



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

DEC -6 2011

Susan Luger, M.S., L.C.S.W.
Lawrence Weinberg, Ph.D., Esq.
155 West 72nd Street, Suite 201
New York, New York 10023

Dear Ms. Luger and Dr. Weinberg:

This is in response to your February 2, 2011 letter to Dr. David M. Steiner of the New York State Education Department (NYSED) and Dr. Alexa Posny, Assistant Secretary for the Office of Special Education and Rehabilitative Services at the U.S. Department of Education. Your letter was forwarded to my office for response.

Your letter indicates that you have observed, in your work representing families of children with disabilities, what you characterize as a “new and disturbing practice” by the New York City Department of Education (DOE) and that you believe “this practice is illegal and contradicts the language and spirit of the New York State statute addressing special education” and the Individuals with Disabilities Education Act (IDEA). You state that children in New York City who have been unilaterally placed by their parents in nonpublic special education schools because they believe there has been a denial of a free appropriate public education (FAPE) are being systemically deprived of their right to transportation to and from their school.

Under Part B of the IDEA and its implementing regulations, the term “related services” includes “transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education.” See 34 CFR §300.34(a). Transportation is defined as travel to and from school and between schools; travel in and around school buildings; and specialized equipment such as special or adapted buses, lifts and ramps, if required to provide special transportation for a child with a disability. See 34 CFR §300.34(c)(16). The child’s individualized education program (IEP) Team is responsible for determining if transportation is required to assist a child with a disability to benefit from special education and related services, and how the transportation services should be implemented. The IEP should describe the transportation services to be provided, including transportation to enable a child with disabilities to participate in nonacademic and extracurricular activities in the manner necessary to afford the child an equal opportunity for participation in those services and activities to the maximum extent appropriate to the needs of that child. See 34 CFR §§300.107 and 300.117. Part B of the IDEA and its implementing regulations do not require local educational agencies (LEAs) to provide transportation to and from school for a child with a disability unilaterally placed by his or her parents in a private school.

Under 34 CFR §300.148, an LEA is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. If the parents and the LEA disagree regarding the availability of a program appropriate for the child and/or disagree regarding the question of financial reimbursement for the non-public placement, these disagreements are subject to the due process procedures in 34 CFR §§300.507-300.520. A court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. Thus, whether the cost of that reimbursement should include the costs of transporting the child to and from school is a matter left to the discretion of the court or hearing officer ordering reimbursement.

Until such time as a court or hearing officer determines that an LEA is financially responsible for the cost of the private placement, the LEA must include that child in the population whose needs are addressed consistent with 34 CFR §§300.131-300.144. Under these provisions, LEAs have an obligation to provide parentally- placed private school children with disabilities an opportunity for equitable participation in the services funded with Federal Part B funds that the LEA has determined, after consultation, to make available to its population of parentally- placed private school children with disabilities. These children have no individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. See 34 CFR §300.137(a). The Part B regulations require that if necessary for the child to benefit from or participate in the services provided under the private school provisions, an LEA must provide a parentally placed private school child with a disability transportation from the child's school or the child's home to a site other than the private school; and from the service site to the private school, or to the child's home, depending on the timing of the services. See 34 CFR §300.139(b)(1)(i). LEAs are not required to provide transportation from the child's home to the private school. See 34 CFR §300.139(b)(1)(ii).

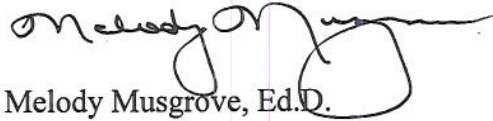
You also state that “New York law requires that districts provide transportation to general and special education students” and you believe that the DOE policy of denying transportation to parents who have unilaterally placed their child in a private school and are seeking tuition reimbursement is a violation of State law. Whether DOE’s policy violates State law is a determination for NYSED, not the Office of Special Education Programs (OSEP), to address.

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.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Melody Musgrove". The signature is fluid and cursive, with a large loop at the end.

Melody Musgrove, Ed.D.
Director
Office of Special Education Programs

cc: Rebecca Cort
Dr. David M. Steiner