UNITED STATES DEPARTMENT OF EDUCATION

THE DEPUTY SECRETARY

OCT - 8 1998

Honorable John T. Benson
State Superintendent
State of Wisconsin Department of Public Instruction
125 South Webster Street
Madison, WI 53702

Dear Superintendent Benson:

This is in response to your letters to Secretary Riley of August 20, 1998 and September 9, 1998, and related letters from John Kalwitz, John O. Norquist, and Howard L. Fuller of the City of Milwaukee, of September 4, 1998, Howard L. Fuller of September 14, 1998, and Milwaukee City Attorneys, Grant Langley, Susan D. Bickert and Roxanne L. Crawford, of September 14, 1998, concerning the responsibility of charter schools, chartered by the Common Council of the City of Milwaukee, to provide a free appropriate public education (FAPE) to children with disabilities in accordance with the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973. We will specifically address the three questions from your August 20, 1998 letter (1a, 2 and 3) and an additional issue raised in correspondence from counsel for the City of Milwaukee (1b).

We want to reiterate the Administration's strong support for public charter school programs as an important component of needed educational reform. We believe that public charter schools must maintain openness and equity, vital components of publicly supported education. Charter school options should be available to appropriately serve all children, including children with disabilities. As with any innovative program that is based upon greater legal flexibility, State charter school provisions often raise novel questions of State law. The United States Department of Education (Department) generally does not resolve issues of State law, but would rely upon a reasonable interpretation by the State, either through the responsible State administrative agency, State Attorney General's Office, or a decision of a State court of competent jurisdiction. It is our hope that the City of Milwaukee and the State can come to a mutual understanding and agreement that provides parents of all children with greater educational options and appropriately educates all children, including those with disabilities.

1a. The Wisconsin Department of Public Instruction has determined that the City of Milwaukee charter school program, like all charter schools in this state, is a public school program under state law.[1] Does the Department of Education agree with that determination?

[1]Counsel for the City has asserted that City-chartered schools are neither public nor private, but rather a distinct category of charter schools. However, for purposes of the IDEA, as well as many other federal programs, a school must be either public or private. The IDEA requires public schools to provide FAPE to children with disabilities. It does not require FAPE to be provided to children with disabilities whose parents have elected not to accept FAPE and place

Yes. The issue of whether a particular type of school is "public" or "private" is primarily a matter of State law. In this matter, the Department defers to the Wisconsin Department of Public Instruction's (WDPI) interpretation, and agrees that the program in question is a public one for the reasons set out below.

"Charter school" is a term of art that is generally understood as a public school. It is defined as a public school in the federal charter school statute, 20 U.S.C. §8066; provisions in the IDEA clearly contemplate that charter schools will provide special education and related services as public schools, 20 U.S.C. §1413(a)(5) and (e)(1)(B); and every State that we have been able to identify treats charter schools as public schools. Given the structural similarities between Wisconsin's charter school law and those of other States, we believe Wisconsin's charter schools should be presumed to be public schools. Although the City has asserted otherwise, the characteristics of Wisconsin's charter schools appear to be typical of charter schools throughout the nation. Specifically, they do not charge tuition to any of their students, receive their basic support through public funds, are exempt from many or all State laws and regulations applicable to traditional public schools, are established under a State charter school law, are chartered by a public authority, are required to meet public standards of educational and fiscal accountability, and are subject to termination by a public authority for failing to meet those standards.[2]

For general purposes, as used in its programs and administrative regulations, the Department defines the term "public" as follows: "as applied to an agency, organization, or institution, ["public"] means that the agency, organization, or institution is under the administrative supervision or control of a government other than the Federal Government." 34 C.F.R. §77.1. Charter schools in Wisconsin, including those chartered by the City of Milwaukee, appear to meet this definition. The City's ability to grant and revoke charters, its ability to include specific contract terms and the requirements regarding evaluations and personnel, are sufficient to meet the Department's regulatory definition of "public."

Moreover, the Department has previously accepted the State's specific determinations, in the form of assurances in the State's application under the federal charter schools program, that charter schools in Wisconsin that would be receiving subgrants under this program meet the federal definition of charter schools, i.e. that they are public schools. Under the federal program,

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their child in a private school. 20 U.S.C. §1412(a)(10). If charter schools were considered non-public entities, we believe there also would be an issue as to whether, under State law, public education functions could be delegated to them. For the reasons stated in this letter, it is unnecessary to reach that issue.

[2]Apart from the exemption from State laws and regulations that apply to traditional public schools and the termination provisions, these characteristics are precisely the indicia of a "public school" under commonly used definitions of a public school and public education. See generally, Black's Law Dictionary 1345 (6th ed.1990); 78 C.J.S. Schools and School Districts, Section 2 (1995); and 20 U.S.C. §8801(15).

the term "charter school" means a public school that, among other things, complies with Part B of the IDEA. 20 U.S.C. §8066. Since 1996, Wisconsin has been the recipient of approximately $1.6 million of federal charter school funds based upon the State agency's interpretation that participating charter schools are public schools. If the State were to reverse its determination on the public nature of all of its charter schools, these grants would be unauthorized.

In the Department's view, the existence of the Milwaukee parental choice program, through which a limited number of low-income students can attend participating private schools, undermines the argument that City-chartered schools are intended to be private schools. If the State legislature had intended to expand public support for private school education, it could have done so simply by expanding the Milwaukee parental choice program, as it has done in the past. By contrast to its charter school law, the State's choice program statute expressly provides for participation of "private schools." See Wisc. Stat. §119.23 (1998) and Jackson v. Benson, 218 Wis. 2d 835 (1998). Instead, the legislature expanded the chartering authority to include additional public agencies under a program that historically has been interpreted to be a public charter school program.

WDPI's determination is also consistent with the IDEA and its legislative history:

> Section 613 contains two provisions concerning how charter schools can use part B funds to serve children with disabilities. First, charter schools that are LEAs may not be required to apply for part B funds jointly with other LEAs unless State law specifies otherwise. Second, in situations where charter schools are within an LEA, the bill directs LEAs to serve children with disabilities attending charter schools in the same manner as it serves children with disabilities in its other schools and directs LEAs to provide part B funds to charter schools in. the same manner they provide such funds to other schools. **The Committee expects that charter schools will be in full compliance with Part B**.

H. R. Rep. No. 105-95, at 97 (1997) (emphasis added).

> 1b. Given the State's broad discretion in designating the local educational agency (LEA) that must serve children with disabilities attending charter schools, what, if any, is the relationship between the LEA designation and the determination of whether that charter school is public or private?
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> Counsel for the City asserts that under the IDEA definition, States have broad discretion in designating the LEA responsible for IDEA services to children with disabilities attending City-chartered schools. They argue that State law defines an LEA for purposes of IDEA and that the City is not an LEA under the State definition.[1] Therefore, they

[1]We note in passing, however, that the definition of LEA, cited by the City, is one of the State law provisions from which charter schools appear to be exempt. This creates an apparent ambiguity in State law, and the Department would look to the State for its interpretation.

argue, the City, itself, has no obligations under State and federal law to comply with the public school provisions of the IDEA. They further argue that under State law, only the Milwaukee Public Schools (MPS) may serve as the LEA responsible for serving students with disabilities residing in its jurisdiction. The net result, according to counsel, is that the parents of charter school children with disabilities, like the parents of children with disabilities who choose to place their child in a private school, must forego their entitlement to FAPE in order to enroll their child in a City-chartered school.

Although the Department agrees that States have great flexibility in designating the responsible LEA, the analysis of counsel for the City is misplaced. "LEA" is a concept in federal law that creates a responsible agency for receiving federal funds and for meeting substantive federal program and civil rights obligations. Neither the City nor the State may use the LEA concept to **avoid** obligations under federal law. For purposes of the IDEA, those obligations-- and specifically the obligation to provide FAPE to children with disabilities-- turn on whether the charter schools are public or private schools, as discussed above. 20 U.S.C. §1412(a)(10). If those schools are public, and we believe that they are, then there is considerable flexibility in the State to designate an LEA under the alternative definitions of LEA in the IDEA. 20 U.S.C. §1402(15). However, that LEA must have the authority to ensure full compliance with the IDEA for children with disabilities attending charter schools for which the LEA is responsible.[2]

States use various models to ensure IDEA compliance in non-traditional settings such as charter schools, including interagency agreements, educational service agencies, and other strategies that pool resources. State law would determine whether Wisconsin could utilize similar approaches. The Department is not responsible for interpreting State law and does not express an opinion as to whether the statutory list of LEAs is intended to be an exhaustive one, what other options are appropriate, or whether the chartering entity or a charter school, itself, should be designated as the LEA for IDEA purposes. As long as they are consistent with the federal definition of LEA, determinations regarding LEAs are left to the State. If the State does not designate a responsible LEA, the Department would look to the State for ensuring that FAPE is made available.

2. The Wisconsin Department of Public Instruction has publicly stated that if the City of Milwaukee charter school program does not comply with IDEA, the state is at risk of losing more than $80 million in federal IDEA finds. Does the Department of

[2]We note that WDPI has determined that MPS cannot be the LEA for students with disabilities who attend City-chartered schools because MPS is unable to exercise sufficient control over the charter schools to ensure compliance.

Education agree with that assertion?

Wisconsin receives federal funds under Part B of the IDEA. For federal fiscal year 1998, Wisconsin's grant award under Sections 611 and 619 of the IDEA was $80,397,184.00. The IDEA establishes that the State has general supervisory responsibility for ensuring that policies and procedures are in place for the provision of FAPE to all eligible children with disabilities residing in the State. The State is also responsible for monitoring agencies, institutions and organizations that have responsibilities under the program. 20 U.S.C. §1232d(b)(3). Because of the novel legal issues raised by each State's charter school laws, questions about IDEA monitoring and compliance will often require City, State and federal consultation and cooperation to resolve the issues in a way that best serves children.

However, where a designated LEA fails to make FAPE available to eligible students with disabilities attending public charter schools, or, absent a designated LEA, where the State fails to make FAPE available, the State would be found to be out of compliance. If the Department is unable to achieve prompt voluntary compliance it has numerous enforcement options, including, but not limited to, partial or full withholding of IDEA funds, a compliance agreement, and a referral to the Department of Justice. As counsel for the City properly points out, the Department has broad discretion as to which enforcement options we may use to ensure full compliance.

3. The Wisconsin Department of Public Instruction has publicly stated that if the City of Milwaukee charter school program does not comply with Section 504 of the Rehabilitation Act of 1973, the city and state are at risk of losing all federal funding that is otherwise available to the city and the state. Does the Department of Education agree with that assertion?

Noncompliance with Section 504 could place at risk all federal financial assistance from the Department to the program, or part thereof, in which such noncompliance has been found. It is our understanding that there is agreement between the parties as to the applicability of Section 504 of the Rehabilitation Act of 1973 to the State and to the Milwaukee charter school program. The issue of disagreement is whether the public or private school provisions would apply. Given WDPI's determination that these are public schools, as discussed above, the Department believes that the public school provisions of the Section 504 regulations would apply to City-chartered schools.

As you may be aware, the Office for Civil Rights (OCR) enforces Section 504 for the Department. The Department's regulation at 34 C.F.R. §100.7(d) requires that OCR seek to resolve compliance matters by informal means wherever possible. The regulation states that, only when OCR determines that the matter cannot be resolved by informal means, should OCR proceed to take enforcement action pursuant to Section 100.8. Formal enforcement action includes the issuance of a formal letter of findings and, lacking voluntary compliance, the initiation of administrative enforcement proceedings to terminate federal financial assistance

from the Department to the particular program, or part thereof, in which such noncompliance has been found. 29 U.S.C. §794. Alternatively, the Department also may refer the matter to the Department of Justice for enforcement. In addition, violations of Section 504 may have implications for federal financial assistance from sources other than the Department.

This Administration is committed to supporting educational improvement through innovative programs such as charter schools, that provide choice to the parents of all children in the State, including children with disabilities. We believe it is in the best interest of both Wisconsin and the City of Milwaukee to come to a mutual understanding and agreement that protects the principle of public school choice and ensures that children with disabilities attending City-chartered schools have available a free appropriate public education. I hope that my responses are helpful in resolving this matter.

Pursuant to 20 U.S.C. §1406(e), this letter has been designated as raising an issue of national significance to the implementation of Part B of the IDEA. As a result, within one year, the Department will be providing all States with additional written guidance as required by the statute. The obligation of public schools to provide FAPE is provided expressly in the IDEA. With respect to whether charter schools are public schools for this purpose and which entity is the responsible LEA, the opinions in this letter, while not legally binding, may be relied upon by WDPI, the City of Milwaukee, and others as informal guidance representing the Department's interpretation of the relevant statutory and regulatory requirements in the context of the facts raised herein and will guide the Department's judgment of what action to take in this matter if it is not appropriately resolved at the State level. We also note that the Department's interpretation is entitled to deference by the courts. *See* Bragdon v. Abbott, 66 U.S.L.W. 4601 (June 25, 1998) (citing Chevron v. Natural Resource Defense Council, 467 U.S. 837 (1984)).

Sincerely,

Marshall S. Smith
Acting Deputy Secretary

cc: John Kalwitz
John O. Norquist
Howard L. Fuller
Grant Langley
Susan D. Bickert
Roxanne L. Crawford