



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

MAR 11 2003

Mr. Geoffrey A. Yudien
Legal Counsel
Vermont Department of Education
120 State Street
Montpelier, Vermont 05620-2501

Dear Mr. Yudien:

This is a response to your January 9, 2003 letter sent by electronic mail to Dr. JoLeta Reynolds, Office of the Director, Office of Special Education Programs (OSEP), regarding the enrollment of children with disabilities, currently in State custody, in Vermont's home school program and the role of the surrogate parent in making educational decisions for children with disabilities placed in State custody. In your letter you request a written opinion from OSEP to the following questions, which are restated below with our response to each question.

- 1. Is the Department of Social and Rehabilitation Services (SRS) Commissioner's authority under State law to make educational decisions on behalf of children under his or her custody entirely superseded by the definition of "parent" at 34 C.F.R. 300.20(a)(2)?***

Under Part B of the Individuals with Disabilities Education Act (IDEA), each State and its public agencies are required to make a free appropriate public education (FAPE) available to all children with disabilities residing within the State in mandatory age ranges, as well as to ensure that the rights and protections under Part B are extended to those children and their parents. The Part B regulations require parental consent prior to conducting an initial evaluation or reevaluation and initial provision of special education and related services to a child with a disability (see 34 C.F.R. §300.505(a)).

Further, the Part B regulations require that parents of a child with a disability be given prior notice of and the opportunity to participate in meetings with respect to the identification, evaluation and educational placement of the child and provision of FAPE (see 34 C.F.R. §300.501(a)-(b)). 34 CFR §300.20 defines the term "parent" as (1) A natural or adoptive parent of a child; (2) A guardian *but not the State if the child is a ward of the State*; (3) A person acting in the place of a parent (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare); (4) A surrogate parent who has been appointed in accordance with §300.515. Unless State law prohibits a foster parent from acting as a parent, a State may allow a foster parent to act as a parent if the natural parents' authority to make educational decisions on the child's behalf has been extinguished under State law; and if

the foster parent has an ongoing, long-term parental relationship with the child, is willing to make the educational decisions required of parents under the Act, and has no interest that would conflict with the interests of the child (see 34 C.F.R. §300.20(b)).

The term “parent” for children with disabilities eligible under Part B specifically excludes the State if the child is a ward of the State. Therefore, pursuant to the definition of “parent” under 34 C.F.R. §300.20(a), the SRS Commissioner cannot serve in the role of a parent and make educational decisions on behalf of a child with a disability who is a ward of the State. It should be clarified that the SRS Commissioner’s authority under State law to make educational decisions on behalf of children in State custody who are not eligible for special education and related services under the IDEA is left to the discretion of the State.

2. *Does the SRS Commissioner have the authority to (1) enroll a child who has just become of compulsory school age and who may be eligible for special education in a Vermont home study program, and (2) disenroll an eligible student of compulsory school age from a public school special education program and enroll the student in a Vermont home study program?*

Each State and its public agencies are required to locate, identify, and evaluate all children residing in the State who are suspected of having disabilities under Part B, so that a FAPE can be made available to all eligible children (see 34 C.F.R. §300.121, 300.125 and 300.220). Further, it is the responsibility of each public agency to ensure that the rights of a child with a disability are protected if (1) no parent (as defined in Section §300.20) can be identified; (2) the public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or (3) *the child is a ward of the State under the laws of the State* (see 20 U.S.C. §1415(b)(1)(B); 34 C.F.R. §300.515(a)).

In order to meet this responsibility, it is the duty of the public agency to have a method for determining whether a child needs a surrogate parent and for assigning an individual to act as a surrogate parent to the child (see 34 CFR §300.515(b)). The IDEA allows a public agency to select surrogate parents by any method permitted under State law, except that it must make certain the individual selected (1) is not an employee of any agency involved in the education or care of the child; (2) has no interest that conflicts with the interest of the child he or she represents; and (3) has the knowledge and skills that ensure adequate representation of the child (see 34 CFR §300.515(c)). It is very important that the surrogate parent adequately represents the educational interest of the child, and not the interests of a particular agency.

In the case of other governmental agencies, even those agencies that are not involved in the education of the child may have a conflict between the interest of the child and those of the employee of the agency because some educational decisions will have an impact on whether an educational agency or some other governmental agency will be responsible for paying for or providing services for the child. Pursuant to the Part B regulations, the SRS Commissioner cannot act as a parent or be appointed as a surrogate parent for a child with a disability who is a ward of the State and thus, cannot determine the

educational placement for the child. It should be noted that if it is determined that the child is not eligible for special education and related services under the IDEA, then State law governs whether the SRS Commissioner has the authority to act on the child's behalf with regard to an educational placement.

3. Does a surrogate parent have the authority to (1) enroll a child who has just become of compulsory school age and who may be eligible for special education in a Vermont home study program, and (2) disenroll an eligible student from public school special education program and enroll the student in a Vermont home study program?

Under 34 CFR §300.515(e), the surrogate parent may represent the child in all matters relating to identification, evaluation and educational placement, as well as the provision of FAPE. The surrogate parent possesses all the rights and responsibilities of a parent under the IDEA. The IDEA does not preclude a surrogate parent from removing an eligible child from a public school special education program and enrolling the child in another program, including a home study program. However, it is important to reiterate that the State has the responsibility under the IDEA to ensure that the rights of the child are protected. This includes the responsibility to ensure that the surrogate parent assigned to a child with a disability has no other interest that conflicts with the interest of the child and has knowledge and skills that will ensure adequate representation of the child.

Finally, it is not clear from your letter whether the State of Vermont may have State statutes and regulations that are inconsistent with respect to this matter. If there are State statutes, regulations, and policies that are inconsistent with the IDEA regarding this issue, then the State must change these State-level rules so that there is no conflict with the IDEA requirements. We hope you find this explanation helpful. If you need further assistance, please call Dr. JoLeta Reynolds at 202-205-5507 or Dale King at 202-260-1156.

Sincerely,



for

Stephanie S. Lee
Director
Office of Special Education Programs

cc: Mr. Dennis Kane
Vermont Department of Education