UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

April 16, 2001

Honorable Rosa L. DeLauro
House of Representatives
Washington, DC 20515-3661

Dear Representative DeLauro:

This is in response to your letter on behalf of your constituent, Mayor Frederick L. Lisman of Milford, Connecticut. In his letter, Mayor Lisman asks you to respond to issues raised in a letter from John Fowler, Alderman in the City of Milford, regarding the "ramification of using non-federal dollars" (from the City of Milford, Connecticut) to help pay for special education and related services for children with disabilities enrolled in private schools by their parents.

Under Part B of the Individuals with Disabilities Education Act (Part B of the IDEA), each State and school district must make a free appropriate public education (FAPE) available to all children with disabilities in the mandatory age ranges who reside in the State. The Office of Special Education Programs (OSEP) within the Department of Education is responsible for administering Part B of the IDEA.

If the public agency has made FAPE available to a child with a disability, and the parents reject the offer of FAPE in favor of placing their child in a private school, Part B does not require the public agency to pay for the child's education at that private placement. See 20 U.S.C. §1412(a)(10); 34 CFR §300.403(a). Part B only requires a local educational agency (LEA) to contribute on a specific proportionate formulaic toward the special education and related services to children with disabilities whose parents place them in a private school. 20 U.S.C. §1412(a)(10).

In his letter, Alderman John Fowler indicated that "special education services to private school children are likely to be cut next year by two-thirds" in Milford due in part to "the belief that providing services to private school children above the per-capita federal grant allocation may expose the public school system to liabilities. . . ." The nature of the "liabilities" and the basis of this belief are unclear from the letter but we read this as suggesting two possible interpretations.

If the concern by the LEA is that children with disabilities may not be provided special education and related services such as speech or occupational therapy in parochial private schools, this is not correct. Under the U.S. Supreme Court decision in *Zobrest*, there is no absolute prohibition under the First Amendment religious establishment clause of the U.S. Constitution on providing such services in a parochial school environment. The attached five OSEP policy letters also clarify some of the issues raised in the *Zobrest* decision: (1) 1993 Letter to Moore, 20 IDELR 1213; (2) 1993 OSEP Letter to Schmidt, 20 IDELR 1224; (3) 1994 Letter to McConnell, 22 IDELR 369; (4) 1994 Letter to Anonymous, 21 IDELR 745; and (5) 1995 Letter to Anonymous, 22 IDELR 889.

If the concern by the LEA is that it cannot pay for more than the minimum amount required under the IDEA, that concern is incorrect. While it is true that effective with the IDEA Amendments of 1997 and the regulations promulgated under it (which were effective as of May 11, 1999), an LEA is not required to pay beyond a specific formula for children who are parentally placed in private or parochial schools, it may choose to do so. Public agencies must provide for participation in their special education programs for children with disabilities placed in private schools by their parents in accordance with the requirements of Part B at section 612(a)(10)(A). However, students with disabilities parentally placed at private schools do not have an individual entitlement to services under Part B or the right to receive the same services that they would be provided if educated in a public school program or placement. Further, the Department's long-standing position is that public agencies are not required to provide parentally placed students with disabilities with the full range of services under Part B. However, to the extent consistent with the number and location of such children, special education and related services must be made available for the children by the State, via the local school districts, through expenditures that are equal to a proportionate amount of the available funds under Part B. The formula used to meet this requirement is at 34 CFR §300.453. In determining the extent of participation of parentally placed private school children with disabilities in special education programs conducted by the local school districts, public agencies are obligated to consult with representatives of these students in considering which private school students with disabilities will receive services, what services will be provided, and how those services will be provided. See 34 CFR §300.454.

In his letter, Alderman Fowler stated that the city of Milford is currently providing more services to children with disabilities who are placed in private schools by their parents than is required under Part B. This is not prohibited under Part B, and is allowable at the option of the State or local school district. There is nothing in Part B that would prohibit a school system from using non-Federal dollars to provide special education services for children who are parentally placed in private schools. Alderman Fowler also asked if there are any additional liabilities to the City of Milford if Milford adds funds to the Federal funds available under Part B to provide special education and related services to children with disabilities who are parentally placed in private schools.

If in future years the City of Milford discontinued its funding, then the LEA may be required to continue this level of non-Federal funding in the future (although it would not be required to continue to spend the funds on private schools). The Part B "maintenance of effort" requirement applies to LEAs. See 34 CFR §300.231. To meet the Part B maintenance of effort requirements, "the total or per capita amount from local funds only or the combination of State and local funds budgeted by an LEA for expenditures in the current fiscal year for the education of children with disabilities must be at least equal to the total amount or per capita amount from local funds only or the combination of State and local funds actually expended for the education of children with disabilities in the most recent preceding year for which information is available." See 34 CFR §300.231(c)

If the City of Milford were to provide the funds directly instead to parochial schools serving

children with disabilities or their parents rather than to the LEA, there may be other potential legal constraints under the First Amendment religious establishment clause of the U.S. Constitution and provisions under Connecticut's State constitutional or other laws. The U.S. Supreme Court opinion in *Mitchell v. Helms*, incorporates the latest analysis on the First Amendment clause of the U.S. Constitution.

Given the complexity of these issues, the City of Milford and Alderman Fowler should consult with the city's legal counsel regarding the viability and ramifications of either option as to the use of City funds to supplement Federal Part B funds for children with disabilities placed by their parents in parochial schools.

I hope that this information is helpful in responding to Alderman Fowlers' concerns. I have enclosed a copy of the Part B regulations, the *Zobrest* and *Helms* Supreme Court decisions, and the OSEP policy letters that discuss application of the *Zobrest* decision for your and Alderman Fowler's review. Please let me know if I can be of further assistance.

Sincerely,

Patricia J. Guard

Patricia J. Guard
Acting Director
Office of Special Education
Programs

Enclosures