RESCINDED

Signed March 30, 2001

John W. Bowen,
School Board Attorney
Pinellas County School Board
P.O. Box 2942
Largo, Florida 33779-2942

Dear Mr. Bowen:

Thank you for your letter to the U.S. Department of Education's Office for Civil Rights (OCR) dated October 19, 2000, written on behalf of the Pinellas County School Board and 17 other school boards in Florida as well as certain organizations. Your letter primarily concerns the application of the requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Individuals with Disabilities Education Act (IDEA) to students with disabilities participating in your State's program of Scholarships to Public or Private Schools of Choice for Students with Disabilities authorized by Florida statute 229.05371 (referred to here as Scholarship Program).

The clarification that follows reflects requirements of Section 504 and its implementing regulation at 34 C.F.R. Part 104, Title II of the Americans with Disabilities Act of 1990 (Title II of the ADA) and its implementing regulation at 28 C.F.R. Part 35, and Part B of IDEA and its implementing regulation at 34 C.F.R. Part 300. Title II of the ADA, which prohibits disability discrimination, applies to public entities regardless of whether they receive Federal funds. The nondiscrimination requirements under Title II of the ADA are similar to those under Section 504. Please note that since the Department administers Federal law, and not State law, this Office can not interpret the specific provisions of Florida law discussed in your inquiry. We suggest that any questions that you may have about specific interpretations of provisions of Florida law be directed to appropriate offices in your State.

The specific inquiries and responses follow:

1. Is a Florida student with a disability as defined in IDEA who attends an eligible private school approved by the State under Florida's Opportunity Scholarship Program for students with disabilities entitled to special education and related services in conformance with an IEP and all of the rights of a child with a disability who is served by a public agency?

In 1990, the Department provided an explanation of the relevant requirements of Federal law applicable to children with disabilities enrolled by their parents in private schools pursuant to the Milwaukee choice program in response to an inquiry from then Governor Tommy G. Thompson (Thompson Letter). Because it appears to us that the characteristics of the Scholarship Program bear similarities to those of the Milwaukee choice program, we believe that the clarification provided regarding the Milwaukee choice program serves as guidance in this regard. A copy of that letter is enclosed for your information.

As we understand it, the Scholarship Program is not financed with Federal special education funds or any other Federal funds. As noted in the Thompson letter, "the private schools are not `recipients' of Federal funds and their programs and activities are not federally-assisted."

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Therefore, Federal civil rights laws, including Section 504, do not directly apply to the private schools participating in the Scholarship Program. Further, Title II of the ADA does not directly apply, as the private schools are not public entities.

However, because the Florida SEA receives Federal financial assistance, Section 504 and Title II of the ADA do apply to all of the SEA's operations, including the SEA's administration of the Scholarship Program. Under Section 504 and Title II of the ADA, the SEA must ensure that participating private schools do not exclude a Scholarship Program student with a disability "if the person can, with minor adjustments, be provided an appropriate education within the school's program." 34 C.F.R. § 104.39 (a). [1] However, the SEA would not be required to ensure that the participating private schools "provide an appropriate education to … students [with disabilities] with special educational needs if [the participating private schools do] not offer programs designed to meet those needs." See 34 C.F.R. Part 104, App. A at 28.

With regard to IDEA, and consistent with the Thompson Letter, we also conclude that if the FDE and its local school districts have made FAPE available to eligible children with disabilities in a public school but their parents elect to place them in private schools through the Scholarship Program, then such children are considered "private school children with disabilities" enrolled by their parents. See 34 C.F.R. §300.450. Under IDEA, such parentally placed private school students with disabilities have no individual entitlement to a free appropriate public education including special education and related services in connection with those placements. In order to avoid parental misunderstanding, the Department strongly recommends that the State or local educational agency notify parents who choose private school placement under the Scholarship Program that the student may retain certain rights under Section 504 and Title II of the ADA, although the student will not be entitled to a free appropriate public education under IDEA, while enrolled in the private school.

It should be noted that IDEA provides for a process by which limited services may be provided to some parentally placed private school students with disabilities. 34 CFR §300.453-300.462. This means that those children with disabilities attending participating private schools through the Scholarship Program must be considered for any limited special education and related services that may be available to them, in light of the available funding and the total number of private school children with disabilities and their needs, in the same manner as other children with disabilities enrolled in participating or nonparticipating private schools. Under IDEA, if the parents decide to return or re-enroll their IDEA-eligible child into the public school system, that child would be entitled to FAPE.

2. Is it a violation of Section 504 to exclude up to 95% of students with disabilities from participating in the Opportunity Scholarship Program [for students with disabilities] and to fail to ensure that students with disabilities participating in the regular Opportunity Scholarship Program are provided a free appropriate public education?

No. We note that the Scholarship Program at issue above is one exclusively for students with disabilities. Therefore, prescribing percentages for the participation of students with disabilities

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[1] This 504 regulations define an "appropriate education" as:

> the provision of regular or special education and related aids and service that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

34 CFR 104.33.

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in this Scholarship Program, with 5 per cent of disabled students participating in the first year and incremental increases in participation of students with disabilities in succeeding years is **not** a violation of Section 504. In further response to your second question and in light of our response to your first inquiry, we believe that Section 504, Title II of the ADA, and the IDEA do not apply directly to the private schools participating in the regular Opportunity Scholarship Program. However, as further discussed above, Section 504, Title II of the ADA, and the IDEA do apply to the SEA with respect to its administration of the regular Opportunity Scholarship Program.

We hope that you find this response to your questions helpful. This letter is not intended to address any other compliance issues under Section 504 or the other statutes that OCR enforces, including Title II of the Americans with Disabilities Act of 1990, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, or the Age Discrimination Act of 1975. Similarly, this letter is not intended to address any other compliance issues under Part B of IDEA. If you have any questions about this letter, please contact Lilian Dorka in OCR at 202-205-5469 or JoLeta Reynolds in the Office of Special Education Programs, at 202-205-5507.

Sincerely,

/signed Susan Bowers/

Susan Bowers
Acting Deputy Assistant Secretary
for Civil Rights

/signed Patricia J. Guard/

Patricia J. Guard
Acting Director
Office of Special Education Programs

cc: Shann Goff
Chief, Bureau of Instructional Support and Community Services
Florida Department of Education

Gary Walker
Director
OCR Atlanta Office