UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

FEB 26 1998

James F. McKethan, Ed.D.
Director
Exceptional Children's Program
Cumberland County Schools
P.O. Box 2357
Fayetteville, North Carolina 28302

Dear Dr. McKethan:

This is in response to your letter written to Judith E. Heumann, Assistant Secretary for the Office of Special Education and Rehabilitative Services, dated February 24, 1997 (February 24th letter). Please excuse the delay in issuing our response.

In your letter you reference Assistant Secretary Heumann's letter, dated August 2, 1996, which was written to and carbon copied to the North Carolina Department of Public Instruction (NCDPI) (August 2nd letter). That letter advised of the grant of his request for Secretarial review, made on behalf of of NCDPI's decision dated November 16, 1995 regarding the complaint against the County Schools (.CS). The reason for granting Secretarial review was that NCDPI had applied an incorrect legal standard in concluding that CS was not out of compliance with the requirements of Part B of the Individuals with Disabilities Education Act (IDEA) and the Education Department General Administrative Regulations (EDGAR) that govern the participation of parentally-placed private school disabled students in programs assisted or carried out under Part B of IDEA. NCDPI issued a revised decision, dated October 7, 1996, based upon the guidance set out in the August 2, 1996 letter.

Your February 24th letter states that Assistant Secretary Heumann's August 2nd letter is in conflict with a letter which the Office of Special Education Programs (OSEP) wrote to Ms. of Fayetteville, North Carolina, dated January 11, 1993 (January 11th letter). In our view, the interpretations set out in the August 2nd and January 11th letters are not in conflict.

In the January 11th letter, OSEP responded to Ms. question regarding the discontinuance of Part B services to parentally-placed, private school disabled students (hereinafter,

private school students). OSEP addressed two separate aspects of Part B as it relates to school districts' responsibilities toward private school students: evaluation and the provision of special education and related services.

At issue in the August 2nd letter was CCS's denial of speech language services to parentally-placed private, including home educated, disabled students. It is our understanding that the decision to deny speech language services was based on CCS's policy that students educated in private settings cannot receive speech language therapy from the local school district since it is not paid for with Part B funds. As we explained in the August 2nd letter, this rationale is inconsistent with the Department's longstanding position that a school district may not limit its responsibility to ensure the equitable participation of private school students by restricting their participation only to those portions of its special education program on which it spends Part B dollars. Instead, the Federal funds available to the district for special education services must be equitably allocated between public school students and private school students in a way that is more or less proportionate to their numbers.

There was nothing stated in the August 2nd letter which contradicted the January 11th letter, nor were expanded requirements set forth. Both letters expressed the Department's longstanding interpretation of IDEA that, with respect to private school students, public school districts must (1) conduct child find (identification, location and evaluation) activities in accordance with 34 CFR §§300.128 & 300.220, and (2)ensure their equitable participation in programs assisted or carried out under Part B of IDEA.

The January 11th letter explained with some detail local school district obligations to evaluate private school students and provide special education services, and included a discussion of the required process by which school districts decide which private school students to serve and how. The August 2nd letter, albeit with less detail, also set forth these obligations and focused on the process required to determine which private school students would be served and the nature and extent of the services. Both letters recognized that private school students do not have an <u>individual</u> entitlement to services under Part B, and that school districts need not make the full range of Part B services available to private school students whom it elects to serve. However, private school students, as a <u>group</u>, must be afforded a genuine opportunity for equitable participation in special education programs conducted by local *school* districts.

In the 1997 Amendments to IDEA, Pub. L. 105-17 (IDEA '97), which

was signed into law on June 4, 1997 by President Clinton, Congress codified the Department's longstanding interpretations of IDEA regarding public school district responsibilities toward private school students. See 20 U.S.C. §1412(a)(10)(A). Section 1412(a)(10)(A)(I) states that private school students must be allowed to participate, to the extent consistent with their number and location, in programs assisted or carried out with Part B funds. The amounts expended by the local educational agency (LEA) on special education for private school students must be equal to a proportionate amount of the available Part B funds. §1412(a)(10)(A)(I)(I). Further, Part B services may be provided to private school students on the premises of the private, including parochial, schools to the extent consistent with law. §1412(a)(10)(A)(i)(II).

IDEA '97 also clarified that the child-find responsibilities of public school districts also apply to private school students. §1412(a)(10)(A)(ii).

Proposed regulations implementing the 1997 amendments were published by the Department of Education (the Department) on October 22, 1997 (62 Fed. Reg. 55026); final regulations are pending. Proposed 34 CFR §§300.450-300.462 address public school district obligations to private school students. Proposed 34 CFR §300.454 would provide that private school students have no individual right to special education and explains the consultative process by which LEAs determine which private school students will receive services, what services will be provided, and how such services will be provided. Proposed 34 CFR §300.455 would require that the services that are actually provided must be comparable in quality to the services provided public school disabled students.

You also asked a number of specific questions regarding public school district obligations toward private school students. The following addresses these questions based, in part, on provisions in the Department's proposed regulations.

In question #1, you requested an explanation of the “practical considerations" which should be involved in an LEA's determination of genuine opportunity for private school students' equitable participation in programs assisted or carried out under IDEA. Proposed 34 CFR §300.453 implements the requirement of IDEA '97 that services be provided to private school students to the extent consistent with their number and location in the State, and explains how the proportionality calculation would be made. Once a district determines how much of its Part B funds it must allocate for private school students, proposed 34 CFR §300.454 would establish that, although no private school student has an

individual right to special education and related services, in determining which children will be served, what services will be provided, and how such services will be provided, the LEA must consult with appropriate representatives of private school students. The consultative process is to ensure that there is a genuine opportunity for the views of the private school children, through their representatives, to be expressed and considered. A requirement for consultation also is required in the current Part B regulations. See 34 CFR §300.451(b) (requires compliance with 34 CFR §§76.651-76.662; 34 CFR §76.652 requires consultation with representatives of private school students).

In question #2, you refer to the terms "comparable benefits," "same benefits," and "different benefits" with respect to private school students, and ask how such terms differ and how they are involved in the determination of which private school students will be served and how. The proposed regulations have incorporated and further clarified 34 CFR §§76.650-76.662 which currently sets forth the responsibilties of public school districts to private school students under IDEA. Proposed 34 CFR §300.455 does not use the three terms in question and would clarify that the services provided to private school students must be comparable in quality to services provided to children with disabilities enrolled in public schools. The definition of "comparable in quality" is proposed at 34 CFR §300.455(c).

In question #3 you ask if LEAs must offer some level of services to every private .school student with a disability. Although an LEA must include private school children in its child find activities, as mentioned above, private school students have no individual right to special education and related services under IDEA, and a school district is not required to serve every private school child provided the district follows the law and regulations in determining the amount it will spend on services to private school children, which private school children it will serve, what services it will provide, and how such services will be rendered.

In question #4 you ask if private school children are entitled to FAPE. FAPE must be offered to all children with disabilities by the school district in which they reside. If a parent rejects a district's offer of FAPE in favor of unilaterally placing his/her child in a private school, then the district is not required to pay for that child's private education. However, should the parent(s) decide to return the child to public school, FAPE must be provided.

It is not clear what you are asking in questions #5 and #9; note, however, as mentioned above, while private school students do not

have an entitlement to particular services -- as they would if they were enrolled in a public school -- services provided to private school students must be comparable in quality to services provided public school disabled students.

In questions #6, #7, #8 and #10, you ask if parents have due process rights if an LEA decides that their child will or will not receive services. Private school students are not entitled to FAPE so the proposed regulations would provide that their parents do not have a right to due process procedures under IDEA regarding the provision of FADE, such as a district's decision not to serve their child or provide a requested service. See Proposed 34 CFR §300.457(a). However, the proposed regulations would make clear that parents of private school students may use the State's complaint procedures if they believe that a public agency has failed to meet its obligations under proposed 34 CFR §§300.451-300.462. See Proposed CFR §300.457(b).

With respect to questions #11 and #12 which refer to the December 1st count child, proposed 34 CFR §300.753 maintains the current regulatory rule that in order to count a student (private or public) who is receiving special education from the local school district, one criterion is that the child must be receiving special education which meets the State's educational standards. The documentation which must be maintained by the District for counted children must, of course, be adequate to support the determination that those children are receiving special education and related services in accordance with (current and proposed) 34 CFR §300.753. See also Note 2 under Proposed §300.753.

Finally, Goodall v. Stafford County School Board, 930 F.2d 363 (4th Cir. 1991), dealt with the provision of an interpreter by a public school for a deaf student who was enrolled by his parents in a parochial school. The question in Goodall was whether interpreter services could be provided on site at the child's religious school. The issue of whether an interpreter would be provided by the local district in the first place was not in question. As you know, the Fourth Circuit held that it would be a violation of the federal constitution, as well as Virginia's constitution, for the school district to provide the interpreter at the religious school. However, the Supreme Court in Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993), overruled Goodall in part by holding that the federal constitution is not violated if a public school provides an interpreter to a private school student on site at private, including parochial, schools. As mentioned above, IDEA '97 states that local school districts may provide IDEA services to private school students on site at their private schools to the extent consistent with law. 20 U.S.C. §1412(a)(10)(A)(i)(II).

For your information, I have enclosed a copy of IDEA '97 and the accompanying Senate Report.

We hope that you find the above explanation helpful. If we can be of further assistance, please contact Dr. JoLeta Reynolds or Rhonda Weiss in OSEP at (202) 205-5507.

Sincerely,

Thomas Hehir
Director
Office of Special Education
Programs

Enclosures

cc: E. Lowell Harris
North Carolina Department
of Public Instruction