



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

JUN 27 2002

By Overnight Delivery

Dina O. Harris, Esq.
John F. Walsh, Esq.
Best Best & Krieger LLP
402 West Broadway, 13th Floor
San Diego, California 92101-3542

Kacey Gregson
Assistant Attorney General
1275 West Washington, ACD/EHS
Phoenix, Arizona 85007

Re: In the Matter of ABC Alternative Learning Center d/b/a Central City Academy v. State of Arizona, Arizona State Superintendent of Public Instruction, and Arizona Department of Education (IDEA-B Appeal)

Dear Counsel:

Enclosed please find a copy of the decision of the Assistant Secretary of Special Education and Rehabilitative Services in the above-referenced matter.

Sincerely,

Stephanie S. Lee
Director
Office of Special Education Programs

 *
 IN RE APPEAL OF *
 *
 ABC Alternative *
 Learning Center * IDEA-B Appeal
 *
 d/b/a *
 *
 Central City Academy *
 *

DECISION OF THE ASSISTANT SECRETARY

I. INTRODUCTION.

The ABC Alternative Learning Center (ABC) -- a public charter school operating in the State of Arizona as a local educational agency (LEA) -- has appealed to the United States Department of Education (ED); pursuant to 34 C.F.R. § 76.401(d)(5), the Arizona Department of Education's (SEA's) decision to withhold from ABC funds under Part B of the Individuals with Disabilities Education Act (IDEA-B), 20 U.S.C. § 1411 - 1420.¹ We have concluded that the SEA's decision in this matter is supported by substantial

¹ Responsibility for appeals under 34 C.F.R. § 76.401(d)(5) that involve IDEA-B has been delegated to the Assistant Secretary for Special Education and Rehabilitative Services (Assistant Secretary).

evidence and consistent with the IDEA-B and its implementing regulations. Specifically, the SEA's decision was necessary to ensure the provision of a free appropriate public education (FAPE) to a student with disabilities and compliance with the SEA's Letter of Findings issued pursuant to a complaint investigation. The SEA's decision, therefore, is affirmed.

II. PROCEDURAL AND FACTUAL BACKGROUND.

This appeal concerns the provision of special education and related services under IDEA-B to a student with disabilities enrolled at ABC.² As a charter school operating as an LEA, ABC is eligible to receive funding under the IDEA-B for the children with disabilities it provides with special education and related services. ABC, however, is responsible for ensuring that all requirements of the IDEA-B are met. 34 C.F.R. § 300.312(b). Similarly, children with disabilities attending charter schools, and their parents, retain all their rights under the IDEA-B. 34 C.F.R. § 300.312(a).

The Student was determined to be eligible for special education due to a speech and language impairment coupled

² During the administrative proceedings conducted by the SEA, the parties agreed that, because the student is a minor, the student's identity would be protected. To accomplish that purpose, the student was referred to as "Student" and the father of the Student was referred to as "Father." That practice will be followed in this Decision.

with a specific learning disability in reading, math, and language. Exhibit 1 to the Administrative Record [Ex.1 to A.R.] at page 1, paragraph 3. An Impartial Due Process Hearing Decision and Order (Due Process Hearing Decision) issued on July 26, 1999 required ABC to provide the Student with a compensatory communications program and occupational therapy and enroll the Student in a communications program consistent with the Student's individualized education program (IEP) on or before August 13, 1999. This communications program was to be provided at a site other than ABC because of ABC's inability to develop such a program in a timely manner. Id. at pages 1-2, paragraph 4. The Arizona Office of Administrative Hearings and Appeals affirmed this Due Process hearing decision on November 29, 1999. Exhibit 2 to AR at page 13. ABC, however, did not comply with the Due Process Hearing Decision's order to place the student in a communications program at a site other than ABC. Exhibit 1 to AR at page 2, paragraph 6. Subsequently, in March 2000, the Student was placed at Summit Elementary Charter School (Summit) at the request of his parents. Id. and Exhibit 3 to AR at page 6.

On March 17, 2000, the Student's parents filed, pursuant to 34 C.F.R. § § 300.660 - 300.662, a formal complaint with the SEA that alleged that ABC had failed to

comply with the Due Process decision. Exhibit 1 to AR at page 2, paragraph 7. Based on that complaint, the SEA investigated the parent's allegations and, on November 30, 2000, issued a Letter of Findings to ABC. Exhibit 3 to AR. The SEA concluded, among other things, that ABC had not complied with the Due Process Hearing Decision's order to place the Student at a communications program at a site other than ABC. Id. at 2-7. ABC was required to work out a contractual arrangement with Summit for providing compensatory educational services to the Student. If ABC and Summit could not agree on the amount of payment for services to the Student, ABC was ordered to reimburse Summit at a rate of \$2,500 per month for those services. In addition, ABC was required to compensate Summit for services provided to the Student from March 8, 2000 until the end of the 2000-2001 school year. Id. at 12.

On June 20, 2001, the SEA issued a Notice of Intent to Withhold Funding from ABC because, as of that date, ABC had not provided any payment to Summit for services provided to the Student. Exhibit 1 to AR. ABC's appeal of this Notice was heard by a three member-hearing panel appointed by the Arizona Superintendent of Public Instruction. Arizona Department of Education Hearing Appeal Panel Proposed Decision at 1 (August 21, 2001). On August 21, 2001, the

hearing panel issued a proposed decision that upheld the Notice of Intent to Withhold IDEA-B Funding from ABC. Id. at 14. The Arizona State Superintendent of Public Instruction accepted that recommended decision on August 24, 2001. August 24, 2001 Letter of Jaime A. Molera, Arizona State Superintendent for Public Instruction. ABC has appealed this decision to ED.

III. ANALYSIS

The Education Department General Administrative Regulations (EDGAR) provide that the State's findings of fact in a decision to withhold funds are final if supported by substantial evidence. 34 C.F.R. § 76.401(d)(5). In order to meet the substantial evidence test, there must be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion See, e.g., Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 477 (1951) (citations omitted). Additionally, under EDGAR, the State's final action is to be overturned only if it is "contrary to Federal statutes or regulations that govern the applicable program." 34 C.F.R. § 75.401(d)(6)(ii).

The parties are in basic agreement on the facts of this case. ABC is responsible for providing special education and related services under the IDEA-B to Student. Exhibit 8 to AR. A Due Process Hearing Decision that was

affirmed by the State required ABC, among other things, to place the Student at a site other than ABC for a communications program. The Student was placed at Summit for that program. The dispute in this case, therefore, is not factual but legal in nature. Specifically, the issue raised in this appeal is whether the SEA acted properly in withholding ABC's IDEA-B funds because ABC had not paid Summit for services provided to the Student.

ABC contends that the SEA withholding decision is improper because there are no IDEA-B issues in this case due to the fact that the Student, since being placed at Summit, is receiving FAPE. The actual issue in this case, according to ABC, involves a contractual dispute between ABC and Summit on payment for services that Summit has provided to the Student. ABC contends that it would pay Summit \$2,500 a month for services to the Student if Summit provided documentation supporting that amount. In the absence of such supporting documentation, ABC contends that it cannot pay the \$2,500 consistent with its obligation to ensure that public funds are used properly and that the Student is receiving proper special education and related services. ABC's Opening Brief at 1-2, and 15-17 (December 5, 2001).

The SEA contends that, contrary to ABC's assertions, this case is about the provision of FAPE to the Student as required by the IDEA-B. The Student, because ABC has failed to provide him with a communications program at a site other than ABC, as required by the Due Process Hearing Decision, was placed at Summit, where the required communications program was provided. ABC, however, from March 8, 2000, the time the Student was placed at Summit, until the present, has not paid Summit anything for the services provided to the Student even though ABC has been responsible for ensuring that the Student receives FAPE. The SEA's decision to withhold funds was not designed to resolve a contract dispute between Summit and ABC, but was the result of ABC's failure to meet its responsibility to provide the Student with FAPE and comply with the corrective action set out in a Letter of Finding issued by the SEA pursuant to a complaint investigation. SEA's Response to ABC's Opening Brief at 1 (January 4, 2002).

We conclude that the SEA's withholding of funds from ABC is consistent with the IDEA-B and its implementing regulations.³ ABC's effort to construe this case as a

³ ABC, in contesting the SEA's withholding decision, also argues that the required payment of \$2,500 to Summit per month for services to Student, in the absence of appropriate documentation, could result in ABC violating a provision of Arizona's State Constitution, the anti-gift clause, and possible liability under audits required by State law.

contractual dispute that is unrelated to the IDEA-B is unpersuasive because it attempts to separate ABC's obligation to ensure FAPE for the Student from ABC's obligation to pay for the services necessary to provide FAPE. This separation, however, is untenable because the Student will not receive the special education and related services required by the IDEA-B unless ABC provides the services or pays a third party service provider to do so. Under ABC's interpretation of an SEA's authority to withhold IDEA-B funds, an LEA that failed to provide or pay for required services to a student with disabilities could continue to receive IDEA-B funds as long as a third party was willing to provide the required services without payment. This outcome, if accepted by the Department, would render the IDEA-B's entire system of enforcement untenable because that system ultimately depends on an SEA's authority to withhold IDEA-B funds from an LEA that is not meeting its obligation to ensure the provision of required services to a student. Moreover the conclusion that ABC failed to provide FAPE to the Student was the finding of a Due Process Hearing Decision. The SEA, pursuant to its authority under 34 C.F.R. § § 300.660-662,

Appellant's Opening Brief at 15-17. These issues involve matters of State law, not the IDEA-B, and will not, as a consequence, be addressed in this Decision.

found that ABC failed to comply with the Due Process Hearing Decision and specifically required ABC to pay Summit to provide services to the Student in order to ensure that the Student received FAPE. To allow ABC to disregard the SEA's findings and requirements would undermine the State compliance process required by the IDEA-B regulations for resolving disputes between parents and public agencies regarding the provision of FAPE. For these reason, we do not accept ABC's assessment of the issues in this case or its conclusions on the SEA's authority to withhold funds.

The SEA's position in this matter and its decision to withhold ABC's IDEA-B funds, by contrast, are consistent with the applicable statutory and regulatory provisions. ABC can receive IDEA-B funds but must provide FAPE for all students with disabilities it is responsible for serving. 34 C.F.R. § § 300.312(b), 300.220(a), and 300.121. In this instance, ABC did not, after being required to do so by a Due Process Hearing Decision, provide the Student with a communications program at a site other than ABC. Subsequently, after the Student was finally placed in a communications program at Summit on March 8, 2000, ABC did not, as required by part of the corrective action in a Letter of Findings issued by the SEA, either work out an

agreement for compensating Summit for services provided to the Student or pay Summit \$2,500 a month for those services.

Under the IDEA-B, the SEA, as part of its general supervisory responsibility for special education in the State, must ensure that all IDEA-B requirements, including the provision of FAPE to all students with disabilities, are met. 34 C.F.R. § 300.600(a)(1). If the SEA determines that an LEA is not meeting its obligation to provide FAPE to all the students with disabilities it is responsible for serving, the SEA shall, after a reasonable notice and opportunity for a hearing "reduce or not provide any further payments to the LEA." 34 C.F.R. § 300.197. The IDEA-B regulations specifically provide that:

An SEA shall use the payments that would otherwise have been available to an LEA or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that local agency, or for whom that State agency is responsible, if the SEA determines that the LEA or State agency -

(1) Has not provided the information needed to establish the eligibility of the agency under Part B of the Act;

(2) Is unable to establish and maintain programs of FAPE that meet the requirements of this part;

(3) Is unable or unwilling to be consolidated with one or more LEAs in

order to establish and maintain the programs; or

(4) Has one or more children with disabilities who can best be served by a regional or State program or service-delivery system designed to meet the needs of these children.

34 C.F.R. § 300.360(a) (emphasis supplied). Finally, the SEA is required to adopt written procedures to resolve complaints that a public agency has violated the IDEA-B.

34 C.F.R. §§ 300.660-300.662.

The SEA's withholding action fits securely within this regulatory scheme. ABC, by not paying Summit \$2,500 a month for services provided to the Student, defaulted on both its obligation to provide FAPE and to comply with the corrective action required by a Letter of Finding issued by the SEA on November 30, 2000 pursuant to a complaint investigation carried out under 34 C.F.R. §§ 300.660-300.662. The SEA, therefore, was authorized by the IDEA-B to withhold funds from ABC to ensure FAPE for the Student and compliance with its November 30, 2000 Letter of Findings. Moreover, the IDEA-B regulations specifically provide for an SEA using the funds withheld from ABC to pay Summit for the special education and related services provided to the Student. We therefore conclude that the SEA's decision to withhold IDEA-B funds is based on

substantial evidence and consistent with the IDEA-B and its implementing regulations.

IV. CONCLUSION.

The SEA's decision to withhold IDEA-B funds from ABC is hereby affirmed.



Robert H. Pasternack, Ph.D.
Assistant Secretary for
Special Education and
Rehabilitative Services.

DATED: JUN 27 2002