



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

June 13, 2012

Kathleen Chamberlain
President
East End Special Education Parents, Inc.
520 Harvest Lane
Mattituck, New York 11952

Dear Ms. Chamberlain:

This is in response to your February 7, 2011 electronic mail (email) communication to Dr. Alexa Posny, Assistant Secretary for Special Education and Rehabilitative Services at the U.S. Department of Education (Department). Your correspondence was forwarded to the Office of Special Education Programs (OSEP) for response. You request clarification regarding “when FAPE [free appropriate public education] is at issue” under Part B of the Individuals with Disabilities Education Act (Part B or IDEA). You also raise questions about New York State Education Department’s (NYSED) interpretation of the child find provision regarding special education services to children enrolled in private schools by their parents.

The IDEA regulation at 34 CFR §300.148 is entitled “placement of children by parents when FAPE is at issue.” Paragraph (a) of that regulation provides that a public agency is not required to pay for a child’s education, including special education and related services, at a private school or facility if the public agency made FAPE available to the child, and the parents elected to place the child in a private school or facility. Rather, the child is considered part of the group of parentally-placed private school children with disabilities whose needs are addressed consistent with the provisions in 34 CFR §§300.131 through 300.144. 34 CFR §300.148(a). The term “parentally-placed private school children with disabilities” is defined to mean those children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the IDEA’s definition of elementary school or secondary school, but does not include those children with disabilities whom the public agency has placed in, or referred to, a private school as a means of providing special education and related services. 34 CFR §300.130. Thus, it is consistent with 34 CFR §300.148 and the definition in 34 CFR §300.130 for a State to consider the needs of children with disabilities placed by their parents in private schools when FAPE is at issue under the provisions in 34 CFR §§300.131 through 300.144.

You also ask about an attached NYSED guidance document that appears to address obligations to parentally-placed children with disabilities under New York law implementing the IDEA. This guidance appears to apply to children with disabilities who are part of the group of private

school students whose needs are addressed consistent with the provisions in 34 CFR §§300.131 through 300.144, and speaks to cost recovery between districts of residence and districts of location of the private schools. The equitable services requirements in IDEA apply to the local educational agency (LEA) where the private school that the child attends is located, and not to the LEA where the child's parents reside. If a parent places their child in a private school located in an LEA in another State, then the out-of-State LEA where the private school is located must conduct child find for that child and, if determined eligible, include that child in the group of children whose needs must be considered for equitable services. See 34 CFR §300.131(f) and 71 Fed. Reg. 46540, 46591 (Aug. 14, 2006).

If a parent of a child with a disability is dissatisfied with the program or placement that the public agency offers their child under the IDEA, the parent has the option of unilaterally placing his or her child in a private school or facility and seeking tuition reimbursement from the public agency for the cost of that unilateral placement. In such situations, 34 CFR §300.148(b) provides that disagreements between the parents and a public agency regarding the appropriate educational program for the child and the question of financial responsibility are subject to the due process procedures in 34 CFR §§300.504-300.520. Further, 34 CFR §300.148(c) provides that if the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school, without the consent of or referral by the public agency, a court or a hearing officer may, under certain circumstances, require the agency to reimburse the parents for the cost of that enrollment where the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009). Accordingly, if a parent unilaterally places his or her child in a private school or facility because he or she believes that the public agency failed to make FAPE available to his or her child, such parental action alone is not sufficient to require reimbursement.

Reimbursement is an equitable remedy.¹ Thus, it is proper for a hearing officer or court to consider all relevant factors in determining whether reimbursement is warranted, and if it is, whether the amount of reimbursement should be reduced. The regulation at 34 CFR §300.148(d), lists a number of factors that hearing officers and courts may consider, e.g., whether 10 business days prior to the removal of the child from the public school, or at the most recent IEP meeting that the parents attended before the removal, the parent gave written notice to the public agency that they were rejecting the public agency's proposed placement to provide FAPE, including stating their concerns and their intent to enroll their child in a private school at public expense. 34 CFR §300.148(d)(1). Another factor listed in the regulations is whether prior to the removal, the public agency properly notified the parents of its intent to evaluate their child and the parents declined to make the child available for the evaluation. 34 CFR §300.148(d)(2). A judicial finding of unreasonableness with respect to actions by the parents is another factor that may be considered in determining whether reimbursement should be reduced or denied. 34

¹ Please note that while reimbursement of a private school placement may also be available through a settlement agreement that is the result of mediation or other settlement negotiations, discussion of settlements is beyond the scope of this letter. See generally, 34 CFR §§ 300.506(b)(6) and 300.510(d)(1).

CFR §300.148(d)(3). The regulation also lists exceptions to the notice provision that a court or hearing officer may consider in fashioning this equitable remedy. 34 CFR §300.148(e).

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have additional questions, please do not hesitate to contact Angela Tanner-Dean at 202-245-6320 or by email at Angela.Tanner-Dean@ed.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Melody Musgrove', with a long horizontal flourish extending to the right.

Melody Musgrove, Ed.D.

Director
Office of Special Education Programs

cc: State Director of Special Education