



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

DEC 24, 2003

Leigh M. Manasevit
Attorney at Law
Brustein and Manasevit
3105 South Street, NW
Washington, DC 20007

Dear Mr. Manasevit:

This is in response to your letter on behalf of the North Carolina Department of Education to the Office of Special Education Programs (OSEP), requesting that OSEP approve North Carolina's federal fiscal year (FFY) 2003 award without requiring North Carolina to revise Section 1512(C)(6) of its State plan, which currently permits a public agency in North Carolina to use the Individuals with Disabilities Education Act (IDEA) due process procedures to override a parent's refusal to consent to the initial provision of special education and related services. You base your request on the following premises, which are restated below with our response to each premise.

1. Not allowing public agencies to use the IDEA due process hearing provisions to override parental refusal to consent to initial placement is inconsistent with IDEA's free appropriate public education (FAPE) mandate.

As OSEP has noted in previous letters on this issue, Congress' intent to require public agencies to provide FAPE to children under the IDEA is balanced with Congress' intent to preserve parental choice to refuse to have the child initially receive special education and related services. In enacting the consent provisions of section 614(a)(1)(C) in 1997, Congress was clearly aware of the long-standing regulatory requirement that parental consent must be obtained before the initial provision of special education and related services and of the requirement expressly allowing States to override parental refusal to the initial provision of special education and related services by using the IDEA due process hearing procedures. Congress failed in the 1997 Amendments to the IDEA to include express provisions allowing States to use the due process hearing procedures to override parental refusal to consent to the initial provision of special education and related services. This statutory language is paralleled in the Part B regulations at 34 CFR §§300.505(a) and (b).

The 1997 IDEA Amendments reflect Congress' intent to provide parents the ultimate choice or decision regarding the initial provision of special education and related services for their child. Congress chose not to allow school districts to use the IDEA due process hearing procedures to override a parent's refusal to consent to the initial provision of special education and related services under section 614(a)(1)(C), although an express provision was included for refusal to consent to initial evaluations. This distinction indicates a clear congressional intent to support parents' rights to choose whether their children would be enrolled initially in special education.

The provision allowing school districts to proceed to due process for non-consent on evaluations was enacted to ensure that parents' choices were informed (such that parents would have information about the special education and related services needs of each individual child) while still enabling the parent to ultimately determine if his or her child would be initially placed in special education. We believe that the IDEA statute and Part B regulations reflect the clear and unequivocal intent of Congress.

2. OSEP cannot establish a rule, such as promoted by *Letter to Cox*, without following the rulemaking requirements of section 607(c) of the IDEA and the requirements of the Administrative Procedures Act.

The Department does not need to go through the public notice and rule making procedures of the Administrative Procedures Act since the Secretary, in the *Letter to Cox*, is not establishing a rule required for compliance with, or eligibility under, the Act. The *Letter to Cox* provides clarification of the IDEA statutory and regulatory requirements and, therefore, does not require the Secretary to follow the requirements of section 553 of title 5, United States Code. The Secretary is implementing congressional mandates as reflected in express IDEA statutory and regulatory provisions.

3. Under section 607(b) of the IDEA, OSEP cannot regulate and take a position, such as outlined in *Letter to Cox*, which would procedurally or substantively lessen the protections provided to children with disabilities under the 1983 IDEA regulations.

Under section 607(b), although the Secretary is not authorized to make regulatory changes to lessen the protections for children with disabilities in the IDEA regulations that were in effect on July 20, 1983, Congress may change the law to change those protections and, in this case, did revise the statute. As noted under issue 1 above, Congress amended the IDEA in 1997 and failed to include express provisions allowing States to use the due process hearing procedures to override parental refusal to consent to the initial provision of special education and related services, while providing override procedures for parental refusal to consent to the evaluation of their child.

4. Under section 615(b)(6) of the IDEA, parties have a right to a due process hearing on any matter related to FAPE. Further, nothing in the statute or regulations prohibits the use of due process procedures for override of parental refusal to consent to the initial provision of special education and related services.

The more specific statutory and regulatory language regarding parental consent would take precedence over the more general language regarding due process hearing procedures. For example, section 614(a)(1)(C)(i) states that parental consent must be obtained before an evaluation is conducted. It further states that "parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services." This provision is immediately followed by section 614(a)(1)(C)(ii), which states that if the parents of such child refuse consent for evaluation, the agency may continue to pursue an evaluation by utilizing the mediation and due process procedures under section 615, except to the extent inconsistent with State law relating to parental consent. There is no similar provision authorizing

Page 3- Mr. Leigh M. Manasevit

public agencies to use mediation or due process procedures to override a parent's refusal to consent to the initial provision of special education and related services.

As you note in your letter, North Carolina's Eligibility Document Submission for FFY 2003 under Part B of the IDEA was conditionally approved by OSEP. OSEP's determination of North Carolina's eligibility for conditional approval was based on the June 25, 2003 letter in which North Carolina assured OSEP that no later than July 1, 2004 it will complete all of the changes set forth in the June 25, 2003 issues chart, which includes the required revision to section 1512(C)(6) of North Carolina's State plan. Under section 612 of the Act, the State must demonstrate to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the requirements under section 612(a) in order to be eligible to receive assistance under Part B. Therefore, North Carolina must complete all of the changes set forth in the June 25, 2003 issues chart, which includes revising section 1512(C)(6), in order to demonstrate to the satisfaction of the Secretary that it has in effect the necessary policies and procedures to meet its obligations under the IDEA.

I hope you find this explanation helpful. If you would like further assistance, please contact Dr. JoLeta Reynolds of my office at (202) 205-5507 (press 3).

Sincerely,

A handwritten signature in cursive script that reads "Patricia J. Swand".

for Stephanie Smith Lee
Director
Office of Special Education Programs

cc: Mary Watson, Director
Exceptional Children Division