



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

JUL 1, 2003

I am writing in response to a series of letters you have written to the Department. I hope the following information is helpful.

Your main question throughout these letters appears to be whether there is an entitlement under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., which would allow parents to choose any private school that is part of a choice program, and have special education and related services provided at that school.

In your letters, you cite the provision in 34 C.F.R. § 300.552(c), which requires that each public agency ensure that “unless the IEP of a child with a disability requires some other arrangements, the child is educated in the school he or she would attend if nondisabled.”

I first note that 34 C.F.R. § 300.552(c) was developed in the context of special education programs within local education agency (LEA) schools, and not choice programs. However, even with regard to LEA programs, the IDEA does not require that LEAs make all services needed by all students with disabilities available at all locations.

Moreover, the IDEA does not require that private schools provide special education and related services that meet the needs of all students with disabilities, and it does not require that States certify all private schools to provide services to all students. In Letter to Reedy, 16 IDELR 1364 (OSEP 1990), the Office of Special Education Programs responded to the question of whether private schools serving students in Vermont are “bound by the same admission and discipline policies that apply to public schools.” OSEP explained that “if a private school or facility is unable or unwilling to provide an appropriate educational program for a child who is disabled, the public agency remains responsible for providing, or ensuring the provision of, a FAPE to that child, either by locating another appropriate private school placement for the child or by educating the child in a public agency program.”

The United States Court of Appeals for the Second Circuit agreed with the policy in Letter to Reedy that private schools are not subject to the same admission policies that apply to public schools. St. Johnsbury Academy v. D.H. et. al., 240 F.3d 163 (2nd Cir. 2001). In St. Johnsbury Academy, a parent contested a private school’s policy that

students had to perform at or above the fifth grade level before being assigned to the Academy's ninth grade mainstream academic classes. The Court held that, although the public school was responsible for making a free appropriate public education (FAPE) available to the student (which in Vermont was done by paying students' tuition at private schools or schools outside the district), that particular private school was not required to change its policy to ensure that the student was able to receive FAPE at that school.

I will also address your request that this Department review the State's response to the issues we forwarded to the State for review, pursuant to its State complaint procedures under 34 CFR §§ 300.660 – 300.662, in a letter dated February 26, 2003. Although the complaint procedures applicable to Part B of the Individuals with Disabilities Education Act (Part B), prior to May 11, 1999, included a provision that after a complaint had been filed with the State and the State had acted on it, either party to the complaint could request the U.S. Secretary of Education to review the State's final decision; on March 12, 1999, new final regulations were published that no longer include a Secretarial review process. The new regulations became effective May 11, 1999, so the Secretarial review process is no longer available. As with other issues raised under the IDEA, if you disagree with the response from the State, you may take advantage of the procedures for the filing of a due process hearing under the IDEA. If you wish the State to address additional issues, you may file a new complaint with the State.

In your April 22, 2003 letter to Ms. Jill Harris you also ask about services plans. Contrary to the statements in your letter, school systems are not required to prepare services plans for all children with disabilities placed in private schools by their parents. Instead, under 34 CFR § 300.455(b), services plans are prepared only for private school children with disabilities who are designated to receive services under 34 CFR § 300.452. If you wish to raise the issue of a services plan for a student who has been designated to receive services, you may file a complaint with the State.

Finally, in response to your question, the Office of Civil Rights (OCR) address where we sent the February 26, 2003 letter is:

U.S. Department of Education
Office for Civil Rights
330 C Street, S.W.
Washington, D.C. 20202

As you requested, we are forwarding a copy of your February 27, 2003 letter to OCR, along with a copy of this letter.

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I hope this information is helpful.

Sincerely,

Patricia J. Guard for

A handwritten signature in black ink that reads "Patricia J. Guard". The script is cursive and fluid, with the first name "Patricia" being more prominent than the last name "Guard".

for Stephanie S. Lee

Director

Office of Special Education Programs

cc: Vermont Department of Education

U.S. Department of Education, Office for Civil Rights