



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

May 26, 2011

Kathleen Chamberlain, President
East End Special Education Parents
520 Harvest Lane
Mattituck, New York 11952

Dear Ms. Chamberlain:

This is in response to your electronic mail (email) communication to Dr. Alexa Posny, Assistant Secretary for the Office of Special Education and Rehabilitative Services, dated February 4, 2011. This communication was forwarded to the Office of Special Education Programs (OSEP) for response.

You have written because an annual review for a child with a disability is scheduled to occur in the very near future, and there is a dispute over whether the child is publicly-placed or parentally-placed under the Individuals with Disabilities Education Act (IDEA). Based on your letter, the pertinent facts are as follows.

You state that “an LEA [local educational agency] in NYS [New York State] is insisting to a parent that her child with a disability, who has an IEP [individualized education program], is parentally placed in a private school where he received special education services.” You further indicate that “[t]he LEA [of residence] approached the parent in August 2010 and offered that if she did not file for a due process hearing for the 2010-2011 school year, that the LEA would pay the tuition and provide transportation services for the child to attend a private school where the child would receive special education services as per his IEP. The parent agreed.”

On April 7, 2011, you provided to Dr. Deborah Morrow, at OSEP, a copy of an unsigned settlement agreement between the child’s parents and the Mattituck-Cutchogue Union Free School District (Mattituck). Mattituck and the child’s parents appear to have entered into a settlement agreement whereby Mattituck would pay the tuition for the child to attend a private school chosen by the parents outside of Mattituck, and the related services associated with that placement, in return for the parents waiving their right to have Mattituck provide certain educational programs as described in the child’s IEP for the 2010-2011 school year. There is now a dispute between Mattituck and the LEA where the private school is located as to which LEA is responsible for providing the special education program.

The Office of Special Education Programs (OSEP) does not review or interpret settlement agreements; they are enforced by courts. A settlement agreement reached through a mediation or resolution session may also be enforced through a voluntary mechanism established by a State educational agency, pursuant to 34 CFR §300.537. Therefore, OSEP cannot comment on the child’s status during the current school year, the period covered by this settlement agreement.

Assuming no other agreement is in place for the 2011-2012 school year, the Part B regulations at 34 CFR §300.101 require the State to ensure that a free appropriate public education (FAPE) is made available to this child. States generally assign the responsibility to provide FAPE to the LEA where the child's parents reside. 34 CFR §300.201. The LEA of residence meets this obligation by developing an IEP and offering the child FAPE in the programs it operates. However, if the LEA where the child's parents reside determines that it cannot provide the child FAPE in its own programs, it develops an IEP for the child to be implemented at a private school at public expense. 34 CFR §300.146. Therefore, if the parent is now seeking a program of FAPE for his or her child in the 2011-2012 school year, the LEA of residence must develop an IEP for the child for that period, although the LEA of residence would not be required to develop an IEP for the child to be implemented in a private school if it believes that it can provide the child with FAPE in its own programs.

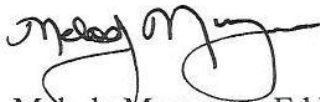
The IDEA also provides that the responsible LEA is not required to pay for the cost of the child's education at a private school, including special education and related services, if that LEA made FAPE available to the child and the parents elected to place the child in a private school or facility. However, in this circumstance, the school district where the private school is located must include the child in the population of children whose needs must be addressed pursuant to 34 CFR §§300.130 through 300.144. 34 CFR §300.148(a).

If the parents and LEA where the child's parents reside cannot agree on what constitutes FAPE for the child in the 2011-2012 school year, and the parent continues to believe that placement in a private school is appropriate for his or her child, the parent could utilize the procedures in 34 CFR §300.148 (placement of children when FAPE is at issue). Under 34 CFR §300.148(b) and (c), disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to IDEA's due process procedures in 34 CFR §§300.504 through 300.520. In general, reimbursement for part or all of the costs of the private placement may be available if a court or hearing officer finds that the agency had not made a FAPE available to the child in a timely manner prior to the child's enrollment in the private school, and finds that the private placement is appropriate.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have questions, please do not hesitate to contact Dr. Deborah Morrow at 202-245-7456 or by email at Deborah.Morrow@ed.gov.

Sincerely,



Melody Musgrove, Ed.D.

Director
Office of Special Education Programs

cc: State Director of Special Education