



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

OCT 28 2004

Honorable Randy J. Dunn
Interim State Superintendent of Education
Illinois State Board of Education
100 North First Street
Springfield, Illinois 62777-0001

Dear Dr. Dunn:

This letter is in response to questions raised regarding services to students with disabilities in East St. Louis. We hope that we have addressed the questions below in a way that will help you and your staff to resolve the issues in that school district.

1. What recourse would the district have against the State if IDEA funds were withheld? Would the district be able to appeal to OSEP?

Part B of the Individuals with Disabilities Education Act (Part B) sets forth, at 20 USC 1413(d) and 34 CFR §300.197, the procedures that the State educational agency (SEA) must follow if it determines that it should withhold funds from a local educational agency (LEA) or State agency. The regulation at 34 CFR §300.197(a) provides:

(a) In General. If the SEA, after reasonable notice and an opportunity for a hearing, finds that an LEA or State agency that has been determined to be eligible under this section is failing to comply with any requirement described in §§300.220-300.250, the SEA shall reduce or may not provide any further payments to the LEA or State agency until the SEA is satisfied that the LEA or State agency is complying with that requirement.

Thus, if the SEA determines that an LEA or State agency previously determined to be eligible may not be complying with an applicable Part B requirement, it must provide that LEA or State agency with reasonable notice and an opportunity for a hearing.

Part B does not specify the type of hearing that States must make available to an LEA or State agency in this circumstance. As indicated in the pages from your State's monitoring manual that were attached to your inquiry, the procedures affording a subgrantee an opportunity for a hearing at 34 CFR §76.783 of the Education Department General Administrative Regulations (EDGAR) are applicable if a subgrantee alleges that an SEA has violated a Federal statute or regulations in terminating further assistance to a subgrantee for an approved project. 34 CFR §76.783(a)(2). That section cross references

the application disapproval hearing procedures in 34 CFR §76.401(d)(2)-(7) of EDGAR, and a copy of these EDGAR provisions is enclosed with this letter.

After determining that an LEA or State agency is eligible for a subgrant, if the SEA determines that it should withhold funds from one of its LEAs or State agencies because that LEA or State agency is not complying with a particular Part B requirement, the SEA must provide the hearing before it terminates funding. 34 CFR §76.401(d)(2) and 34 CFR §76.783(b). Under 34 CFR §76.401(d)(3), the affected applicant must request the hearing within 30 days of the action of the SEA. Paragraph 76.401(d)(4) provides that the SEA must hold a hearing on the record within 30 days of the date of the hearing request, and must issue its written ruling within 10 days of the date of the hearing. Under 34 CFR §76.401(d)(5), if as a result of the hearing the SEA does not rescind the disapproval, the LEA may file, within 20 days of being notified of the results of the SEA's review, a notice of appeal to the Secretary of Education. The Secretary has delegated responsibility for appeals under 34 CFR §76.401(d)(5) involving Part B to the Assistant Secretary for Special Education and Rehabilitative Services.

The regulation at 34 CFR §76.401(d)(5) provides that if supported by substantial evidence, the SEA's findings of fact are final, and 34 CFR §76.401(d)(6)(ii) provides that the Secretary can overturn the SEA's action only if it was contrary to the Federal statutes or regulations that govern the applicable program. Your letter makes reference to a June 27, 2002, decision of the former Assistant Secretary for Special Education and Rehabilitative Services in the appeal under 34 CFR §76.401(d)(5) by the ABC Alternative Learning Center of a hearing decision of the Arizona Department of Education. That decision is an example of a situation where an LEA invoked the procedures in 34 CFR §76.401(d)(5), after notice and hearing at the SEA level, to appeal the State's final action withholding Part B funds from the LEA under 34 CFR §76.401(d)(5) to the Secretary of Education.

We also have reviewed the procedures referenced in the attached pages from your State's monitoring manual entitled, "Enforcement of Legal Obligations." Most of the information contained there is consistent with applicable Federal requirements; however, we have the following comments and suggestions. In the section entitled "Enforcement of Legal Obligations," language from 20 USC 1413(d) or the implementing Part B regulation at 34 CFR §300.197 should be added, since Part B provides for notice and an opportunity for a hearing in the case of LEA or State agency noncompliance after an LEA has approved the subgrantee's application. The section entitled Notice and Opportunity for Hearing on LEA Applications should be modified to include the citation to and language from 20 USC 1413(c) (Notification to LEA or State agency in case of ineligibility). A reference to the Part B regulation implementing this statutory provision at 34 CFR §300.196 also could be added. The language from section 613(a)(8), which is no longer a current provision of IDEA, should be removed.

- 2. Pursuant to 34 CFR §300.360(a) and other than paying for a private provider, what other mechanisms are there for an SEA to provide special education and related services directly to children with disabilities in an LEA?**

Part B sets forth procedures, at 20 USC 1413(h) and 34 CFR §§300.360 and 300.361, for an SEA to follow in using Part B funds, that would otherwise have been available to an LEA or State agency, for the SEA to provide direct services to children with disabilities residing in an area served by an LEA or State agency. As referred to in your inquiry, this authority could be utilized under the circumstances set out at 34 CFR §300.360(a)(1)-(4) if the SEA determines that the LEA or State agency:

- (1) Has not provided the information needed to establish the eligibility of the agency under Part B of the Act;
- (2) Is unable to establish and maintain programs of FAPE that meet the requirements of this part;
- (3) Is unable or unwilling to be consolidated with one or more LEAs in order to establish and maintain the programs; or
- (4) Has one or more children with disabilities who can best be served by a regional or State program or service-delivery system designed to meet the needs of these children.

The regulations provide, at 34 CFR §300.360(c), that the SEA may provide special education and related services directly, by contract, or through other arrangements, and at 34 CFR §300.361, in the manner and at the location it considers appropriate (including regional or State centers). However, the manner in which the education and services are provided must be consistent with the Part B statute and regulations (including the least restrictive environment provisions of §§ 300.550-300.560). The regulations do not otherwise specify how the SEA meets its direct services obligations, but we find nothing in Part B that would preclude an SEA from using staff of other LEAs or State agencies, if the SEA determines that those arrangements would be appropriate.

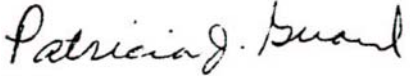
3. If IDEA funds are withheld, how long should these funds be withheld? What is the mechanism for reinstating IDEA funds to an LEA?

As explained above, the Part B statute and regulations specify, at 20 USC 1413(d)(1) and 34 CFR §300.197(a), that if the SEA determines, after reasonable notice and an opportunity for a hearing, that an LEA or State agency that has been determined to be eligible under this section is failing to comply with any requirement, the SEA shall reduce or not provide any further payments to the LEA or State agency until the SEA is satisfied that the LEA or State agency is complying with that requirement. If the SEA utilizes this authority, Part B does not specify a time period for the SEA to use to determine whether the LEA or State agency has come into compliance. However, once the SEA determines that the LEA or State agency has come into compliance, it would be appropriate for the SEA to send a letter, informing the LEA or State agency of its decision to end the withholding and of the basis on which the SEA has determined that it is satisfied that the LEA or State agency is complying with Part B.

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I hope that this clarification is helpful and encourage you to contact Cynthia Bryant at (202) 245-7284 or Larry Ringer at (202) 245-7496 of my office for further assistance.

Sincerely,

 for

Stephanie Smith Lee

Director

Office of Special Education Programs

cc: Dr. Christopher A. Koch

Enclosure