



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

MAR 19 1999

Susan Luger, C.S.W.  
Educational *Consultant and*  
Advocate  
15 West 75th Street New York, New  
York

Dear Ms. Luger:

This is in response to your letter written to the Office of Special Education Programs (OSEP) dated December 22, 1998, concerning §612 (a)(10)(C)(ii) of the Individuals with Disabilities Education Act Amendments of 1997, Pub.L. 105-17 (IDEA '97). The purpose of your inquiry is to ascertain whether-,, under IDEA '97, parents seeking reimbursement from a public agency for all or part of the cost of a unilateral private school placement because they believed that the public program offered to their child would deny their child a free appropriate public education (FAPE) must have enrolled their child in a public program as a prerequisite to the award of reimbursement for the cost of the private school placement from the public agency.

The statutory provision at issue is §612(a)(10)(C) of IDEA '97 which concerns "Payment for Education of Children Enrolled in Private Schools Without *Consent of* or Referral by the, Public Agency." All of §612(a)(10)(C) was added to the Statute by IDEA 197.

Subparagraph (i) of §612(a)(10)(C) of IDEA '97 provides that, in general, a public agency is not required "... to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." However, under subparagraph (ii), "a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." Nevertheless, subparagraph (C)(iii) explains that the cost of that reimbursement may be reduced or denied

(I) if --

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did-not inform the IEP team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child .°: .a private school at public expense:  
or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in [this section, unless an exception set forth at (iv) of this section applies];

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, [through the applicable notice requirements], of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation: or (III) upon a judicial finding of unreasonableness with respect to actions taken by the parents. §612 (a) (10) (C) (iii) of IDEA '97.

In our view, it does not appear that the question presented by your query -- namely, whether actual receipt of some form of special education and related services from a public agency is a prerequisite for a parent's ability to seek tuition reimbursement for all or part of the cost of their child's unilateral private school placement -- is answered by §612(a)(10)(C) of IDEA '97. We do not view §612(a)(10)(C) as foreclosing categorically an award of reimbursement in a case in which a child has not yet been enrolled in special 'education and related services under the authority of the public agency. Reimbursement is an equitable remedy that courts and hearing officers may order in appropriate circumstances. In such a case, a parent may wish to avail him or herself of due process and judicial action, so that a hearing officer or court can determine whether there has been a denial of FADE, and, if so, whether and to what extent tuition reimbursement would be warranted.

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We hope that you find this explanation helpful. If you would like further assistance, you can contact Ms. Rhonda Weiss or Dr. JoLeta Reynolds of OSEP at (202) 205-9053 or (202) 205-5507, respectively, or Carolyn Smith, the New York State contact in the Monitoring and State Improvement Planning Division at (202) 2059159.

Sincerely,

Thomas Hehir  
Director  
Office of Special Education  
Programs

cc: Mr. Lawrence C. Gloeckler  
New York State Education  
Department