



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Honorable Richard P Mills
Commissioner of Education
New York State Education Department
111 Education Building
89 Washington Avenue
Albany, New York 11234

JUN 4 1999

Dear Commissioner Mills:

The Individuals with Disabilities Education Act (IDEA) requires the New York State Education Department (NYSED) to ensure that,

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not-disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 USC § 1412(a)(5)(A) The IDEA Amendments of 1997 further provide, at 20 USC §612(a)(5)(B), that

(I) If the State uses a funding mechanism by which the State distributes State funds on the basis of the type of setting in which a child is served, the funding mechanism does not result in placements that violate the requirements of subparagraph (A). (ii) If the State does not have policies and procedures to ensure compliance with clause (i), the State shall provide the Secretary an assurance that it will revise the funding mechanism as soon as feasible to ensure that such mechanism does not result in such placements

Since 1993, NYSED has acknowledged that New York uses a funding mechanism that distributes State funds to local educational agencies for special education on the basis of the type of setting in which a child is served. The Office of Special Education Programs (OSEP's) August 16, 1994 New York, Monitoring Report (based upon OSEP's 1993 monitoring review of the State), stated:

NYSED has developed a "Draft Policy Statement on Least Restrictive Environment" and "Draft Paper on State Funding for Education Programs for Students with Disabilities." These papers include a detailed analysis demonstrating that public agencies receive far richer State funding support for placing students in public and private separate school settings than for serving the same students in less restrictive placement options. They specifically state that "State school aid funding for students is not fiscally neutral. ... State Aid is higher for different levels of special education; the more segregated setting, the greater the reimbursement." The documents further state that this funding disparity is believed to have the following "significant programmatic impact: Students with disabilities are inappropriately placed in segregated settings." While both documents are drafts, three key [NYSED] administrators confirmed that they concur with the documents' description of current funding patterns and the conclusions in the documents regarding impact on placement decisions.

OSEP's 1994 monitoring report and September 10, 1996 follow-up monitoring report noted that NYSED has not been effective in ensuring compliance with the Part B requirements regarding placement in the least restrictive environment. The 1994 monitoring report concluded that NYSED had not been effective in ensuring that: (1) to the maximum extent appropriate, children with disabilities were educated with nondisabled children, and children with disabilities were removed from the regular education environment only if the nature or severity of their disability was such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily (34 CFR §300.550(b)); (2) a continuum of alternative placements was available to meet the needs of children with disabilities for special education and related services, and the various alternative placements included at §300.551 are available to the extent necessary to implement the IEP for each child with a disability (34 CFR §§300.551); (3) the educational placement for each child with a disability was based on his or her IEP (34 CFR §300.552(b)(2)); and (4) each child with a disability participated with nondisabled children in nonacademic and extracurricular services and activities to the maximum extent appropriate to the needs of that child

(34 CFR §300.553). OSEP identified continuing noncompliance regarding these requirements When it conducted a follow-up review of New York in December 1995.

OSEP conducted a comprehensive monitoring review of New York in April 1999, and again found continuing noncompliance regarding placement in the least restrictive environment. During that visit, personnel in a number of districts reported to OSEP that they continue to base placement decisions on the availability of resources, such as staff, space and funding, rather than the unique needs of each child with a disability. As a result, some children are served in unnecessarily restrictive placements, and others do not receive the supplementary aids and services that they need in order to succeed in less restrictive placements. Personnel in some of these districts told OSEP that fiscal incentives are needed in order to ensure that school districts successfully educate children with disabilities in the least restrictive placement. .

As exemplified by the table below, public agencies in New York place a significantly lower percentage of children with mental retardation in the less restrictive placement options of regular class and resource room than the national average, and a significantly higher percentage in public and private separate facilities.

PERCENTAGE OF CHILDREN 6-21 WITH MENTAL RETARDATION SERVED IN DIFFERENT EDUCATIONAL ENVIRONMENTS UNDER PART B DURING 1996-97 SCHOOL YEAR		
PLACEMENT	NEW YORK	50 STATES, DC, AND PUERTO RICO
REGULAR CLASS	6.24	10.5
RESOURCE ROOM	7.54	28.41
SEPARATE CLASS	56.66	54.21
PUBLIC SEPARATE FACILITY	25.34	4.94
PRIVATE SEPARATE FACILITY	3.03	0.92
PUBLIC RESIDENTIAL FACILITY	0.13	0.31
PRIVATE RESIDENTIAL FACILITY	0.66	0.21
HOME/HOSPITAL ENVIRONMENT	0.41	0.49

Over the same six-year period of 1993-1999 during which OSEP has made repeated findings of noncompliance in New York, NYSED has repeatedly identified the way in which State special education funds flow to school districts as hindering compliance with the requirements regarding placement in the least restrictive environments. NYSED's findings in the "Draft Policy Statement on Least Restrictive Environment" and "Draft Paper on State Funding for Education Programs for Students with Disabilities" regarding the negative impact of the funding formula on placement decisions were quoted in OSEP's 1994 monitoring report and are cited above. In October 1997, NYSED provided OSEP with a copy of a document that NYSED developed in support of an unsuccessful legislative proposal to revise the funding formula, in which NYSED stated that "the current education finance system provides a fiscal incentive to place students in restrictive environments." In May 1998, NYSED updated its "Least Restrictive Environment Policy Paper," which had been approved by the Board of Regents in May

1994, and widely disseminated it throughout the State. That Paper states, in relevant part, that:

The current funding system does not offer the flexibility and support needed to provide more integrated school programs and produce the results we want for all students with disabilities. It provides a fiscal incentive to place students in restrictive environments.

In the State's Part B grant award letter for Federal Fiscal Year 1998, the Assistant Secretary for the Office of Special Education and Rehabilitative Services informed NYSED of this Department's expectation that:

NYSED take whatever steps are necessary to revise NYSED's current funding formula to ensure that your State is in compliance with current law. As stated above, these actions are crucial to New York's continued eligibility for assistance under the (IDEA).

In sum, OSEP concludes that NYSED has a formula for distribution of State aid that is based on the type of setting where the child is served, that the funding formula results in children being placed in unnecessarily restrictive settings, and that the State does not have policies and procedures that ensure that practices in local educational agencies comply with Part B's least restrictive environment requirements. OSEP bases this conclusion on its monitoring findings in 1993, 1995, and 1999, and on NYSED's own determination that it must revise its funding mechanism in order to ensure compliance with the least restrictive environment requirements. Therefore, in order to remain eligible under Part B, the State must revise the funding mechanism by which the State distributes State funds for special education in a manner that will enable NYSED to ensure compliance with the least restrictive environment requirements of Part B.

Accordingly, unless NYSED provides documentation to OSEP prior to July 1, 1999 that the funding mechanism by which the State distributes State funds for special education has been revised to make it consistent with the requirements of 20 USC § 1412(a)(5), this Department will determine that the State is a high risk grantee within the meaning of 34 CFR §80.12, and that the State's Part B grant award for Federal Fiscal Year 1999 should include special conditions requiring the State to make such a revision.

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it is our understanding that NYSED has, on more than one occasion, proposed statutory revisions to the State Legislature that would change the funding mechanism, but that to date those legislative initiatives have been unsuccessful. We understand that such a statutory revision is currently pending before the legislature. We are hopeful for your success in ensuring that the State's funding mechanism is revised to make it consistent with Part B. We will be happy to continue to assist you in your efforts to finally resolve this issue.

Sincerely,

 Judith Heumann

Assistant Secretary