



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

JUL 22 2004

Mr. David Heckler
Legislative Director
Office of Assemblywoman Lynn Daucher
State Capitol, Room 2158
Sacramento, California 95814

Dear Mr. Heckler:

This letter is in response to your electronic mail regarding California Assembly Bill (AB) 2359, proposed by Assemblywoman Lynn Daucher. It appears that AB 2359 would limit the amount of the reimbursement for a nonpublic education from the date that the court action was filed or the date that the due process hearing was initiated, when a school district is unable to provide a free appropriate public education (FAPE) to a child with disabilities.

You ask whether the proposed State law exceeds federal law and whether such a limitation on retroactive reimbursement would constitute noncompliance by California and jeopardize federal funding. After reviewing the documents that you provided, it appears that the proposed limitation is inconsistent with the provisions of the Individuals with Disabilities Education Act (IDEA) in that it would limit the authority of courts, and hearing officers, to fashion appropriate relief, including full reimbursement for nonpublic placements where FAPE is not made available to the child in a timely manner. Under 20 USC 1415(i)(2) and 34 CFR §300.512, a court hearing a dispute under the IDEA must be able to fashion an appropriate remedy. Likewise, 20 USC 1412(a)(10) and 34 CFR §300.403 provide that:

If the parents of a child with a disability...enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, 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.

The only limitations on such reimbursement contemplated by the IDEA are, subject to certain exceptions, a reduction or denial of reimbursement:

- (1) If—
- (i) 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 FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

- (ii) At least ten (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 [that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense];
- (2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the [federal] 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 the evaluation; or
- (3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.
34 CFR §300.403(d)

The limitation on reimbursement that is contemplated in AB 2359 would be inconsistent with these provisions.

In response to your questions regarding federal funding, a State is eligible for assistance under Part B of the IDEA for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets the conditions in 34 CFR §§300.121-300.156. Sections 300.129 and 300.133 require, in part, that the State have on file with the Secretary, policies and procedures that ensure that the provisions of 34 CFR §§300.400-300.403 and §§300.500-300.529 are met. Because AB 2359 appears inconsistent with the provisions of 34 CFR §§300.403 and 300.512, it is unclear how the State could enact this State law provision and still meet the eligibility requirements of the IDEA.

I hope you find this response helpful. If you would like further assistance, please contact Dr. JoLeta Reynolds at (202) 245-7459 (press 3) or Dale King at (202) 245-7405.

Sincerely,



for

Stephanie Smith Lee
Director
Office of Special Education Programs

cc: Dr. Alice Parker
California Department of Education