



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

DEC 10 2003

This is in response to your letter dated September 16, 2003 to Secretary Rod Paige, which was referred to the Office of Special Education Programs (OSEP) for reply. In your letter, you expressed your continued concern over what you believe to be “non answers” to the questions you posed in previous correspondence with the U.S. Department of Education with regard to the Florida Department of Education’s (FDE) compliance with the Individuals With Disabilities Education Act (IDEA).

As stated in OSEP’s response to you on September 25, 2002, staff members from the U.S. Department of Education have carefully and extensively examined the issues you raised and provided you with clarification. While we regret that you are not satisfied with the responses that you received, we continue to believe that we have addressed your questions concerning Florida’s due process system.

Our conclusion that Florida operates a one-tier due process system is not based solely on the assurance that the State provided in its Eligibility Document. As part of our review of Florida’s Eligibility Document submission in 2000, we reviewed the Florida Statute and State Board of Education Rules and concluded that Florida operates a one-tier due process system. As we noted in our letter to you dated April 2, 2002, section 6A-6.03311(5) of the Florida Statute and State Board of Education Rules outlines the requirements for due process hearings in Florida. Section 6A-6.03311(5)(a)-(b) describes certain responsibilities to be carried out by school districts, such as keeping a list of persons who serve as hearing officers, including a statement of their qualifications. Section 6A-6.03311(5)(e) states, “A hearing shall be conducted by a hearing officer from the Division of Administrative Hearings, Department of Administration.” IDEA does not preclude the State Educational Agency (SEA) from assigning the responsibility to conduct hearings to an entity other than the SEA, as long as the due process requirements of IDEA are met. Several States transfer responsibility for conducting due process hearings to another agency, such as the State’s Office of Administrative Hearings, to avoid a conflict of interest. This structure does not alter the State’s status as a one-tier due process hearing system. The SEA, as part of its general supervisory authority under section 612(a)(11) of IDEA, is ultimately responsible for ensuring that the due process requirements are met, including the requirement that hearing officer decisions are reached no later than 45 days after the receipt of a request for a hearing.

Your February 7, 2003 letter suggests that your position that Florida is a two-tier system is based, in part, on the language in 34 CFR §300.510(b)(1) that states that if a due process hearing “is conducted by a public agency other than the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA.” Public agency is defined at 34 CFR §300.22 as the SEA, local educational agencies (LEAs), educational service agencies (ESAs), public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities. A State’s Office of Administrative Hearings is not a public agency under IDEA. Therefore, the fact that a State’s Administrative Office conducts due process hearings does not mean that a party aggrieved by the decision in the hearing has the right to appeal to the SEA.

Under section 615(f)-(i) of IDEA, hearing officers are required to conduct hearings and issue decisions in accordance with the requirements of IDEA. Nothing in IDEA precludes the hearing officer from citing State law, including the State’s Administrative Procedures Act, which in Florida is Chapter 120 of Title X of the 2003 Florida Statutes, as long as the State law is not inconsistent with IDEA. Under section 615(i)(2), any party aggrieved by the findings and decisions of the hearing officer in a one-tier system has the right to bring a civil action in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. The court must receive the records of the administrative proceedings and hear additional evidence at the request of a party.

There is no requirement in IDEA that a State must enact a State statute waiving its sovereign immunity. Section 604(a) of IDEA states that a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of the IDEA. You state that OSEP has not explained how, as a one-tiered State, the SEA can argue that it is not a proper party at due process hearings or in court. The fact that the SEA operates a one-tier system does not automatically make the State a proper party to an administrative or judicial proceeding. The hearing officer or the judge makes the decision about whether the SEA is a proper party based on the particular facts in the case. To respond to your question regarding whether or not children receiving vouchers are receiving a free appropriate public education (FAPE), we are enclosing our April 2, 2002 letter to you, which addresses this issue.

In order to improve services for children with disabilities, OSEP is continuing to work with Florida on a number of major activities as described below.

Eligibility Document Submissions - On July 7, 2003, OSEP issued a grant award letter to Florida indicating that the U.S. Department of Education had conditionally approved Florida’s Eligibility Document Submission for Federal Fiscal Year 2003 under Part B of IDEA. As part of its review of Florida’s Eligibility Documents, OSEP required that FDE revise several sections of the State Board of Education Rules and other related narrative describing the State’s policies and procedures to ensure that the documents are consistent with IDEA. As stated in the letter, Florida has provided an assurance that by December

30, 2003 the State Board of Education Rules and other related narrative describing the State's policies and procedures will be finalized. At this time, we understand that Florida has completed public hearings, which are part of the rulemaking process, and expects to meet the December 30 deadline.

Part B Improvement Plan - Florida is in the process of implementing the Improvement Plan written in response to Florida's 2001 Monitoring Report and must provide documentation to OSEP by December 2003 that it has corrected all of the noncompliance identified in the Report. OSEP's Monitoring Report identified several areas of noncompliance including the State's failure to implement an effective monitoring system, to resolve Part B complaints within the required timeline, and to ensure that speech and language pathology and psychological counseling are provided as a related service to all students with disabilities who need them to benefit from special education. The areas of noncompliance identified in OSEP's 2001 Florida Monitoring Report are also contained in the priority goals of the Florida State Improvement Plan for Students with Disabilities.

Verification Reviews - During the week of September 8, 2003, OSEP conducted a verification visit to Florida as part of OSEP's Continuous Improvement and Focused Monitoring System for ensuring compliance and improving performance under Parts B and C of IDEA. The purposes of the verification visits were to: (1) understand how the State's general supervision, State-reported data collection, and State-wide assessment systems work at the State level; (2) determine how the State collects and uses data to make monitoring decisions; and (3) determine the extent to which the State's systems are designed to identify and correct noncompliance. Currently, OSEP is in the process of developing a letter explaining the results of OSEP's recent verification visit to Florida.

We believe that we have fully responded to the questions you asked in your February 7, 2003 and September 16, 2003 letters. We hope you find this information helpful.

Sincerely,



for Stephanie Smith Lee
Director
Office of Special Education Programs

cc: Michele Pollard
Florida Department of Education