



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Oct 7, 1997

Joann M. Biondi
Director
office of Special Education
Berkeley Unified School District
2134 Martin Luther King, Jr., Way
Berkeley, California 94704-1180

Dear Ms. Biondi:

This is in response to your letter to the Office of Special Education Programs (OSEP), dated May 21, 1997. In your letter, you seek clarification from this Office regarding which school district would be responsible for providing special education and related services to disabled students whose parents are legally divorced, have joint legal and physical custody of their child, and reside in two separate school districts.

In our view, Part B of the Individuals with Disabilities Education Act (Part B) does not specifically address the issue raised by your inquiry. Rather, we believe that State law, not Federal law, would be determinative of the responsibilities of the respective school districts in the situation you describe. As long as the State makes a determination of which district is required to make available a free appropriate public education (FADE), and as long as that district carries out its responsibility, the Federal requirements will be met. However, a discussion of the applicable requirements of Part B, as interpreted by this Office, follows.

Under Part B, each State and its local school districts have an ongoing responsibility to ensure that FADE is made available to all eligible children with disabilities in mandatory age ranges residing in the State, and that the rights and protections of Part B are extended to eligible students with disabilities and their parents. 34 CFR §§300.121 and 300.2. If the parents are separated or divorced, it is the position of this Office that both parents retain parental rights under Part B, unless State law or a court order provides otherwise. See EHLR 211:297.

In general, based on State law and practice, the State educational agency (SEA) designates the public agency in the State that is responsible for ensuring the provision of FADE to eligible disabled students. 34 CFR §300.600. Under Part B, if there is a dispute over which school district in a State is responsible for providing FADE to a disabled student, the duty to make FADE available to that student is generally derived from the parent's residency. Therefore, the State and generally the school district where the child's parents reside would be responsible for the provision of FADE. Part B, however, does not

address the issue of which school district in the State is responsible for ensuring the provision of FAPE when the child's parents have joint custody and reside in two separate school districts in the same State.

In situations where a State wishes to offer parents a choice as to which school district would be responsible for ensuring the provision of FAPE, it has been the Department's position that the SEA, through whatever process it chooses to develop, must designate one educational agency in the State as having the ultimate responsibility for ensuring the provision of FAPE to eligible disabled students. See generally 17 EHLR 836.

Even if a school district contracts with another school district in the same State to serve a disabled student, this Office has interpreted Part B to require that the sending school district is the school district that is responsible for the student's individualized education program (IEP) and placement and is generally the school district that counts the student for purposes of generating Part B funds. See EHLR 211:373.

Therefore, in the situation you pose, while it appears that both parents would retain rights under Part B, the California State Department of Education (CDE) must determine which school district in the State has ultimate responsibility for ensuring the provision of FAPE to this student. This would include responsibility for ensuring that the student's IEP is developed and implemented and that applicable procedural safeguards and due process rights are made available. Even though one public agency or local school district bears ultimate responsibility for ensuring the provision of FAPE, there is nothing in Part B that would prohibit the State from requiring a shared financial arrangement in this situation, consistent with State law. For example, it would not seem unreasonable for the school district in which the child resides with the parent the majority of time to have ultimate responsibility for the provision of FAPE, which would include bearing major financial responsibility for the cost of the placement. However, if consistent with State law, the school district or the parent where the child lives for a lesser percentage of time could bear a proportionate share of financial responsibility for the cost of the student's placement.

Since this Office interprets Federal law only, and not State law, we would suggest that you write to the named CDE official at the address listed below for further guidance:

Mr. Leo J. Sandoval
State Director
Special Education Division
California State Department of Education
515 L Street, No. 270
Sacramento, California 95814

In your letter, you also call to our attention the decision of the U.S. Federal district court in Linda W. v. Indiana Department of Education, 927 F. Supp. 303 (N.D. Ind. 1996), also reported at 24 IDELR 651. In our view, the resolution of that case was based primarily on an interpretation of State law, not Federal law. As your letter correctly recognizes, even had Federal law been controlling of the outcome in Linda W., since Linda W. was a decision of a U.S. Federal district court, its reasoning and holding are not binding in jurisdictions outside of Indiana.

We hope that you find the above explanation helpful. If we can be of further assistance, please let me know.

Sincerely,



Thomas Hehir
Director
Office of Special Education
Programs

cc: Mr. Leo J. Sandoval