



**UNITED STATES DEPARTMENT OF EDUCATION**

**OFFICE OF THE GENERAL COUNSEL**

NOV - 8 2002

Honorable Ken Lucas  
Member, House of Representatives  
277 Buttermilk Pike  
Fort Mitchell, KY 41017

Dear Representative Lucas:

I am writing in further response to your recent letter to the Department on behalf of your constituent, \_\_\_\_\_ asked for help in explaining assistance under Title V of the Elementary and Secondary Education Act (ESEA), as amended by the No Child Left Behind Act, especially with regard to "getting a nurse in every school in Fort Thomas, KY funded by Title V of ESEA." I am sorry for the delay in responding.

Title V, Part A of ESEA provides assistance to State educational agencies and local educational agencies (LEAs) for innovative educational programs. Funds are distributed under a statutory formula and Section 5131(a) of Title V describes twenty-seven innovative assistance programs for which LEAs may use program funds. One of the programs described in that section is a program to hire and support school nurses, so an LEA that wishes to use funds to hire school nurses with Title V funds may do so. As required by the statute, any use of Title V Part A funds for innovative programs, including hiring school nurses, must be (1) tied to promoting challenging academic achievement standards; (2) used to improve student academic achievement; and (3) part of an overall education reform strategy.

Under section 5133(c)(1) of the statute, LEAs have substantial discretion in determining how they use their Title V Part A funds among allowable program areas and cannot be required to use funds for any particular program. Thus, if an LEA decides to use funds to hire school nurses, it might not necessarily decide to hire nurses for every school in the LEA. This decision is generally within the LEA's discretion, based on the needs of the school district and other factors. Based on the Title V statute, the Department could not require an LEA to spend funds on nurses, nor could it require the LEA to have nurses in each school.

There is more information available on the implementation of the Title V Part A program in the program's guidelines, which were issued in August and are available on the Department of Education's Internet site at:

<http://www.ed.gov/offices/OESE/SIP/titlevguidance2002.doc>

Under other statutes setting forth the general authority of the Department, such as the Department of Education Organization Act and the General Education Provisions Act, it is clear that this Department, generally does not have the authority to determine personnel and administrative matters in the schools. These limits on authority would include whether to require nurses in each school, unless these matters are directly related to requirements in Federal education statutes.

With regard to other Federal statutes, it is possible under specific circumstances that a child with asthma (as mentioned in E-mail message) may be eligible under the Individuals with Disabilities Education Act (IDEA) or under Section 504 of the Rehabilitation Act or under both.

Although children with asthma are not recognized in IDEA as a separate “disability category,” there may be instances when a child with such a condition could be identified as “other health impaired.” *See:* the regulations issued under IDEA at 34 C.F.R. § 300.7. To be classified as “other health impaired,” the child must have limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, that adversely affects a child's educational performance. That determination is made as part of an evaluation to determine whether the child needs special education and related services. If it is determined that the child requires special education and related services, a meeting to develop an individualized education program (IEP) for the child must be conducted within 30 calendar days of a determination that the child needs special education and related services. *See:* 34 C.F.R. § 300.343(b)(2). It is the responsibility of the IEP “team” to determine any special education and related services, including any school health services that the child needs, and formulate an IEP that includes those services. A copy of the IDEA regulations is available on the Department's Internet website at:

<http://www.ed.gov/offices/OSERS/OSEP/Policy/regulations.html>

Separate and apart from the IDEA requirements, your constituent may wish to contact the U.S. Department of Education's Office for Civil Rights (OCR) Regional Office. OCR is responsible for implementation of Section 504 of the Rehabilitation Act of 1973, as amended (Section 504), which prohibits discrimination on the basis of disability.

Although, a child might not otherwise be eligible for special education and related services pursuant to IDEA, the child may require accommodations under Section 504. OCR may be able to provide your constituent with information about specific accommodations that can be made for children with asthma. You or your constituent may address an inquiry to the OCR Regional Office at the following address and telephone number:

Philadelphia Office  
U.S. Department of Education  
Wanamaker Building,  
Suite 515  
100 Penn Square East  
Philadelphia, PA 19107  
Telephone: 215-656-8541

For more information regarding IDEA, Section 504, and Title V Part A with regard to this specific situation, \_\_\_\_\_ may also wish to contact appropriate State and local officials to share her concerns and to get their views on this matter.

I appreciate your interest in this matter and in education, and \_\_\_\_\_ concerns. I hope you find the information in this letter helpful. If you have further questions on this matter, please let me know.

Sincerely,

A handwritten signature in dark ink, reading "Philip Rosenfelt". The signature is written in a cursive style with a large, stylized "P" and "R".

Philip Rosenfelt  
Assistant General Counsel  
for Elementary, Secondary,  
Adult and Vocational Education