Honorable Kerri L. Briggs
Acting State Superintendent
Office of the State Superintendent
Government of the District of Columbia
441 4th Street, NW
Suite 350 North
Washington, DC 20001

Dear Dr. Briggs:

I am writing in response to your June 16, 2009 letter in which the District of Columbia Office of the State Superintendent for Education (OSSE) requests a hearing to appeal the decision in the June 1, 2009 letter issued by the Office of Special Education Programs (OSEP), indicating the U.S. Department of Education’s (Department’s) intent to withhold 20 percent of the District of Columbia’s (DC’s) Federal Fiscal Year (FFY) 2009 funds reserved for State-level activities under section 611(e) of the Individuals with Disabilities Education Act (IDEA) in accordance with IDEA section 616(e)(2)(B)(iii) and 34 C.F.R. §300.604(b)(2)(iii). The Department has calculated the withholding amount to be $479,959, out of the total State set-aside of $2,399,795 under IDEA section 611(e) and out of the total regular and American Recovery and Reinvestment Act of 2009 (ARRA) FFY 2009 section 611 and section 619 grants of $33,922,108.

In your letter of June 16, 2009, OSSE also sets forth its position with regard to the opportunity to show cause why the Department should not suspend payment of those funds pending the outcome of the hearing in accordance with IDEA section 616(e)(4)(B) and 34 C.F.R. §300.605(b). OSSE does not contest the determination in the June 1, 2009 letter that DC continues to "need intervention" in meeting the requirements of Part B of the IDEA.

With regard to the request for a hearing, the Department has granted OSSE’s request to have a hearing pursuant to the procedures in 34 C.F.R. §§300.180 through 300.183 “to appeal the Department’s decision to withhold these funds” in accordance with IDEA section 616(e)(4)(A) and 34 C.F.R. §300.605(a). Under 34 C.F.R. §300.181(b), within 15 days after receiving a request for a hearing, the Secretary designates a Hearing Official or Hearing Panel and notifies the parties. You have been informed regarding the designation of a Hearing Official.
With regard to the opportunity to show cause, I have carefully considered the arguments made in your letter and concluded that OSSE has failed to show cause why 20 percent of OSSE’s FFY 2009 funds reserved for State-level activities under section 611(e) of the IDEA should not be suspended pending the outcome of the hearing. The basis of the decision indicating our intent to withhold funds was not based on a “snapshot of the past” or “the fact that a prior compliance agreement with a different State agency from 10 years ago did not result in compliance,” as argued in your letter of June 16, 2009. Under IDEA section 616(d)(2), the Secretary must annually make a determination based on information provided by the State in the Annual Performance Report (APR), information obtained through monitoring visits, and any other public information made available. In making its determination and selecting an enforcement action, the Department considered, among other things, the more updated data provided from 2008-2009 in the FFY 2008 Special Conditions Progress Reports, as well as data from FFY 2007 (July 1, 2007 through June 30, 2008) provided in OSSE’s FFY 2007 APR submitted on February 1, 2009.

In last year’s June 17, 2008 determination letter, we specifically stated that we did not place OSSE in “needs substantial intervention,” which would have required the Department to take more serious enforcement action, because we recognized that OSSE had taken over State-level responsibilities on October 1, 2007 and was beginning to implement several reform initiatives designed to improve its special education program. We advised OSSE that we expected the District “to make significant progress during the 2008-2009 school year in satisfying the Special Conditions and meeting the requirements of the IDEA” and we intended to “carefully review the District’s level of progress, to determine if further corrective measures are necessary.”

Despite the fact that there has been some improvement in some areas, which we acknowledged in the June 1, 2009 determination letter, the District has not made “significant progress.” We do not agree that “present-day facts and circumstances are materially different.” OSSE continues to report low levels of compliance with many basic requirements of Part B of the IDEA. For example, OSSE reported in the final FFY 2008 Special Conditions Report, which covered the period from December 18, 2008 through April 18, 2009, that only 56 percent of children whose initial evaluation deadlines fell within the reporting period received a timely initial evaluation and only 47.2 percent of children with disabilities whose reevaluation deadlines fell within the reporting period received a timely reevaluation. This means that 44 percent of children did not receive a timely initial evaluation and 52.8 percent of children with disabilities did not receive a timely reevaluation during the reporting period. OSSE did not address these two longstanding areas of noncompliance, over ten years old, in its June 16, 2009 letter. The failure of a State to ensure the provision of a timely initial evaluation and reevaluation results in a delay in the determination of whether a child is or continues to
be a child with a disability and in the provision of services that appropriately meet a child’s current educational needs.

Additionally, OSSE reported in the final FFY 2008 Special Conditions Report that only 34.54 percent of hearing officer decisions were implemented in a timely manner during the reporting period of December 18, 2008 through April 18, 2009. This means that 65.46 percent of hearing officer decisions were not implemented in a timely manner during the reporting period. In the June 16, 2009 letter, OSSE reported that “for the reporting period of July 1, 2007 to June 30, 2008, the timely implementation of due process hearing decisions with due dates was at 37.1%” and “recently compiled data reveal that measurable progress in that timely implementation has risen to 56.5% from July 1, 2008 through May 31, 2009 for all due process hearing decisions with due dates.”

This means that from July 1, 2008 through May 31, 2009, 43.5 percent of hearing officer decisions with due dates were not implemented in a timely manner. This is also a longstanding area of noncompliance that is over 10 years old. The implementation of hearing officer decisions in a timely manner ensures that a child with a disability is not denied the services a hearing officer has determined are necessary for the child to receive a free appropriate public education. This is an essential part of establishing an effective due process system.

One of the State’s most critical functions under the IDEA is the development and implementation of a general supervision system that is capable of identifying noncompliance with the requirements of Part B of the IDEA by local educational agencies (LEAs) and ensuring the noncompliance is corrected as soon as possible, and in no case later than one year after the State’s identification of the noncompliance. OSSE is responsible for monitoring the implementation of Part B of the IDEA in the District of Columbia Public Schools (DCPS) and charter schools that elect to be treated as LEAs for the purpose of the IDEA. OSEP first identified DC’s failure to ensure identification and timely correction of noncompliance under Part B of the IDEA in its June 18, 2002 monitoring report. This area of noncompliance was first addressed in the Special Conditions on DC’s FFY 2005 IDEA Part B grant and has continued on each grant to DC since that time. Therefore, when OSSE took over State-level education responsibilities on October 1, 2007, it was aware the lack of an effective monitoring system was part of the Special Conditions imposed on DC’s IDEA Part B grant award. Further, DC’s failure to effectively monitor compliance with the requirements to ensure placement in the least restrictive environment has been included in the Special Conditions on each IDEA Part B grant award from FFY 2001 to the present. Yet, OSSE has not yet implemented an effective monitoring system. The June 1, 2009 determination letter acknowledged that OSSE has developed a self-assessment and a monitoring manual that were submitted with the May 15, 2009 progress report. In the June 16, 2009 letter, you report that OSSE commenced focused monitoring of LEAs in May 2009. While these are positive steps, it still means that DC has not demonstrated that it has an effective monitoring system, and
the Department cannot yet determine how effective the system will be in identifying and correcting noncompliance with the requirements of Part B of the IDEA.

For the third consecutive year, DC did not provide valid and reliable data for Indicators 9 and 10. These indicators measure whether any districts have disproportionate representation of racial and ethnic groups in special education and related services and in specific disability categories that was the result of inappropriate identification. This is an important way to ensure that students, especially those from racial and ethnic minorities, are identified as students with disabilities and in specific disability categories only using appropriate identification procedures. All States are required to provide data for these indicators, except for those whose student population consists entirely of a single race or ethnicity. Other States with LEAs whose student population consists primarily of a single racial or ethnic group have been able to provide valid and reliable data for these indicators; therefore there is no reason why OSSE should not be able to do so.

For two consecutive years, DC did not provide valid and reliable data for Indicator 17 regarding the percent of adjudicated due process hearing requests that met the timeline required by 34 C.F.R. §300.515. The issuance of timely due process decisions is a key component of an effective due process system. In DC’s FFY 2007 APR, submitted on February 1, 2009, OSSE reported that methods used prior to August 11, 2008 yielded unreliable data. In your June 16, 2009 letter, you indicated that OSSE has remedied the problem so that valid and reliable data can be provided for FFY 2008 and you provided data from January 2009 through April 2009. If OSSE is able to provide valid and reliable data on the percent of adjudicated due process hearing requests that met the required timeline from August 11, 2008 through June 30, 2009, OSEP will consider OSSE to have sufficiently addressed this area in which the State “needs intervention.”

OSSE has also failed to demonstrate progress in the area of secondary transition, which enables a student to make a successful transition from school to post-school activities, including postsecondary education, vocational education, integrated employment and independent living. OSSE reported only 29.15 percent compliance in its FFY 2007 APR for Indicator 13, which measures the percentage of youth aged 16 and above with an individualized education program (IEP) that includes coordinated, measurable, annual IEP goals and transition services that will reasonably enable the student to meet the post-secondary goals. This represents slippage from the already low FFY 2006 compliance level of 54 percent. Further, the State was unable to demonstrate it corrected prior noncompliance related to these requirements. OSSE did not address this area of noncompliance in its June 16, 2009 letter.

We appreciate the initiatives OSSE is undertaking to correct deficiencies in its special education program and the stated commitment the new leadership has made to the reform of special education protections and services. However, the Department can no longer delay more serious enforcement action because of new leadership or a new agency. DC
has a long history of turnover in the administration of the school system as a whole and in the administration of its special education program in particular. In the last three years, there have been four special education directors. In prior years when we have declined to take more serious enforcement action because new leadership had just arrived, the District continued to fail to meet many of the basic requirements of Part B of the IDEA. While the State organization and leadership changes, deficiencies in addressing the needs of children with disabilities remain, and many continue to be denied the free appropriate public education which they are entitled to under Part B of the IDEA.

This year, the third consecutive year that DC “needs intervention” in meeting the requirements of Part B of the IDEA, IDEA section 616(e)(2)(B) compels the Department to take one or more of six specified enforcement actions. We thus expressed our intent to withhold 20 percent of OSSE’s FFY 2009 funds reserved for State-level activities under section 611(e) of the IDEA until DC has sufficiently addressed the areas in which it “needs intervention.” None of the IDEA Part B funds that are distributed to DCPS and charter school LEAs for the provision of special education and related services are subject to the Department’s enforcement action. We understand that withholding these funds may have an impact on State-level activities, but any time the Department withholds funds, an option Congress provided in the IDEA, there will be an impact. We chose to indicate an intent to withhold the smallest percentage of State set-aside funds that is permissible under IDEA section 616(e)(2)(B)(iii). As a result, OSSE would receive 80 percent of its FFY 2009 funds reserved for State-level activities under section 611(e) of the IDEA.

OSSE proposed that the Department, in the alternative, enter into an agreement with DC to enable OSSE to remain eligible to receive 20 percent of its FFY 2009 funds for State-level activities as a means of bringing about compliance. We have entered into agreements with DC before with little result. For example, every year since FFY 2001, the Department has imposed Special Conditions on DC’s grant award under Part B of the IDEA. DC has assured the Department that it will meet all grant terms and conditions and all applicable requirements, but it has not carried out its commitments. Agreements alone with no consequences have repeatedly failed to result in DC achieving compliance with critical requirements of Part B of the IDEA. Therefore, in addition to imposing Special Conditions under section 616(g) of the IDEA and 34 C.F.R. §80.12, the Department is exercising its authority to indicate its intent to withhold 20 percent of DC’s FFY 2009 funds reserved for State-level activities under section 611(e) of the IDEA until DC has sufficiently addressed the areas in which it “needs intervention.”

The Department is not taking this enforcement action lightly. It is only after ten years of documented noncompliance that continues to the present day that we have determined our intention to withhold, and to suspend 20 percent of OSSE’s FFY 2009 funds reserved for State-level activities under section 611(e) of the IDEA. When OSSE can demonstrate
to the Department’s satisfaction that it has sufficiently addressed each of the areas in which the State “needs intervention,” the Department will release those funds. We believe that this enforcement action is necessary and appropriate and will accelerate OSSE’s progress in correcting noncompliance with the fundamental requirements of Part B of the IDEA, and ultimately result in positive benefits for DC’s children with disabilities. For all of the reasons noted above, we do not believe that OSSE has provided sufficient cause why the Department should not suspend payment of 20 percent of OSSE’s FFY 2009 funds reserved for State-level activities under section 611(e) of the IDEA in accordance with IDEA section 616(e)(4)(B) and 34 C.F.R. §300.605(b) pending the outcome of the hearing. Therefore, the Department declines to reverse its decision and will suspend payment of 20 percent of OSSE’s FFY 2009 section 611 funds reserved for State-level activities pending the outcome of the hearing you requested. We look forward to DC’s future compliance with the applicable requirements of Part B of the IDEA.

Sincerely,

Andrew J. Pepin
Executive Administrator
delegated the authority to
perform the functions of the
Assistant Secretary for OSERS