UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

SEP 18 1998

Mr. Gene Lenz
Director of Special Education Unit
Texas Education Agency
W.B. Travis Building, Room 5-120
1101 N. Congress Avenue
Austin, Texas 78701-1494

Dear Mr. Lenz:

The Office of Special Education Programs (OSEP) has received a letter dated November 18, 1997 from of , Texas. A copy of Mr. letter is enclosed for your information. As the enclosed letter indicates, Mr. is concerned that 19 Texas Administrative Code (TAC) §89.1185 (m) is inconsistent with the requirements of Part B of the Individuals with Disabilities Education Act (Part B). Upon our review of 19 TAC §89.1 185, we have determined that it may be in conflict with federal law (as set forth below) and request that the Texas Education Agency (TEA) explain to us how this regulatory provision, in particular §89.1185(m) and (n), is implemented.

Under Part B, a decision made in a due process hearing conducted by the State educational agency (SEA)[1] is final, unless a party to the hearing appeals that decision by bringing a civil action in an appropriate State or Federal court. Section 615(i)(1)(A) of the Individuals with Disabilities Education Act (IDEA) and 34 CFR §§300.509-300.511. 19 TAC §89.1185(m) states that a hearing decision that is not appealed to court is final, and 19 TAC §89.1185(n) states that:

> Under provisions of the Individuals with Disabilities Education Act (IDEA) concerning prompt rendering of final decisions**,** decisions issued under this subpart shall be final. No motion for rehearing shall be required for a decision to be appealable to court under the APA, Texas Government Code, 2001.145. The decision shall recite the fact that the public welfare requires immediate effect of the final decision.

[1] In Texas, the SEA apparently conducts the due process hearings.

However, 19 TAC §89.1 185(m) also includes a provision that states:

> A school district shall implement any decision of the hearing officer that is, at least in part, adverse to the school district in a timely manner within 90 days after the date the decision was rendered. If a decision directing action on the part of a school district is not appealed or implemented within 90 days after the date of the decision, the TEA shall refer the matter for enforcement under APA, Texas Government Code, §§2001.051 et seq.

Thus, read together, it appears that 19 TAC §89.1185(m) and (n) requires a school district to give immediate effect to, and implement in a timely manner, a due process hearing decision while simultaneously affording a school district, in all situations, 90 days to implement that decision before the TEA will initiate enforcement proceedings. The reasonableness of the length of time a school district takes to implement a SEA's decision, especially if such time period is not set forth in the SEA's decision, would depend on the particular circumstances of the case.

As you may already know, the Fifth Circuit recently held that a State's review of an independent hearing officer's decision which concluded in favor of the parents regarding their child's placement under IDEA constituted an agreement between the parents and the State for the child's appropriate placement (a.k.a. "stay-put" placement) during the pendency of the dispute. *St. Tammany Parish School Board v. Louisiana, 141 F.3d 776 (5th Cir. 1998).* Therefore, in Texas, if the SEA renders a decision in a due process hearing against the school district and in favor of the parents, under *St. Tammany,* the child's placement must from that point forward, unless the parents and the State agree otherwise, and until overturned by court order if appealed, comply with the hearing decision.[2]

In addition, under 34 CFR section 300.512(a), a hearing decision must be issued and mailed to the parties within 45 days of receipt of the hearing request. However, 19 TAC §89.1185 (o) states that a party to a due process rearing decision may request "specified additional or amended findings or conclusions within ten days after the date of the decision." The hearing officer then has ten days to issue any additional or amended findings or conclusions, at his or her discretion. It appears that this provision could allow 20 additional days beyond the 45 day requirement for final decisions.

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[2] Note that the IDEA does not specify a time period within which hearing decisions must be appealed.

Given the foregoing, we request that the TEA clarify whether 19 TAC §89.1 185 (m) is consistent with federal law as discussed above. Please also clarify the purpose of 19 TAC §89.1185 (o) and how it is implemented. To facilitate resolution of this matter, please provide the requested clarification within 30 days from the date of receipt of this letter. OSEP appreciates your continued efforts on behalf of children with disabilities and your commitment to administer your programs in accordance with applicable Part B requirements.

Sincerely,

Thomas Hehir
Director
Office of Special Education
Programs

Enclosure

cc: Mr.