OSE’S CAP DOES NOT COMPLY WITH THE PLAIN MEANING OF NJDOE’S REGULATIONS AND IS NOT LEGALLY SUFFICIENT TO CORRECT EACH NONCOMPLIANCE ITEM FOUND BY OSE (Pa28-30, Pa184, Replying to Respondent’s Point I.B, Rb30-34)

OSE describes as “facile [and] formalistic,” ELC’s argument that OSE’s CAP, Pa28-30, failed to meet the requirements of N.J.AC. 6A:14-9.2(g) because it “only contain[s] ‘directive activities.’” Rb32. But OSE’s regulation on its face requires a CAP to include “objectives, strategies, and activities for correcting each noncompliance item cited, including resources needed to obtain the objectives, and

⁴ OSE claims it has “no authority to modify the regulations” of OAL, Rb30, in contradiction to its responsibility as SEA to operate a dispute resolution system that complies with IDEA, Ab21-23. The fact that OSE contracts with OAL in order to do so does not relieve the SEA from its oversight responsibilities.

the dates by which the noncompliance shall be corrected.” Ab70. ELC’s argument, Ab70-75, is in no way superficial or rigid as it flows from the fundamental rule of statutory construction that each word must be given effect in accordance with its ordinary meaning “[u]nless otherwise indicated.” Cruz v. Trotta, 363 N.J. Super. 353, 358 (App. Div. 2003). Here, there is nothing to suggest that any word in NJDOE’s regulation may be ignored or given a meaning other than its “ordinary meaning.” Id. The CAP issued by OSE not only fails to enumerate each noncompliance item (leaving blank the section labeled “Finding: Noncompliance regarding,” Pa28), but also fails to link specific items of noncompliance to any objectives, strategies, or resources for achieving compliance. Pa28-30.

OSE’s secondary argument is just as baseless, claiming that the SEA need not lay out objectives and goals in its CAP because they are “outlined in detail throughout the entirety of the final report.” Rb32-33. Despite this claim, OSE’s brief fails to identify any objectives or goals contained within its Report - not surprising because there are none. As for whether objectives must be listed “serially,” Rb33, ELC never focused on the order in which objectives must be listed – only that OSE comply with N.J.AC. 6A:14-9.2(g) by including objectives, strategies and resources to achieve correction in its CAP.

Having labelled the memoranda discussed at Rb30-34 as “Documentation needed to demonstrate compliance” and included their due dates in its CAP, OSE

argues that “nothing more is required.” Rb33. But, as OSE itself concedes at the end of its Report, *correction of noncompliance within a one-year period* is what the law requires. 34 C.F.R. §300.600(e); Pa30 (stating OSE “must ensure that any identified noncompliance is corrected as soon as possible, but in no case later than one year from identification”). Thus, the issuance of memoranda is only the first step toward achieving compliance. OSE’s supervision requires more than a reminder to relevant parties about the existing legal rules governing student removal to an IAES for 45 days; it requires assurance that the rules are now being followed.

Finally, OSE states that “ELC’s general argument that each CAP lacks a means of collecting data lacks any basis in law,” in that neither state nor federal regulations “require a CAP to contain a method for the collection of data.” Rb33. The word “data” may not appear in the regulations, but a determination of whether and when compliance has been achieved by necessity requires information-gathering. Moreover, NJDOE is no stranger to data collection,⁵ and OSE must not be less willing to engage in data collection to verify the effectiveness of its CAP when the need to do so arises from a complaint against OSE itself. More than the simple issuance of reminder memoranda is required under the law and must be demanded of OSE – even more so when the negative consequences of student

⁵ See NJDOE, “Data-based Decision Making for Addressing Chronic Absenteeism” (2023), Appendix A: Sample School Corrective Action Plan (CAP) Template for Addressing Chronic Absenteeism at 18, cited at Ab71, note 32.

removal violations are so significant for students with disabilities. We ask this Court to reject OSE's CAP as contrary to law and arbitrary and capricious and to remand for the development of a meaningful CAP. Ab75.

III. OSE'S DETERMINATIONS OF COMPLIANCE WITH REGARD TO ELC ISSUES 8(A) AND 8(B) ARE NEITHER REASONABLE NOR SUPPORTED BY THE RECORD (Pa27, Replying to Respondent's Point I.C, Rb34-36)

OSE's assertion of compliance with respect to Issues 8(a) and 8(b) of ELC's Complaint suffers from two fundamental flaws: its failure to acknowledge barriers to parental participation in ER hearings resulting from regulations that either conflict with, or are implemented inconsistently with, IDEA requirements; and its failure to accept that the burden for investigation rests on the SEA, not on ELC. Three violations raised by ELC under these issues – related to the failure to schedule oral argument at a time reasonably convenient to parents; the failure to afford parents the opportunity to testify by telephone in ER proceedings; and the allowing of school district testimony without advance notice to parents – establish that New Jersey's current implementation of ER proceedings does not protect parent and student rights under IDEA and must be corrected.

First, OSE obscures and mischaracterizes the conflict between 34 C.F.R. § 300.515(d) and N.J.A.C. 1:6A-12.1(d). OSE does not contest that the federal regulation requires the scheduling of proceedings "at a time or place that is reasonably convenient to the parents and child involved." Rb34. Instead, OSE claims

the state regulation does nothing more than address “*adjournments of an already scheduled* emergent relief application.” Rb35 (emphasis in original). The only way that OSE can make this claim is by brushing aside the fact that the scheduling already done was never based on the reasonable convenience of the parent and child. The state regulation’s mandate that OAL “*shall schedule an emergency relief application hearing on the earliest date possible and shall notify all parties of this date,*” N.J.A.C. 1:6A-12.1(d) (emphasis added) (which was ignored in OSE’s brief despite having been acknowledged in OSE’s Report (see Rb34-36; Pa27)) cannot be reconciled with the federal requirement for scheduling at the reasonable convenience of parent and child. This direct conflict between federal and state law supports the reversal of OSE’s decision on this point and the granting of relief sought by ELC in III.D.2. Ab54-55.

Second, OSE contorts ELC’s claim that N.J.A.C. 1:6A-12.1(d) permits parents opposing an emergency relief application to “be heard by telephone on the date of the emergency relief hearing,” *id.*, by baselessly asserting ELC claims that the same regulation “prevents parents” from doing so, Rb35. In fact, ELC’s argument rests on the plain meaning that the state regulation allows a parent opposing an emergency relief application to be heard by telephone while, as confirmed by OSE, ALJs in practice allow telephone participation only “for good cause.” Pa27, Pa19, Fact 62. Again, imposition of a good cause requirement is not

consistent with the state regulations or with the federal requirement for reasonable convenience, so the reversal of OSE’s decision is warranted, as is the relief sought by ELC in III.D.3. Ab55.

Third, OSE disregards IDEA’s mandate that parents be given advance notice in writing of testimony to be taken and evidence to be introduced at a hearing, as well as copies of documents. 34 C.F.R. § 300.512(a)(3) and (b)(1); N.J.A.C. 1:6A-10.1(b) and (c); see also N.J.A.C. 1:6A-12.1(e) (allowing affidavits “to be *supplemented* by testimony and/or oral argument”) (emphasis added). The obligation to provide advance notice is undisputed by OSE. See Rb35.⁶ Instead, OSE claims: “Beyond the citation to an absence of certain language in three decisions, ELC did not proffer any other facts to support its allegations.” Id. However, OSE overlooks the record evidence ELC provided by relying on K.Q. v. Deptford Twp. Bd. of Educ., OAL Dkt. No. EDS 02364-23 (March 23, 2023) (no “Answer... brief, certification, or exhibits” filed by school district in opposition to parent’s ER application yet school district witness allowed to testify), Pa378, n.1, and G.P. and K.P. v. Stratford

⁶ Federal regulations require advance disclosure five business days in advance of evidence and expert reports before testimony is taken in either a due process or expedited hearing. 34 C.F.R. § 300.512(a)(3) & (b); 34 C.F.R. § 300.532(c)(4). N.J.A.C. 6A:14-2.7(o)(3) provides that the exchange of relevant information must take place within two business days of an expedited hearing. See also B.G. v. Ocean City Bd. of Education, 2014 WL 4798647 (D.N.J. Sept. 26, 2014) (holding adult student’s rights violated when district allowed to testify at ER oral argument without advance disclosure of evidence as required by IDEA). Pa194; Ab48.

Boro Bd. of Educ., OAL Dkt. No. EDS 05084-23 (June 14, 2023), (only “a letter brief” submitted by district prior to accepting district testimony), Pa363. Thus, the record fully supports the lack of advance notice to parents prior to being confronted by district testimony in opposition to their ER applications. Accordingly, the relief sought by ELC in Point III.D.4, Ab55, should be granted.

Had OSE believed that further evidence was needed on one or more of these three issues, then it would have been OSE’s duty to investigate, not ELC’s. See Point I.A, supra at 6 (state regulations require that once a complainant files a properly constituted complaint, OSE is responsible for “reviewing, investigating and taking action” on the complaint). OSE’s obligation to investigate is also compelled by its well-established oversight responsibility for IDEA implementation, see Ab Point I, and by its status as “the party with the better access to relevant information,” Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 45 (1989). For all these reasons, OSE’s arguments in Point I.C of its opposition brief, Rb34-36, must be rejected and the relief sought by ELC should be granted.

CONCLUSION

For the reasons set forth above and in Appellant’s opening brief, ELC requests that this Court reverse the sections of OSE’s Report specified above and direct OSE to make the necessary corrections and provide the requested relief.

Respectfully,



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