



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

AUG 22 2000

Dr. Gordon M. Riffel
Deputy Superintendent
Center for Special Education
Illinois State Board of Education
100 North First Street
Springfield, Illinois 62777-0001

Dear Dr. Riffel:

This responds to your April 27, 2000 letter, in which you sought additional explanation of our March 20, 2000 letter regarding compensatory education services under Part B of the Individuals with Disabilities Education Act (IDEA). Our March 20, 2000 letter clarified the authority of your office, the Illinois State Board of Education (ISBE), to award compensatory education to a student with disability as a result of adjudicating the complaint filed on the student's behalf. We noted in our March 20, 2000 letter that the student's right to receive compensatory education, as a remedy for a previous denial of a free appropriate public education (FAPE) under the IDEA, is independent of any current right to FAPE.

Specifically, we noted that the remedy was appropriate because ISBE had already determined, under the IDEA, that the student, had been denied FAPE and had not been provided with the services listed in individualized education program (IEP). We stated that ISBE's mandate to the school district to reconvene her IEP team to determine the appropriateness of compensatory education services, for the period that ISBE determined that had been denied FAPE, was appropriate. However, we also noted that the student's receipt of a regular high school diploma (a terminating event under the IDEA to the right to FAPE), did not negate the student's independent right to compensatory education services because ISBE determined that the school district denied FAPE to the student. Your April 27, 2000 letter sought further clarification and authority on this last point.

Despite the additional information provided, we find no provision in Part B that limits the authority of the State educational agency (SEA) in identifying the appropriate remedy for a student who has been denied FAPE, including an award of compensatory services. Because the basis of the compensatory services remedy is the past denial of educational and related services that were not originally provided, compensatory education as a remedy is available even after the right to FAPE has terminated. Thus, the student's election to graduate with a regular high school diploma does not alter the student's right to the compensatory education remedy identified by ISBE.

However, we concur with ISBE in its statement that Part B does not authorize a school district to provide a student with compensatory education, through the provision of instruction or services, at the postsecondary level. See: 34 CFR §300.25. If a student is awarded compensatory

education to cure the denial of FAPE during the period when the student was entitled to FAPE, the compensatory education must be the type of educational and related services that are part of elementary and secondary school education offered by the State.

Compensatory educational and related services, as a remedy to redress the denial of FAPE, is available to both judicial officers and SEAS. See 20 U.S.C. §1415(e)(2); 34 CFR §300.660(b)(1) ("corrective action appropriate to the needs of the child"), and 34 CFR §300.662(c). The independence of the remedy of compensatory services is consistent with the primary statutory and regulatory purpose set forth under the IDEA, namely, "[t]o ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." See 20 U.S.C. §1400(d); 34 CFR §300.1(a).

Federal circuit courts of appeal have confirmed the independence of the right to compensatory education as an equitable remedy to address the denial of FAPE from the right to FAPE generally, which latter right terminates upon certain occurrences (including reaching the age at which the right to FAPE ends or graduating with a regular high school diploma). See generally, *Board of Educ. of Oak Park v. Illinois State Board of Educ. et al.*, 79 F.3d 654, 660 (7th Cir. 1996) (noting "[c]ompensatory education is a benefit that can extend beyond the age of 21 [the terminating FAPE age in Illinois]."); *Murphy v. Timberlane Regional School Dist.*, 22 F.3d 1186 (1st Cir.) (awarding two years of compensatory education to former student after student had reached the [otherwise terminating-FAPE] age of 21 given finding that FAPE had been denied to student), cert. denied, 115 S.Ct. 484 (1994); *Appleton Area School Dist v. Benson*, 32 IDELR 91 (E.D. WI 2000) (authorizing award of compensatory education to a student who graduated with a regular high school diploma). See also, *School Comm. of Town of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70, 105 S.Ct. 1996, 2002-03 (1985).

A student's decision to graduate with a regular high school diploma does not automatically relieve a school district of its responsibility to provide that student with compensatory education and related services awarded to the student. The purpose of the award is to remedy the failure to provide services that the student should have received during a enrollment in high school when was entitled to FAPE. Compensatory services are often appropriate as a remedy even after the period when a student is otherwise entitled to FAPE because, like FAPE, compensatory services can assist a student in the broader educational purposes of the IDEA, namely to participate in further education, obtain employment, and/or live independently. For example, if a student was denied services on IEP (such as speech services or additional reading or math instruction), may not have ever achieved the proficiency necessary to utilize the skills consistent with the broader purposes of the IDEA. The fact that the student has graduated or reached the age at which the right to FAPE would ordinarily end does not necessarily negate the relevancy of, and the need for, compensatory services.

Regarding your request for further clarification, while we agree that this student no longer is entitled to FAPE, by reason of _____ decision to graduate with a regular high school diploma, we find nothing in the regulation at 34 CFR §300.122(a)(3) that would relieve a school district of its obligation to provide a student with compensatory education in the form of services that would _____ address the services that _____ was denied during the period of _____ entitlement to FAPE.

There is nothing in this clarification, however, which requires or authorizes a school district to provide a student with compensatory services at the junior-college level, unless such services also would be considered elementary and secondary school education in Illinois. Rather, we understand the purpose of the ISBE's decision was to mandate that the school district reconvene the IEP team for this student to determine the need for compensatory services based on those services that the student had been denied.

We address here briefly your comments that the student is undergoing due process proceedings as well. Under Part B, a parent or a public agency may initiate an impartial due process hearing on any matter related to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. See 34 CFR §300.507(a). Within 45 days from the receipt of the hearing request, the hearing officer must provide the parties a copy of the final decision. Although the Part B regulations do not comprehensively list all of the specific remedies available to a hearing officer if he or she finds that a child has been denied FAPE, we have stated that an impartial hearing officer has the authority to grant any relief he or she deems necessary, inclusive of compensatory education, to ensure that a child receives the FAPE to which he or she is entitled. See: e.g., OSEP Kohn Letter (February 13, 1991) reprinted at 17 EHLR 522 (noting "OSEP's position is that Part B intends an impartial hearing officer to exercise his or her authority in a manner which ensures that the due process hearing is a meaningful mechanism for resolving disputes between parents and responsible public agencies concerning issues relating to the provision of FAPE to a child . . ."). A copy of this letter is enclosed.

In this matter, we understand that the student requested a due process hearing after ISBE issued its decision on the complaint filed on behalf of the student under ISBE's state complaint procedures. While we have not reviewed the due process complaint, we assume that the student sought to enforce ISBE's determination, since the student prevailed as a result of the complaint filed on behalf with ISBE. Therefore, there is nothing in the Part B regulations that would permit ISBE to delay enforcement and implementation of its decision.

We hope that you find this explanation helpful in clarifying your concerns. If you would like further assistance, please contact either JoLeta Reynolds, at (202) 205-5507, or Greg Corr at (202) 205-9027 Sincerely,

Kenneth R. Warlick
Director
Office of Special Education Programs

Enclosure

cc: 

Accordingly, the petition for writ of mandamus is GRANTED and the district court is DIRECTED to vacate its order disapproving the settlement agreement and approve the settlement in light of the foregoing.

"No settlement after an action has been commenced by or on behalf of a minor or other incompetent shall be effective unless approved by the court having jurisdiction of the action." Fla. Stat. §744.387(3xa).

The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 12179 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

Although this is a federal question case rather than a diversity case, the trial court may consider state law in evaluating whether the

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Digest of Inquiry
(July 10, 1990)

- Is compensatory education a proper means to provide FAPE to a child with disabilities who was previously denied an appropriate education?
- Does a hearing officer have the authority to award compensatory education to a child with disabilities who has been denied FAPE?
- May a child be awarded summer school programming as compensatory education, as opposed to extending his/her special education beyond the maximum age of entitlement?

Digest of Response
(February 13, 1991)

Compensatory Education Is a Remedy under IDEA-B

Compensatory education is a proper method to provide FAPE to children with disabilities who were entitled to, but were denied, FAPE. Moreover, compensatory education may be the only means to provide FAPE to children with disabilities who have been forced to remain in inappropriate public placements due to their parents' financial inability to pay for private placements.

Hearing Officers May Award Compensatory Education

An impartial hearing officer has the authority grant any relief deemed necessary, including compensatory education, to ensure that a child with disabilities receives FAPE.

Compensatory Education May Include Summer Programming

A hearing officer, who has concluded that a child with disabilities is entitled to compensatory education, may order summer school programming as a means to redress the denial of FAPE.

Text of Inquiry

I am writing for a policy interpretation of the Education of the Handicapped Act concerning compensatory education for handicapped children who have been denied appropriate special education services or programs. Having represented many handicapped children in due process hearings conducted pursuant to the EHA, I seek clarification of the authority of an independent hearing officer to award compensatory education services to a child, upon a finding that the school system failed, in the past, to provide the child a free appropriate public education. In addition, may compensatory education services take the form of summer school programming as well as an instead of additional months or years of special education added on at the end of the child's eligibility for special education.

I have found that it is often most advantageous for a student who has been denied appropriate special education services over an extended period of time to attend a specialized special education summer school program in addition to the school year program. The added content frequently allows the child to catch up on some of the skills and learning she or he would have already been able to master had the previous educational programs been appropriate. The earlier the intervention, the more constructive and profitable the services are likely to be. To require the delivery of compensatory education services be withheld until after age 21 is fiscally imprudent, and counterproductive for many children. It is not consistent with the basic tenet of special education—that decisions about programming for a handicapped child be designed to meet his, her unique individual needs. Hearing officers, as well as courts need a variety of remedial options so that the individual needs of the handicapped student can be met and so that society can benefit most from the education provided.

This issue is especially important in school systems with limited special education summer school offerings. The opportunity to attend a summer school program that is not designed to meet the needs of the handicapped student may be all that is available to a handicapped student, unless a hearing officer has the power and authority to require the school district to provide compensatory education in the form of special education summer school.

I look forward to your response.

Text of Response

This is in response to your letter to the office of Special Education Programs (OSEP) concerning: (1) the authority of

hearing officers under **Part B** of the Individuals with Disabilities Education Act (Part B) to award compensatory education services to a child, upon a finding that the school system failed, in the past to provide the child a free appropriate public education (FAPE); and (2) the provision of compensatory education services in the form of summer school programming as well as or instead of additional months a years of special education added on at the end of the child's eligibility for special education.

Your concerns raise several issues, namely, whether. (1) compensatory education is an appropriate method for providing FAPE to a child with disabilities for whom FAPE has previously been denied; (2) a hearing officer has the authority to award compensatory education to a child with disabilities who has previously been denied FAPE; and (3) a hearing officer, upon awarding compensatory education to a child with disabilities who has previously been denied FAPE, can determine its scope. We will address the above issues separately.

In response to the first issue raised, OSEP's position, which is supported by several court decisions is that compensatory education is an appropriate means for providing FAPE to a child with disabilities who had previously been denied FAPE. A major purpose of Part B is to insure that all children with disabilities are provided FAPE. 34 C.F.R. § 300.1. Compensatory education effectuates this purpose by providing the FAPE which the child was originally entitled to receive. Further, compensatory education may be the only means through which children are forced to remain in an inappropriate placement due to their parents' financial inability to pay for an appropriate private placement would receive FAPE.

The second issue raised by your letter concerns the authority of a hearing officer to award compensatory education to a child with disabilities who had been denied FAPE.

Under Part B, parents have the right to initiate a hearing on any matter relating to the provision of FAPE for their child. 34 C.F.R §§ 300.504(a)(1) and (2); 300.506(a). The due process hearing provisions of Part B: (1) enumerate criteria for appointment of impartial hearing officers (34 C.F.R § 300.507); (2) specify hearing rights (34 C.F.R. § 300.508); (3) require that findings of fact and decisions, with the deletion of personally identifiable information, be made available to the public (20 U.S.C. § 1415(d); and (4) prescribe a 45-day timeline for issuance of hearing decisions, unless an extension of the 45-day timeline is granted (34 C.F.R. §300.512).

Part B and its legislative history evince the importance attached by the Congress to the procedural safeguards as a method of ensuring that FAPE is made available to children with disabilities. Therefore, OSEP's position is that Part B intends an impartial hearing officer to exercise his/her authority in a manner which ensures that the right to a due process hearing is a meaningful mechanism for resolving disputes between parents and responsible public agencies concerning issues relating to the provision of FAPE to a child. Although Part B does not address the specific remedies an impartial hearing officer may order upon a finding that a child has been denied FAPE, OSEP's position is that, based upon the facts and circumstances of each individual case, an impartial hearing officer has the authority to grant any relief he/she deems

necessary, inclusive of compensatory education, to ensure that a child receives the FAPE to which he/she is entitled.

The decision of the impartial hearing officer is binding unless an aggrieved party appeals through applicable Administrative or judicial procedures. 34 C.F.R. §§ 300.509-300.51

The third issue raised by your letter asks whether compensatory education may take the form of summer school programming as well as or instead of additional months or years of special education added on at the end of the child's eligibility for special education.

The scope of compensatory education ordered in an impartial hearing officer's decision must be consistent with a child entitlement to FAPE, but should not impose obligations that would go beyond entitlement. Therefore, a hearing officer who concludes that a child with disabilities is entitled to compensatory education may order, as a means of redressing the denial of FAPE to that child, that compensatory education include or take the form of summer school programming.

I hope the above information is helpful. If we may provide further assistance, please let me know.

Robert R. Davila

¹ see. Wier *vs.* r. X. Gilhool *vs.* The Chester Upkind School District. 91 F.l.d 863 (3rd Cir. 1990) *Burr vs Burr* r. Ambork 663 F.2d 1171 (2nd. Ci 1981) *Scott vs. Scott* 618 F.2d 719 (8th Cir. 1986) *and Campbr* r. Talladega Cowry Board of Education, 518 F. Supp. 47 (N.D. AL. 1981)

² OSEP's position is in *con* with *trae*at con and State educational agency *decisions*. See, *Burr vs Burr* r. Atnba h. 863 F.2d 1071 (2nd. Cit. 198E); (coo of appeals reinstated hearing *officer's* award of compensatory education to child with disabilities *rod Auburn City Board of Education*. 16 EHLR 3S (1989) (*hearing officer* awarded tutorial services to child with disabilities wh had been denied FAPE, *holding* that he had the authority, just u a federal c oats court would here, to 8rmt the relief sou8tu~

Honorable Robert R. Livingston
Home of Representatives
Washington, DC 20515

Digest of Inquiry
(September 18, 1989)

- Should a local school district provide interpreter services to a child with a hearing impairment who attends a private school?

Digest of Response
(February 15, 1991)

Interpreter Services Are Not Mandatory in
Private Placements

If FAPE is made available to a child with disabilities, but the parents choose to pursue private place-