



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

JUN 27, 2003

This is in response to the inquiry set forth in your March 18, 2003 electronic letter and during subsequent telephone conversations between you and Wendy Tada and Dale King, members of the Office of Special Education Programs (OSEP). You asked for clarification regarding a proposed alternative special education program for your State, intended to be modeled after Florida's McKay scholarship program. As you stated in your electronic letter, you are proposing to offer parents of children in special education "an option, other than mediation, to allow their child to attend an alternative State approved special education program other than where their child is presently assigned." You specifically asked if federal funds provided under the Individuals with Disabilities Education Act (IDEA) could be used to pay tuition at a public or private State-approved special education program. Since you reference providing parents an additional placement option and the McKay scholarship program, it is our understanding that alternate State-approved private school placement options are intended to be selected by the parents rather than as a way for public agencies to provide a free appropriate public education (FAPE) through the regular IDEA placement process. Based upon this understanding, the availability of federal funds for such enrollment will primarily depend on whether the student's placement is into a public or private program. A discussion of the various issues is set out below.

Children Enrolled in Private Schools By Their Parents. Based upon our review of the draft legislation, your communications with staff and the stated intent to model the proposed program after the McKay Scholarship program in Florida, it is our understanding that Connecticut is **not** proposing to provide FAPE to students with disabilities through private school placements under this program. Under the IDEA, where the State and its local school districts have made FAPE available to eligible children with disabilities in its public school system but their parents elect to place them in private schools through a program such as the one you are proposing, such children would be considered "private school children with disabilities" enrolled by their parents. See 34 CFR. §300.450. Under IDEA, such parentally-placed private school children with disabilities have no individual entitlement to FAPE, including special education and related services. Under these circumstances, it would not be permissible to use IDEA funds to pay for the tuition of children enrolled by their parents in private alternative State-approved special education programs. Instead, a proportional share of IDEA funds would be used to provide limited services to parentally-placed private school students in

accordance with specific federal provisions covering such students. (As you are intending to model your program proposal on Florida's McKay Scholarship program, it is important to point out that the Florida program uses State funds, not federal funds, to finance its private school scholarships.)

IDEA requires local education agencies (LEAs) to consult with representatives of parentally-placed private school children with disabilities to consider the special education and related services that may be available in light of available funding, the number of private school children with disabilities, the needs of private school children with disabilities, and their location. 34 CFR §300.454(b). "Amounts expended for the provision of those services by a [LEA] shall be equal to a proportionate amount of the Federal funds available under [Part B]," based on the number of children with disabilities in private schools relative to the number of such children in public schools. 20 USC §1412(a)(10).

Public School Choice. Under the IDEA, LEAs must ensure that funds received under Part B of the IDEA are used only to pay the excess costs of providing special education and related services to children with disabilities and expended in accordance with the applicable provision of the Act. See 34 CFR §300.230. In designing a program that allows parents to choose between public school programs, Connecticut must ensure that FAPE is made available and should carefully review the Department's previous letters on this topic (enclosed, see below).

In general, the Department has previously approved public school choice programs 1) where parents choose which public agency will be responsible for providing FAPE; and 2) that allow IDEA placement teams to offer the parent a choice between two or more placement options capable of providing FAPE. However, the Department has rejected a public school choice program that was based solely on parental choice, without regard to the provision of FAPE.

In a 1990 joint OSERS-OCR letter, the Department stated that:

if a State chooses to allocate district responsibility for FAPE based upon parental choice, that is not inconsistent with [IDEA] providing that the effect of this will not result in the denial of any of the rights guaranteed by the [IDEA].
Consequently, it is not inconsistent with [IDEA] for choice legislation to require that responsibility for providing FAPE be delegated to the district of choice.

Letter to Tatel, 16 EHLR 349 (1990). Under such a program, parents may choose between one or more public agencies that, if chosen, would be responsible for making FAPE available consistent with the IDEA. Likewise, the Department also previously stated that:

it would be permissible under [the IDEA] for school officials to give the parent the right to select a child's placement from one or more public placements that

have been determined appropriate for a child by the placement team based upon applicable [IDEA] requirements.

Letter to Siegel, 16 EHLR 797 (1990). Under both such programs, the responsible public agency could use IDEA funds to pay the excess costs of providing FAPE.

However, it also is important to note that in 1991, the Department concluded that a State law “permitting a public agency to base a placement decision solely on ‘parent option’ or ‘parent preference’ is inconsistent with Federal requirements.” Letter to Bayh, 17 EHLR 840; see also, Letter to Evans, 17 EHLR 836 (1991); Letter to Lugar, 17 EHLR 834 (1991); and Letter to Bina, 18 EHLR 582 (1991).

Mediation. Finally, I would like to address the issue of mediation that you raised in your electronic letter and in your phone conversations with Wendy Tada and Dale King. You stated that your proposed bill would offer parents of special education students “an option, other than mediation” to attend an alternative State-approved special education program. I want to be clear that under the IDEA, mediation must be offered whenever a due process hearing is requested. See 34 CFR §300.506. Therefore, it would not be permissible under IDEA to offer an alternative State-approved special education program in lieu of mediation. That is, parents of students with disabilities attending public school programs and eligible to receive FAPE must have the option of mediation whenever a due process hearing is requested, regardless of whether or not they are offered enrollment in an alternative State-approved special education program under the proposed State legislation.

We hope this information is helpful. This letter is not intended to address any compliance issues under Section 504 or other statutes, including the No Child Left Behind Act. Similarly, this letter is not intended to address any other compliance issues under Part B of IDEA. Please feel free to contact Wendy Tada at (202) 205-9094 or Dale King at (202) 260-1156 if you need further assistance.

Sincerely,

A handwritten signature in black ink that reads "Stephanie S. Lee". The signature is written in a cursive style with a large, prominent 'S' at the beginning.

Stephanie S. Lee
Director
Office of Special Education Programs

cc: George P. Dowaliby
Bureau Chief
Connecticut Department of Education