



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

September 4, 2007

Michael D. Hampden
Partnership for Children's Rights
271 Madison Avenue, 17th Floor
New York, NY 10016

Dear Mr. Hampden:

This letter is in response to your letter dated May 31, 2007 in which you request clarification of a statement that appears in the preamble to the final regulations for Part B of the 2004 reauthorization of the Individuals with Disabilities Education Act (IDEA), published on August 14, 2006 in the Federal Register, Vol. 71, No. 156, at page 46710, concerning a change in former regulation 34 CFR §300.514, now 34 CFR §300.518, Child's Status During Proceedings. You indicate that, "The following statement in the preamble has unfortunately occasioned confusion in due process administrative decisions in New York, to the detriment of students' rights:

To clarify that new § 300.518(d) (proposed § 300.518(c)) does not apply to a first-tier due process hearing decision in a State that has two tiers of administrative review, but only to a State-level hearing officer's decision in a one-tier system or State review official's decision in a two-tier system that is in favor of a parent's proposed placement, we are removing the reference to "local agency" in new § 300.518(d). This change is made to align the regulation more closely with case law."

In particular, you express concern that this statement has been interpreted (incorrectly, you believe) to mean that pendency rights are not established by an unappealed first-tier hearing decision on the merits that is in favor of the parent.

Under 34 CFR §300.518(d) of the final Part B regulations, published August 14, 2006, if the hearing officer in a due process hearing conducted by the State educational agency (SEA) or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and parents for purposes of 34 CFR §300.518(a). Paragraph (a) states that, except as provided in 34 CFR §300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under 34 CFR §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

Under 34 CFR §300.518(a), if the parent is requesting a change of placement with which the first-tier hearing officer agrees and the local agency appeals that decision, the original placement (where the child received services at the time the hearing request was made) is the child's placement until the result of the appeal (second-tier hearing). Under 34 CFR §300.518(d), if the result of the State-level appeal is that the placement should be changed, as requested by the

parent, that placement is the child's placement during any subsequent appeal to a court of competent jurisdiction. However, neither of these provisions address a situation in a State that has a two-tier due process system, in which a local agency does not appeal a first-tier due process officer's decision on the merits that is favorable to the parent. Under 34 CFR §300.514(a), an unappealed decision is final, and must be implemented. That final decision on the merits, as implemented, becomes the child's current educational placement.

In a single-tier system, the result of the initial hearing must be treated as the child's current educational placement, pending any judicial appeals by either party. If there are no appeals, the child's placement remains in accordance with the hearing officer's decision.

The same decision rules apply if it is the local agency requesting the change in placement. If the hearing officer agrees with the local agency, in a two-tier system, and the parent does not appeal the decision, the placement is that determined by the hearing decision. If the parent appeals the decision, the child's placement at the time the first-tier hearing was requested is the child's placement until the result of the appeal. Once the second-tier placement decision is made, that placement becomes the child's placement during any subsequent judicial appeals.

Based on section 607(c) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, hut represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

We hope this clarification is helpful. If you have further questions, please do not hesitate to contact Deborah Morrow at 202-245-7456.

Sincerely,



Patricia J. Guard
Acting Director
Office of Special Education
Programs

cc: Rebecca Cort