

Enclosure C

SPECIAL CONDITIONS

1. Basis for Requiring Special Conditions

a. For Biennial Performance Report Conditions

The requirements that States ensure that children with disabilities participate in State and district-wide assessment systems; develop and administer alternate assessments, if necessary; and report publicly on the participation and performance of children with disabilities in State and district-wide assessments are crucial to ensuring that children with disabilities are provided access to high-quality instruction in the general curriculum, and that States and districts are held accountable for the progress of these children. 20 U.S.C. 1412(a)(16)-(17); 34 CFR §§300.137-300.139. The requirements regarding performance goals and indicators and the participation of children with disabilities in, and reporting on participation and performance of children with disabilities in regular assessments have been in effect since July 1, 1998; the requirements regarding reporting on alternate assessments have been in effect since July 1, 2000. According to the information reported to the Department in the Connecticut's Biennial Performance Report for the 2000-2001 school year, Connecticut is not reporting publicly on the performance of children with disabilities on alternate assessments in the same frequency and detail as for nondisabled children as required by Part B of the Individuals with Disabilities Education Act (IDEA).

Therefore, Connecticut has not complied with all the terms and conditions of the Federal Fiscal Year 2001 awards under Part B of IDEA. Under the authority of the Education Department General Administrative Regulations, 34 CFR §80.12, the Department is imposing these Special Conditions on Connecticut's Federal Fiscal Year 2002 awards under Part B of the IDEA.

b. For the PPT Limitation on IDEA Due Process Hearing Conditions

Connecticut has established a limitation on IDEA due process hearings at Ct. Stat. Ann. §10-76h(a)(1), Ct. Reg. §10-76h-3(h) and also in other eligibility documents (including Section VII.E. of the May 20, 2002 Procedural Safeguards document). Connecticut requires that parents and school districts must raise issues at its planning and placement team meetings (PPT) or be barred from raising them at IDEA due process hearings, which impermissibly restricts parties' due process hearing rights.

As explained in more detail below, Connecticut's PPT limitation on due process hearings is inconsistent with a parent's statutory rights under 20 U.S.C. §§1415(f)(1) and (b)(6) to a due process hearing on "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education [FAPE] to the child" because it is likely to result in the denial and/or delay of a due process hearing on issues not raised at a PPT meeting. The PPT limitation also severely

undermines both the purpose of an individualized education plan (IEP) meeting and Congress' efforts to foster the early resolution of disputes in 1997 when Congress added mediation, notice and attorneys' fee provisions to the IDEA. Unlike other State-enacted alternative dispute resolution mechanisms designed to encourage settlement, the PPT limitation increases substantially the potential for an adversarial atmosphere at the IEP meeting by forcing parents to consult and involve attorneys earlier in the process, participation that is clearly discouraged by the IDEA and its implementing regulations.

One of the express purposes of the IDEA is "to ensure that the rights of children with disabilities and their parents are protected." 20 U.S.C. §1401(d)(1)(B). Among those rights is the right to a due process hearing on any of the matters listed under 20 U.S.C. §1415(b)(6). The statute provides that "whenever" a due process hearing is requested, the parents are afforded an opportunity for that hearing. It states that "[w]henver a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. §1415(f)(1). Under the IDEA regulations, a party is entitled to have a due process hearing decision within 45 days of the due process hearing request. 34 C.F.R. §300.511.

Under 20 U.S.C. §1415(f)(1), State law controls whether (and to some degree how) the hearing is conducted by the State or local educational agency and whether the due process hearing process is one- or two-tiered. State law does not control, however, whether the hearing is conducted at all or whether the State can delay the holding of a hearing by requiring additional mandatory meetings or steps that delay the hearing or the issuance of a timely hearing decision. As the Second Circuit has made clear, "state procedures which more stringently protect the rights of the handicapped and their parents are consistent with the EHA and thus enforceable, ... those that merely add additional steps not contemplated in the scheme of the Act are not enforceable." Antkowiak by Antkowiak v. Ambach, 838 F.2d 635, 641 (1988), cert. denied, 448 U.S. 850, 109 S. Ct. 133 (1988). *See also*, 20 U.S.C. §1415(l) (containing IDEA's express exhaustion provision) and Mrs. C. v. Wheaton, 916 F. 2d 69, 73 (2nd Cir. 1990) ("The EHA incorporates state substantive standards as the governing federal rule only if they are consistent with, and at least as exacting as the EHA provisions.").

Of greatest concern to the Department is the very likely effect of Connecticut's PPT limitation, namely a significant delay in the issuance of a due process hearing decision by requiring parents who failed to raise all issues in their first PPT meeting to request an additional meeting and then request another hearing. Because the Connecticut statute imposes an additional burden (i.e., additional steps and delays) on the right of parents to obtain a due process hearing, an additional burden that is not contemplated by the IDEA, it cannot be squared with the IDEA.

In 1997, Congress specifically amended the IDEA to address the concern that appears to have led to enactment of Connecticut's PPT statutory provision in 1995 – how to encourage early resolution of disputes between parents and school districts over the

education of children with disabilities. Among the changes made were the addition of voluntary mediation and two new notice requirements that were imposed on parents.

First, Congress specifically added the requirement that the State offer mediation to resolve disputes between parents and school districts, which must be available at least “whenever a hearing is requested under subsection (f) or (k).” 20 U.S.C. §1415(e)(1). As noted above, subsection (f) of the IDEA provides that “[w]henver a complaint has been received . . . , the parents involved in such a complaint shall have the opportunity for an impartial due process hearing” 20 U.S.C. §1415(f)(1). Congress noted that “in States where mediation is being used, litigation has been reduced, and parents and schools have resolved their differences amicably, making decisions with the child’s best interest in mind.” H.R. Rep. No. 105-95 at 106. However Congress also expressly provided that mediation must be voluntary for both parties and may not be used “to deny or delay a parent’s right to a due process hearing under subsection (f), or to deny any other rights afforded under this part.” 20 U.S.C. §1415(e)(2). The Senate noted that its bill “reduces potential conflict between local educational agencies and parents of children with disabilities by requiring States to make mediation available to such parents, on a voluntary basis. The [Senate] committee believes that the use of mediation can resolve disputes quickly and effectively, and at less cost.” S. Rep. No. 104-275 at 53. Thus, States are free to offer mediation even before a hearing is requested, but may not condition access to a due process hearing on a failure to use available mediation first. Connecticut’s PPT limitation on due process hearings is akin to a mandatory mediation meeting, clearly prohibited by Congress under 20 U.S.C. §1415(e)(2). In addition, it will delay a due process hearing for any parents who fail to raise all of their issues at the PPT meeting.

Second, Congress added a notice requirement for parents in 1997 to ensure that school districts would have an adequate opportunity to redress the underlying issues that are in dispute. With the request for a due process hearing, and not before, the parents are required to provide notice to the school describing the “nature of the problem, . . . including facts relating to the problem” and “a proposed resolution of the problem to the extent known and available to the parents.” 20 U.S.C. §1415(b)(7). Failure to provide this notice does not prohibit the parent from proceeding with a due process hearing on any issue under 20 U.S.C. §1415(b)(6). Rather, it can result in a reduced attorneys’ fee award if the parent was represented by an attorney. 20 U.S.C. §1415(i)(2)(F)(iv). With regard to this change, the House and Senate conference committee reports note “[t]he committee believes that the addition of this provision [the notice requirement] will facilitate an early opportunity for schools and parents to develop a common frame of reference about problems and potential problems that may remove the need to proceed to due process and instead foster a partnership to resolve problems.” H. Rep. No. 105-95 at 105; S. Rep. No. 105-17 at 25.

Also of great concern to the Department is the potential effect of Connecticut’s PPT limitation, namely the greater likelihood that parties will enter the IEP meeting in an adversarial posture. IEP meetings are intended to be collaborative so that parents and school officials can jointly work out the right educational services and placement for the

child. *See*, 20 U.S.C. §1414(d); 34 C.F.R. §§300.340-300.350. The Connecticut PPT limitation fosters a litigious environment at IEP meetings as it forces parents to seek to ensure that every issue that they may need to take to hearing has been properly raised in that forum first, and thereby encourages parents to consult attorneys at an even earlier stage in the process and even bring attorneys with them to IEP meetings. By contrast, Congress amended the IDEA in 1997 to specifically discourage the participation of attorneys in IEP meetings. Specifically, Congress prohibited the award of attorneys' fees "relating to any meeting of the IEP team unless such meeting is convened as a result of an administrative proceeding or judicial action" 20 U.S.C. §1415(i)(3)(D)(ii). Congress noted that "an IEP meeting shall not, in and of itself, be deemed to be a proceeding triggering the awarding of attorneys' fees." S. Rep. No. 104-275 at 53. The House and Senate conference committee reports note "that the IEP process should be devoted to determining the needs of the child and planning for the child's education with parents and school personnel. To that end, the bill specifically excludes the payment of attorneys' fees for attorney participation in IEP meetings, unless such meetings are convened as a result of an administrative proceeding or judicial action." H. Rep. No. 105-95 at 105; S. Rep. No. 105-17 at 25-6.

The Department has also, through its IDEA regulations, discouraged the participation of attorneys at IEP meetings, as their presence could create an adversarial atmosphere not consistent with the purpose of the meeting. 64 Fed. Reg. 12478, question 29 (March 12, 1999). As noted in the Discussion to the 1999 IDEA regulations that implement the IDEA amendments of 1997, "an attorney's presence would have the potential for creating an adversarial atmosphere [at the IEP meeting] that would not be in the best interests of the child. Therefore, the attendance of attorneys at IEP meetings should be strongly discouraged" *Id.*

The two major effects of the PPT limitation, a significant delay or denial of the due process hearing decision by the requirement of an additional mandatory process and the increased adversarial nature of IEP meetings are inconsistent with the IDEA. Therefore, Connecticut has not complied with all the terms and conditions of Part B of IDEA. Under the authority of the Education Department General Administrative Regulations, 34 CFR §80.12, the Department is imposing these Special Conditions on Connecticut's Federal Fiscal Year 2002 grant awards under Part B of the IDEA.

2. Nature of the Special Conditions

a. For Biennial Performance Report Conditions

By May 30, 2003, Connecticut must demonstrate that it is reporting to the public and to the Secretary on the performance of children with disabilities on its alternate assessments as required at 20 U.S.C. §§1412(a)(16)-(17) and 34 CFR §§300.137-300.139. The following are the specific actions Connecticut must take.

- i. By October 30, 2002, Connecticut will submit a plan detailing the steps and timelines for reporting on performance of children with disabilities on alternate assessments by May 30, 2003.
- ii. Connecticut will submit progress reports on November 29, 2002, January 31, 2003, March 28, 2003 and the final submission due on May 30, 2003. The final submission that includes information on the reporting of the performance of children with disabilities on alternate assessments is to be submitted on the Biennial Performance Report format provided by OSEP. (This format is available at <http://www.ed.gov/offices/OSERS/OSEP/Monitoring/>.)

b. For the PPT Limitation on IDEA Due Process Hearing Conditions

- i. In recognition of the separation of powers issues raised by Connecticut's August 2, 2002 letter, the Department requires that the Connecticut State Board of Education must make good faith efforts to support in the next session of the Connecticut General Assembly a legislative amendment to remove the mandatory PPT limitation on due process hearings at Ct. Stat. Ann. §10-76h(a)(1) to ensure that the right to a due process hearing is not delayed.
- ii. During the grant period, Connecticut must comply with the provisions of the IDEA, which do not prohibit a party from raising in a due process hearing an issue that was not raised in a PPT meeting.
- iii. CSDE must make progress reports to OSEP on its efforts to amend the PPT requirement: by November 29, 2002 (with a draft of its proposed legislative amendment and its revised interpretations of or revisions to its regulation and any other eligibility documents containing the PPT requirement); by January 31, 2003 (with the proposed statutory amendments submitted to the legislature as Connecticut's state legislature next convenes on January 8, 2003); by March 28, 2003 (to report on the legislature's progress); and with a final submission by June 9, 2003 (the Monday following the June 4, 2003 close of Connecticut's state legislature). Connecticut must inform school districts and parents of the status of its legislative amendments and the deletion of its PPT limitation on due process hearings by memo or other documentation and provide in its progress reports to OSEP copies of this documentation.

3. Evidence Necessary for Conditions To Be Removed

a. For Biennial Performance Report Conditions

The Department will remove the Special Conditions on the biennial performance report if, at any time prior to the expiration of the grant year, Connecticut provides documentation, satisfactory to the Department, that it has fully met the requirements to report on the performance of children with disabilities on alternate assessments. This information is to be submitted on the Biennial Performance Report format provided by

OSEP. (This format is available at [http://www.ed.gov/offices/OSERS/OSEP/Monitoring/.](http://www.ed.gov/offices/OSERS/OSEP/Monitoring/))

b. For the PPT Limitation on IDEA Due Process Hearing Conditions

The Department will remove the Special Conditions on Connecticut's PPT requirement if, at any time prior to the expiration of the grant year, Connecticut provides documentation, satisfactory to the Department, that: (1) Connecticut State legislature has deleted the PPT limitation on due process hearings from Ct. Stat. Ann. 10-76h(a)(1); and (2) Connecticut has deleted this limitation from (a) Connecticut's Reg. §10-76h-3(h) and Procedural Safeguards documents (Procedural Safeguards documents, page 318, section J of the original and Section VII.E. of the May 20, 2002 submission) and (b) any other Connecticut documents that contain this requirement for IDEA Part B due process hearings; and (3) Connecticut has informed school districts and parents of the deletion of its PPT limitation on due process hearings by memo or other documentation. The foregoing information is to be submitted by letter addressed to the OSEP Part B contact for Connecticut, Margaret Romer, whose contact information is listed below.

4. Method of Requesting Reconsideration

The State may write to the Assistant Secretary for the Office of Special Education and Rehabilitative Services, if the State agency wishes the Department to reconsider any aspect of these Special Conditions. Any request should describe in detail the changes to the Special Conditions sought by the State and the reasons for those requested changes.

5. Submission of Reports

All reports that are required to be submitted by Connecticut to the Department under the Special Conditions should be submitted to:

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Washington, DC 20202
Tel.: (202) 205-9131
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