



City of New York

OFFICE OF THE COMPTROLLER

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MANAGEMENT AUDIT

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Deputy Comptroller for Audit

Audit Report on the Department of
Education's Adjudication of Alleged
Teacher Misconduct and Incompetence
Cases

ME13-109A

January 6, 2015

<http://comptroller.nyc.gov>



THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
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NEW YORK, NY 10007

SCOTT M. STRINGER
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January 6, 2015

To the Residents of the City of New York:

My office has audited the Department of Education (DOE) to determine whether its Administrative Trials Unit (ATU) and Teacher Performance Unit (TPU) effectively tracked the teacher misconduct and incompetence case referrals they received and whether the misconduct and incompetence charges served on tenured teachers were adjudicated within the required timeframes. We conduct audits of efforts such as these in order to ensure that City agencies are meeting their responsibilities in a timely manner.

The audit identified weaknesses relating to DOE's handling of teacher misconduct and incompetence cases. In particular, the audit determined that ATU failed to track the teacher misconduct referrals it received. In addition, the audit also found that DOE did not adequately track the ATU and TPU cases for which charges had been served to help ensure that these cases were adjudicated in a timely manner. Finally, the audit found that approximately 36 percent of the misconduct and incompetence cases filed in School Year 2011-2012 were not completed within the required timeframe of 115 days.

The audit makes four recommendations to DOE: that ATU track its handling of all of the teacher misconduct referrals that it receives; that ATU prepare written case closure statements for those referrals that do not lead to charges being served; that ATU and TPU actively monitor the overall timeliness of their adjudication of teacher misconduct and incompetence cases; and that ATU and TPU track the amount of time that occurs between key events so that they are able to readily determine where delays in the adjudication process are occurring.

The results of this audit have been discussed with DOE officials, and their comments have been considered in preparing this report. Their complete written response is attached to this report.

If you have any questions concerning this report, please e-mail my audit bureau at audit@comptroller.nyc.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "Scott M. Stringer".

Scott M. Stringer

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THE CITY OF NEW YORK OFFICE OF THE COMPTROLLER MANAGEMENT AUDIT

Audit Report on the Department of Education's Adjudication of Alleged Teacher Misconduct and Incompetence Cases

ME13-109A

EXECUTIVE SUMMARY

This audit examined whether the Department of Education (DOE), the largest school system in the United States, effectively tracks the teacher misconduct and incompetence referrals it receives and whether the misconduct and incompetence charges served on tenured teachers are adjudicated within the required timeframes. The audit's primary scope was referrals received and charges filed against tenured teachers during School Year 2011-2012.¹

On April 15, 2010, DOE and the United Federation of Teachers (UFT) entered into an agreement intended to improve the timeliness of the investigation and adjudication of allegations of teacher misconduct and incompetence. The agreement established new procedures for these cases which, in conjunction with New York State Education Law Article 61, §3020, Discipline of Teachers, and §3020-a, Disciplinary Procedures and Penalties, set a timeframe of 115 days to resolve these cases, starting from the day that misconduct or incompetence charges are filed against a tenured teacher and concluding on the day that the assigned arbitrator renders a decision.

DOE has two units that handle the adjudication of these cases: the Administrative Trials Unit (ATU), which handles teacher misconduct cases, and the Teacher Performance Unit (TPU), which handles incompetence cases. ATU and TPU records indicate that at least 187 tenured teachers were charged with misconduct and at least 91 tenured teachers were charged with incompetence during School Year 2011-2012.

Audit Findings and Conclusion

The audit identified weaknesses relating to DOE's handling of teacher misconduct and incompetence cases. In particular, the audit determined that ATU failed to track the teacher misconduct referrals it received. As a result, it was not possible for the auditors or DOE to determine whether ATU served charges for all of the misconduct referrals that it received or whether it prepared written case closure statements for all of those referrals for which it did not

¹ The audit reviewed the handling of School Year 2011-2012 incompetence cases through November 20, 2013, and School Year 2011-2012 misconduct cases through January 18, 2014.

serve charges. In addition, the audit also found that DOE did not adequately track the ATU and TPU cases for which charges had been served to help ensure that these cases were adjudicated in a timely manner. Finally, the audit found that approximately 36 percent of the misconduct and incompetence cases filed in School Year 2011-2012 were not completed within the required timeframe of 115 days.

DOE provided documentation showing that it is in the process of developing computer-based case tracking applications for its ATU and TPU cases. DOE currently maintains information on its ATU and TPU cases in Access databases. We recommend that until the new case tracking applications are available, DOE use its existing Access databases to track teacher misconduct referrals and to more effectively track its teacher misconduct and incompetence adjudications.

While the 115 day timeframe was not met in 36 percent of the cases, the audit found that most of the misconduct and incompetence charges that were filed against tenured teachers during School Year 2011-2012 were resolved by the end of the following school year. Specifically, by June 30, 2013, 178 (95 percent) of the 187 misconduct cases and 87 (96 percent) of the 91 incompetence cases had been resolved either through a settlement or an arbitrator's decision.

Audit Recommendations

To address these issues, the audit recommends that:

- ATU track its handling of all of the teacher misconduct referrals that it receives to ensure that timely action is taken on each referral.
- For those referrals that do not lead to ATU serving charges, ATU ensure that written case closure statements are prepared.
- DOE actively monitor the overall timeliness of its adjudication of teacher misconduct and incompetence cases.
- DOE track the amount of time that occurs between key events (such as the time between the pre-hearing conference and the last hearing on a case) so that it is able to readily determine where delays in the adjudication process are occurring.

Agency Response

In their response, DOE officials disagreed with the main findings of the audit and claimed that they were already implementing two of the audit's recommendations and that they will be implementing the other two when the new case tracking system is complete.

We note that the development of the new case tracking system began in June 2012 and is not scheduled to be completed until the end of the current school year. While the system is being developed, DOE has Access databases of its cases that it could use to systematically track those cases. DOE provided no evidence to auditors that it actively tracks cases in a comprehensive and systematic way so that it can identify those that exceed, or are at risk of exceeding, the timeframe of 115 days, or to identify those steps in the adjudication process at which delays are occurring. Additional comments on DOE's responses to the audit's findings and recommendations are presented in the body of the report.

AUDIT REPORT

Background

As the largest public school system in the United States, DOE serves roughly 1.1 million students in 1,800 schools, employs approximately 75,000 teachers and has an annual budget of about \$24 billion.

On April 15, 2010, DOE and the UFT entered into an agreement intended to improve the timeliness of the investigation and adjudication² of alleged teacher misconduct and incompetence cases. The agreement established new procedures for these cases which, in conjunction with New York State Education Law Article 61, §3020, Discipline of Teachers, and §3020-a, Disciplinary Procedures and Penalties, set a timeframe of 115 days³ to resolve these cases, starting from the day that misconduct or incompetence charges are filed against a tenured teacher⁴ and concluding on the day that the assigned arbitrator renders a decision. According to the 2010 agreement, teachers accused of misconduct or incompetence are generally assigned administrative work in DOE offices or non-classroom duties in their schools at full pay while their cases are being resolved.

DOE has two units that handle the adjudication of these cases: ATU, which handles teacher misconduct cases, and TPU, which handles incompetence cases. ATU's and TPU's records indicate that at least 187 tenured teachers were charged with misconduct and at least 91 tenured teachers were charged with incompetence during School Year 2011-2012. DOE maintains information on its ATU and TPU cases in Access databases.

Objective

The objective of this audit was to determine whether DOE's ATU and TPU offices effectively tracked the teacher misconduct and incompetence case referrals they received and whether the misconduct and incompetence charges served on tenured teachers were adjudicated within the required timeframes.

Scope and Methodology Statement

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the New York City Charter.

² An adjudication consists of an order, judgment, or decree rendered by a court or administrative tribunal.

³ The 115 days exclude holidays and winter, mid-winter, spring, and summer breaks.

⁴ Under New York State law, teachers achieve tenure after completing a probationary period (usually three years) and fulfilling all the requirements for the professional certificate. Tenured teachers have the right to a hearing before an independent arbitrator regarding any charges filed against them.

The primary scope of the audit was referrals received and charges filed against tenured teachers during School Year 2011-2012. Our review included DOE's adjudication efforts on these charges through November 20, 2013, for the incompetence cases and through January 18, 2014, for the misconduct cases. Please refer to the Detailed Scope and Methodology at the end of this report for a discussion of the specific procedures followed and the tests conducted during this audit.

Discussion of Audit Results with DOE

The matters covered in this report were discussed with DOE officials during and at the conclusion of this audit. A preliminary draft report was sent to DOE officials on August 15, 2014, and was discussed at an exit conference held on September 10, 2014. On October 7, 2014, we submitted a draft report to DOE officials with a request for comments. We received a written response from DOE on October 27, 2014. In their response, DOE officials disagreed with the main findings of the audit.

DOE stated that the report "omits key facts," but fails to identify what exactly it contends was omitted. DOE also stated that the report "deeply buries" other facts "in the text." The only evidence that DOE offers to support this claim, however, is our use of one footnote.

Regarding the audit's four recommendations, DOE officials stated that they were already implementing two and that they will be implementing the other two when the new case tracking system is complete. During the audit and again in its response, DOE argues that this case tracking system is necessary to allow the agency to track the timeliness of its cases. We acknowledge in several places in the audit report that the agency has been developing this system since June 2012 and that the system is scheduled to be completed by the end of the current school year. However, we recommend that DOE use other processes to systematically track its cases in the meantime. As our report points out, DOE already has Access databases of its cases that it could use to systematically track its cases. DOE has offered no evidence that it actively tracks cases in such a way that it can identify cases that exceed, or are at risk of exceeding, the timeframe of 115 days, or to identify those steps in the adjudication process at which delays are occurring.

Additional comments on DOE's responses to the audit's findings and recommendations are presented in the body of the report, and DOE's written response in its entirety is included as an addendum to this report.

FINDINGS AND RECOMMENDATIONS

The audit identified the following weaknesses relating to DOE's handling of misconduct and incompetence cases:

- DOE failed to track the misconduct referrals that ATU received for adjudication,
- DOE did not adequately track the adjudications of the ATU and TPU cases for which charges had been served to help ensure that they were conducted in a timely manner, and
- Approximately 36 percent of the School Year 2011-2012 misconduct and incompetence cases were not completed within the required timeframe of 115 days.

DOE provided documentation showing that it is in the process of developing computer-based case tracking applications for its ATU and TPU cases. DOE currently maintains information on its ATU and TPU cases in Access databases. Until the new applications are available, we recommend that DOE use its existing Access databases to track teacher misconduct referrals and to more effectively track its teacher misconduct and incompetence adjudications.

The audit found that most of the misconduct and incompetence charges that were filed against tenured teachers during School Year 2011-2012 were resolved by the end of the following school year. Specifically, by June 30, 2013, 178 (95 percent) of the 187 misconduct cases and 87 (96 percent) of the 91 incompetence cases had been resolved either through a settlement or an arbitrator's decision.

DOE Did Not Track Teacher Misconduct Referrals

DOE did not track the teacher misconduct referrals that ATU received for adjudication from various sources, including DOE's Office of Special Investigations (OSI), Office of Equal Opportunity, Office of Personnel Investigation, Office of the Auditor General, principals, and superintendents, as well as the Special Commissioner of Investigation for the New York City School District, and the Conflicts of Interest Board. In response to a request by the audit team, ATU said that it could not provide a comprehensive list of all of the misconduct referrals that it received during School Year 2011-2012. As a result, neither we nor DOE could determine whether ATU served charges for all of the misconduct referrals that it received or whether it prepared written case closure statements for all of the referrals for which it did not serve charges.

OSI, in particular, is the source of many of the teacher misconduct cases sent to ATU. OSI investigates allegations of misconduct by DOE employees, vendors, contractors, and PTA board members and is primarily responsible for investigating allegations of the corporal punishment or verbal abuse of students. Substantiated complaints that involve tenured teachers are referred by OSI to ATU for adjudication and disciplinary procedures. However, OSI officials said that they were unable to provide us with a list of the substantiated complaints that they had referred to ATU during School Year 2011-2012.

As a result of its failure to track misconduct referrals to ATU, DOE had no assurance that all of the complaints referred to ATU either led to charges being served or to written case closure

statements being prepared. DOE also had no assurance that these referrals had been processed in a timely manner.

Recommendations

1. ATU should track its handling of all of the teacher misconduct referrals that it receives to ensure that timely action is taken on each referral.

DOE Response: “Before the audit began, the DOE had taken significant steps to create a tracking system for ATU and TPU cases. The database is currently in the building phase and it is anticipated that the system will be functional by the end of the current school year. To the extent that the recommendation implies that the delays in case adjudication are attributable to the current lack of such a system, the DOE strongly disagrees. More importantly, the DOE never stated nor implied that ATU had no assurance that referred cases were processed in a timely manner. Nor would such a statement be necessary as there is no statutory time proscribed by the Education Law in which referred cases need to be reviewed or processed prior to acceptance for formal charges.”

Auditor Comment: DOE’s response to this recommendation confuses the issue of the ATU tracking of teacher misconduct referrals, which is the subject of recommendations 1 and 2, with the issue of the ATU and TPU tracking of misconduct and incompetence case adjudications, which is covered by recommendations 3 and 4. Even if the case tracking system that is being developed will allow ATU to track the teacher misconduct referrals it receives, until the new system is available, we recommend that DOE use its existing Access database to track teacher misconduct referrals.

We found that ATU has no assurance that it is adequately tracking the teacher misconduct referrals that it receives. When we asked for a list of the referrals that ATU received during School Year 2011-2012, ATU stated that it could not provide us with such a list. In addition, OSI was also unable to provide us with a list of the substantiated complaints that it had referred to ATU during that same period. The consequence of not tracking referrals is that ATU has no assurance that it took action on all of the teacher misconduct referrals that it received, including the substantiated complaints that it received from OSI. While there is no statutory time for the processing of teacher misconduct referrals, ATU still needs to track the handling of these referrals to ensure that they are processed in a reasonable amount of time.

2. For those referrals that do not lead to ATU serving charges, ATU should ensure that written case closure statements are prepared.

DOE Response: “As the auditors had been advised, it has been and still is ATU’s practice to close referrals that will not result in charges with a written communication to the referring agency or division.”

Auditor Comment: As stated above, ATU could not provide us with a list of all the teacher misconduct referrals that it received. Without such a list, we could not determine whether all of the teacher misconduct referrals to ATU either led to charges being served or to written case closure statements being prepared.

Misconduct and Incompetence Cases Were Not Adjudicated in a Timely Manner

For School Year 2011-2012, approximately 36 percent of the misconduct and incompetence cases filed that year were not completed within the required timeframe of 115 days. The audit concluded that DOE did not adequately track the ATU and TPU cases for which charges had been served to help ensure that these cases were adjudicated in a timely manner.

A number of factors outside of DOE's control may have affected the timeliness of these cases. These factors include: 1) the number of available arbitrators, which is affected by the level of reimbursement that the New York State Education Department (NYSED) provides for the arbitrators and by DOE's working relationship with the UFT (which, along with DOE, chooses the arbitrators),⁵ 2) the arbitrators' handling of the cases, and 3) the defense actions in these cases. Because these factors are outside their control, DOE officials told auditors that they do not need to actively monitor the timeliness of individual Education Law §3020-a cases. DOE states in its written response to the draft report that its officials did not say this. We believe that our auditors noted the officials' comments accurately. We also note that DOE provided no evidence that it actively tracks the timeliness of individual cases or that it tracks cases in a comprehensive and systematic way to be able to identify those that exceed, or are at risk of exceeding, the 115-day timeframe, or to identify those steps in the adjudication process at which delays are occurring. As indicated below, because DOE's actions can also affect the timeliness of these cases, actively tracking the timeliness and movement of cases would potentially aid DOE in developing strategies to address the causes of the delays.

Table I shows the number of days for each stage of the adjudication process, from the date the teacher has been charged to the disposition date when a decision is rendered by an arbitrator.

⁵ DOE notes that although its April 15, 2010, agreement with UFT calls for the appointment of 39 arbitrators, only 24 arbitrators were appointed for school year 2011-2012, and that six of these arbitrators resigned during the school year citing NYSED's decision to only pay arbitrators for the hours actually worked each day rather than pay a set daily fee.

Table I

Required Timeframe to Resolve Misconduct and
Incompetence Cases

	Stages in Hearing Process	Number of Days to Complete
1	Teacher requests a hearing	10
2	Pre-hearing conference is conducted	15
3	Hearing is conducted	60
4	Arbitrator renders a decision	30
Total		115

To determine whether DOE's teacher misconduct and incompetence cases were completed within the required timeframe of 115 days, we reviewed the full populations of ATU misconduct and TPU incompetence cases for which charges had been filed during School Year 2011-2012. The ATU and TPU case lists provided by DOE had a number of inaccuracies and instances in which information was missing. We were subsequently able to resolve the discrepancies⁶ and to conclude that the ATU and TPU case lists were reasonably accurate and complete for the purposes of our analysis. As referred to above, of the 187 misconduct cases for which ATU filed charges during the year, 67 (36 percent) exceeded the required timeframe by an average of 85 days, ranging from one to 316 days. Of the 91 incompetence cases for which TPU filed charges during the year, 33 (36 percent) exceeded the required timeframe by an average of 86 days, ranging from two to 303 days.

In addition, from a sample of 30 cases (20 ATU and 10 TPU cases), we further analyzed the 10 sample cases (6 ATU and 4 TPU cases) that exceeded the required timeframe to determine at which stages in the process the delays occurred. Table II shows the number of these 10 cases that exceeded the required timeframes at the various stages.

⁶ On an initial list of 183 misconduct cases, there were 22 blank disposition date fields. On an initial list of 90 incompetence cases, two cases had inappropriate entries in that the disposition date was before the charge date. For a sample of 20 ATU and 10 TPU cases, our review of the pertinent documents showed that the disposition dates shown on the case lists for three ATU and three TPU cases were incorrect. DOE subsequently resolved these discrepancies and we revised the original lists accordingly. In our review of the completeness of the case lists, we also found four ATU cases and one TPU case that should have been on the lists. We added these cases to the original lists to arrive at a total of 187 ATU cases and 91 TPU cases for which charges were filed during the school year. There might have been additional cases that should also have been on these lists that we did not find because they were not randomly selected as part of our sample review of the cases that had been sent to archives between December 2011 and November 2013.

Table II

Analysis of 10 Sampled Cases that Exceeded the Required Timeframes at the Different Stages of Adjudication

Stage of Adjudication Process	Required Timeframe (number of days to complete)	Actual Timeframe (average number of days to complete)	Number of Sampled Cases Exceeding Required Timeframe*
Charge Date to Pre-hearing Conference**	25	66	9
Pre-hearing Conference to Final Hearing	60	81	6
Final Hearing to Disposition	30	87	8
Total	115		

*The one case that met the required timeframe of 25 days for holding a pre-hearing conference nevertheless exceeded the required timeframes of 60 and 30 days for the other two stages of the adjudication process.

** For our analysis, we conservatively included the full 10-day period during which teachers may request a hearing in the timeframe from the charge date to the pre-hearing conference date.

For the 10 cases in our sample that exceeded the required timeframe, we determined that 9 cases exceeded the timeframe from charge date to pre-hearing conference and were from 16 to 116 days late; 6 cases exceeded the timeframe from pre-hearing conference to final hearing and were from 3 to 113 days late; and 8 cases exceeded the timeframe from final hearing to disposition and were from 33 to 229 days late.

However, DOE officials informed us that they did not actively track the overall timeliness of these cases or the amount of time that occurred between the key events of each case. As a result, DOE did not routinely determine which cases were at risk of being completed after the required 115-day timeframe or, for those that exceeded this timeframe, at what stages in the adjudication process the delays occurred. DOE officials said that ATU and TPU managers regularly meet with case attorneys to discuss the status of these cases. However, DOE did not routinely generate aging reports to identify cases that had timeliness issues.

As indicated above, the causes of the observed delays include factors outside of DOE's control as well as matters within its control. Among the causes of delay attributable to both DOE and to the teachers who are the subjects of the misconduct hearings are cancellations of conference and hearing dates by one party or the other. If a pre-hearing conference or a hearing is canceled or if the block of time that the arbitrator committed to the case is not fully used, the arbitrator may impose cancellation fees on the responsible party or parties. Based on a DOE list of cancellation fees paid by the department during Fiscal Years 2012 and 2013, there were a total of 207 cancellations for which arbitrators concluded that DOE was at least partly responsible. During those two years, DOE paid over \$156,000 in cancellation fees. We determined that some of these cancellation fees were paid for four of the 67 ATU cases and seven of the 33 TPU cases that exceeded the required timeframe. Arbitrators imposed cancellation fees on DOE for not making adequate use of scheduled hearing dates, which

indicates that delays in conducting pre-hearing conferences and hearings were not simply the results of arbitrators' scheduling practices or defense actions; these delays can also be attributed at least in part to DOE's handling of the cases.

By more closely tracking the timeliness of these cases, DOE would be better able to identify steps it could take to improve case timeliness, such as making full use of scheduled hearing times. In addition, DOE could identify arbitrators who consistently exceeded the 30-day timeframe for rendering decisions and take that fact into consideration when evaluating reappointments for the following school year.

Improving the timeliness of the adjudication of DOE's misconduct and incompetence cases would help those teachers who are found to be not guilty of the charges filed against them to return to the classroom more quickly. This would save the City money in the long term, since these teachers remain on full salary during the adjudication process. It would also help DOE more quickly take disciplinary measures against those teachers who are found to be guilty of the charges filed against them. The penalties, which in certain cases can include termination, also save more money the sooner they are imposed.

Recommendations

3. DOE should actively monitor the overall timeliness of its adjudication of misconduct and incompetence cases.

DOE Response: "As the auditors had been advised, it is the DOE's current practice to actively monitor timeliness of misconduct and incompetence cases."

Auditor Comment: DOE provided no evidence that it actively tracks cases in a comprehensive and systematic way to identify those that exceed, or are at risk of exceeding, the timeframe of 115 days, or to identify those steps in the adjudication process at which delays are occurring.

4. DOE should track the amount of time that occurs between key events (such as the time between the pre-hearing conference and the last hearing on a case) so that it is able to readily determine where delays in the adjudication process are occurring.

DOE Response: "The case tracking system that currently is in development will allow the DOE to generate precise timeline reports."

Auditor Comment: Since the case tracking system is not scheduled to be completed until the end of the current school year, we recommend that DOE use its existing Access databases to more effectively track its teacher misconduct and incompetence adjudications.

DETAILED SCOPE AND METHODOLOGY

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the New York City Charter.

The primary scope of the audit was referrals received and charges filed during School Year 2011-2012. Our review included DOE's adjudication efforts on these charges through November 20, 2013, for the incompetence cases and through January 18, 2014, for the misconduct cases.

To gain an understanding of the applicable laws and standards, we reviewed the April 15, 2010, agreement between DOE and the UFT to improve the timeliness of the investigation and adjudication of alleged teacher misconduct and incompetence cases. We also reviewed New York State Education Law Article 61 §3020, Discipline of Teachers, and §3020-a, Disciplinary Procedures and Penalties.

To gain an understanding of the overall adjudication process, we interviewed DOE and UFT officials, including their General Counsels. We also interviewed DOE's ATU, TPU, and OSI directors and reviewed various essays and articles relating to the disciplining of tenured teachers in New York.

DOE provided lists of 183 misconduct cases (from ATU) and 90 incompetence cases (from TPU) for which charges had been filed against tenured teachers during School Year 2011-2012. To assess the accuracy of the case data on these lists, we analyzed them for any irregularities, such as blank fields, duplicates, and inappropriate entries. We also randomly selected 30 cases (20 ATU and 10 TPU cases) and compared certain information (especially charge and decision date information) on the lists to information on the supporting documentation in the case files. To assess the completeness of these case lists, we reviewed 80 cases (50 ATU and 30 TPU cases) that we randomly selected from lists of cases that had been sent to archives between December 2011 and November 2013 and all the closed cases that were still available in the ATU and the TPU offices to determine whether any of these cases should have been on the case lists we received. In our review of the completeness of the case lists, we found four ATU cases and one TPU case that should have been on the lists. We added these cases to the original lists to arrive at a total of 187 ATU cases and 91 TPU cases for which charges were filed during the school year.

To determine whether these cases were completed on time and, for those that were not, at which stages in the process the delays occurred, we reviewed the same randomly selected 30 cases (20 ATU and 10 TPU cases) referred to in the preceding paragraph. Based on our conclusion that the data on the cases on DOE's lists was generally accurate, we then expanded the samples to the populations of ATU and TPU cases for which charges had been filed during School Year 2011-2012 in order to determine the timeliness of these cases. Before we conducted our timeliness reviews of these populations, we added to the initial populations (of 183 ATU cases and 90 TPU cases) that DOE had provided to us those cases (four ATU cases and one TPU case) that we identified during our list completeness reviews as cases that should have been on the initial DOE case lists.

Courtenaye Jackson-Chase
General Counsel

October 27, 2014

Marjorie Landa
Deputy Comptroller for Audit
The City of New York
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New York, NY 10007-2341

Re: Audit Report on the Department of Education's Adjudication of Alleged Teacher Misconduct and Incompetence Cases (ME 13-109A)

Dear Ms. Landa:

This is the formal response of the New York City Department of Education ("DOE") to the City of New York Office of the Comptroller's ("Comptroller") draft audit report titled *Audit Report on the Department of Education's Adjudication of Alleged Teacher Misconduct and Incompetence Cases* ("Report").

The Department's ability to discipline or discharge tenured teachers is controlled by Section 3020-a of the New York State Education Law ("3020-a"). The Administrative Trials Unit ("ATU") and the Teacher Performance Unit ("TPU") are the divisions within the DOE that implement disciplinary action against tenured teachers. TPU handles incompetence cases against ineffective pedagogues and ATU handles cases involving misconduct committed by tenured employees. A 3020-a proceeding is initiated with the filing of charges against a tenured teacher. Tenured teachers facing disciplinary charges are entitled to a 3020-a hearing and said hearing is presided over by a hearing officer who determines the guilt or innocence of the teacher involved. Upon a finding of guilt, the hearing officer is empowered to issue a penalty.

Under Article 21(G)(2) of the collective bargaining agreement between the DOE and the UFT, it was agreed that disciplinary cases in the New York City school district would be heard by a permanent rotational panel of arbitrators. Pursuant to that provision, arbitrators must be chosen by the parties and the parties then notify the New York State Education Department ("NYSED") of the arbitrators who have been chosen to serve on the New York City panel.

In April 2010, the DOE and the UFT entered into an agreement ("Agreement") whereby 3020-a cases would be adjudicated within the timelines mandated by the New York State Education

Law. The Agreement also provided that the number of arbitrators on the existing rotational panel would be increased to 39 arbitrators that would be split between the ATU and TPU panels. During the period covering the audited year, a full 39 arbitrator panel was not seated. During the 2011-2012 school year, a number of arbitrators resigned from the panel citing State payment practices as the reason. As a result of an inadequate number of arbitrators on the New York City panel, a backlog of 3020-a cases developed.

Case Tracking

On numerous occasions during audit fieldwork, the ATU and TPU Directors (“Directors”) advised the auditors that before the audit was announced, and in recognition of the benefits to be gained from a dedicated case tracking system, the DOE had begun the process of procurement and design of such a system. For that reason, DOE managers were surprised when the Preliminary Draft Report was issued without reference to that undertaking. When that omission was raised with the audit team at the exit conference, the Directors were told that their representations had been discounted because they were not supported with evidence that the project had begun. Satisfactory evidence was produced. The report does now acknowledge, in the Executive Summary, that the “DOE provided documentation showing that it is in the process of developing computer-based tracking applications for its ATU and TPU cases.” (Report, p. 2). It should be noted that the Directors also had explained at various times during meetings with the auditors that many factors outside the DOE’s control contribute to delays and that, despite the unavailability of an electronic system in the audited years, they met regularly with staff and were well aware of where cases were in the adjudicative process, whether benchmarks were being met, and if not, why.

Majority of Cases Fall Within Completion Timelines

The 3020-a hearing is a trial whereby, for the purpose of this audit, the DOE, and the teacher, along with their counsel, have the right to call and cross-examine witnesses. This litigation-based system, is fluid, not static. The nature of litigation is such that, despite careful planning and preparation, external factors may arise that will significantly impact the hearing officer’s and parties’ ability to strictly control the time in which a case is resolved. These factors notwithstanding, it is noteworthy that 64 percent of 3020-a cases are heard within the completion timelines.

Key to understanding timeline issues is that once a case is assigned to an arbitrator, the DOE no longer controls every aspect of the hearing process. Pursuant to 3020-a, the arbitrator presides over the matter and drives the course of the hearing. The arbitrator is empowered to: schedule hearing dates; hear and decide discovery requests and motions; issue subpoenas; grant adjournments and/or extend the time in which to exchange discovery. It is also important to

highlight that an arbitrator may not serve simultaneously on more than one 3020-a hearing without the consent of the New York State Education Commissioner and therefore, will start a new case only upon completion of the preceding matter.¹ If that “preceding matter” is a case that requires presentation of extensive evidence/witnesses or involves private counsel whose schedule may not be flexible, the arbitrator’s docket will be filled for an extended time while newer cases await the earlier one’s adjudication before beginning. Situations such as these can lead to adjournments and canceled hearing dates.

Additionally, 3020-a cases are witness driven, meaning that the DOE requires the actual testimony of a witness in the hearing room to prove the charges against the tenured teacher. Consequently, adjournments may be required where the witness has failed to appear on the scheduled date, or has arrived late, or, has relocated. And, common experience suggests that the progress of a trial may be impacted by the same types of irksome scheduling conflicts and transportation issues that affect other events in our lives. Hearings occur during the employee and student school/work day, and flexibility is required. It is understandable, then, that although the DOE has been “charged” with a trial delay, the cause of that delay cannot be attributed to anything the DOE trial attorney had done or failed to do.

The timeliness of a case is also affected by employee defense actions that can include: requests for lengthy adjournments; instances of illness during the hearing; firing counsel once the hearing is underway; hiring private counsel; evidence requests; requests for transcripts prior to closing arguments; and, leaves of absence requests during the hearing. Ultimately, the arbitrator’s discretion governs the timeliness of the proceeding.

Before closing, we will say that we are disappointed in the tack the Report has taken. The Report either omits key facts that could have elucidated the narrative or deeply buries them in the text, and, in one unfortunate case, relegates them to a footnote. We must also correct a misstatement contained in the audit report concerning factors outside the DOE’s control that might have affected the timeliness of case adjudication. Specifically, the auditors report that “[b]ecause these factors are outside their control, DOE officials said that they do not need to actively monitor the timeliness of individual Education Law Section 3020-a cases.” (Report, p.6). No DOE official said that. No DOE official would have absolved the DOE of the need to monitor the timeliness of 3020-a cases – why else would the DOE seek to create a system designed for that very purpose? What was expressed in this regard is that, even with active monitoring, certain of the 3020-a cases would still fall outside the 115 day timelines due to the numerous factors that are outside the DOE’s control. Historically, all of the noted factors have affected 3020-a cases and the time in which the matters are litigated.

¹ 8 NYCRR § 82-1.7(c).

Response to Recommendations

To address the issues raised in the Report, the auditors recommend that:

Recommendation 1. *ATU should track its handling of all of the teacher misconduct referrals that it receives to ensure that timely action is taken on each referral.*

Response. Before the audit began, the DOE had taken significant steps to create a tracking system for ATU and TPU cases. The database is currently in the building phase and it is anticipated that the system will be functional by the end of the current school year. To the extent that the recommendation implies that the delays in case adjudication are attributable to the current lack of such a system, the DOE strongly disagrees. More importantly, the DOE never stated nor implied that ATU had no assurance that referred cases were processed in a timely manner. Nor would such a statement be necessary as there is no statutory time proscribed by the Education Law in which referred cases need to be reviewed or processed prior to acceptance for formal charges.

Recommendation 2. *For those referrals that do not lead to ATU serving charges, ATU should ensure that written case closure statements are prepared.*

Response. As the auditors had been advised, it has been and still is ATU's practice to close referrals that will not result in charges with a written communication to the referring agency or division.


Recommendation 3. *DOE should actively monitor the overall timeliness of its adjudication of misconduct and incompetence cases.*

Response. As the auditors had been advised, it is the DOE's current practice to actively monitor timeliness of misconduct and incompetence cases.

Recommendation 4. *DOE should track the amount of time that occurs between key events (such as the time between the pre-hearing conference and the last hearing on a case) so that it is able to readily determine where delays in the adjudication process are occurring.*

Response. The case tracking system that currently is in development will allow the DOE to generate precise timeline reports.

Sincerely,


Courtenaye Jackson-Chase
General Counsel