



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

DEC 20 2004

William L. Librera, Ed.D.
Commissioner
Department of Education
Trenton, New Jersey 08625-0500

Dear Commissioner Librera:

The Office of Special Education Programs (OSEP) received your letter which was sent in response to our second request that the New Jersey Department of Education (NJDOE) explain in writing how it is fulfilling its responsibilities under Part B of the Individuals with Disabilities Education Act (Part B) for children with disabilities living in New Jersey who attend school in New York under a contract between New Jersey and New York school districts. In that letter, you indicate that in order to develop a plan to ensure full compliance with Part B, NJDOE was in need of the Department's written responses to two specific questions. Although we believe that we have thoroughly addressed the first issue you raise in our prior letters to you of October 24, 2003 and May 26, 2004, we will again provide an explanation of applicable Part B requirements to enable NJDOE to provide a written explanation of the steps you are taking to ensure compliance. The Department's responses to your specific inquiries follow.

- **Clarify whether it is the United States Department of Education's position that parents of Montague students should have access to due process procedures in New Jersey regardless of whether they have access to due process procedures in New York.**

It is the Department's position that when a school district in a sending State contracts with a school district in a receiving State to educate children with disabilities living in the sending State, the due process procedures of the sending State and its school district must be made available to parents of students with disabilities attending school in a school district in the receiving State. As a condition of eligibility for Part B funds, each State must ensure compliance with the requirements of 34 CFR §§300.121-300.156. Among these requirements is that each State ensure the availability of a free appropriate public education (FAPE) to children with disabilities residing in the State in mandatory age ranges, that the State has procedural safeguards consistent with 34 CFR §§300.500-300.529, and that eligible students and their parents are afforded these procedural safeguards, including due process protections. 34 CFR §§300.121 and 300.129. Likewise, under 34 CFR §300.220, local educational agencies (LEAs), in providing for the education of children with disabilities in their jurisdiction, must have policies, procedures and programs that are consistent with §§300.121-300.156. Further, although Part B does not prohibit NJDOE or Montague School District from entering into a contractual agreement with Port Jervis City Schools in New York to provide special

education and related services, NJDOE retains ultimate responsibility for ensuring that each educational program for children administered by the Port Jervis City Schools through a contractual agreement is under the general supervision of the persons responsible for educational programs for children with disabilities in New Jersey, and meets the education standards of New Jersey, including the requirements of Part B. 20 U.S.C. 1412(a)(11); 34 CFR §300.600(a)(2)(i)-(ii).

We are aware that under Clause 4 of the contractual arrangement between the Montague School District and Port Jervis City Schools, entitled Sending-Receiving Contract Agreement, the parties expressly agree that parents will use New York's due process procedures if they wish to appeal an educational decision affecting their child. Since the above contractual provision is inconsistent with Part B, insofar as it removes New Jersey parents' right to utilize New Jersey's due process procedures, NJDOE must instruct the Montague School District and any other school districts in New Jersey that may have entered into contractual arrangements with receiving school districts in neighboring States to eliminate similar contractual provisions from their contracts. In this circumstance, NJDOE's procedures governing the conduct of mediation and due process proceedings, and the initiation of a civil action in a New Jersey court of competent jurisdiction or in a Federal district court of the United States are applicable. *See* 34 CFR §§300.506-300.514.

NJDOE may want to consider whether it would be advantageous to the parties to conduct the hearing at the receiving school district, and there is nothing in Part B that would prohibit such a practice. Our staff stands ready to provide technical assistance to the NJDOE and its school districts in developing a plan to ensure that New Jersey's due process procedures are applicable to parents of children with disabilities educated at Port Jervis City Schools.

Your letter next asks:

- **Would a request for a change of program for a Montague student attending school in Port Jervis require Montague to remove the student from Port Jervis and place the student itself? In other words, would parents requesting program changes lose access to Port Jervis?**

It depends. As is true with respect to all educational decisions under Part B, individualized determinations must be made as to the educational program and services that are appropriate for each disabled child. In this circumstance, officials of the Montague School District would need to work with officials of the Port Jervis City Schools through Part B's individualized education program (IEP) and placement processes to determine what the student's needs are and if those needs could be met at Port Jervis. *See* 34 CFR §§300.340-300.350 and §§300.550-300.553. Each child's IEP forms the basis for the placement decision. 34 CFR §300.552(b)(2); Appendix A to 34 CFR Part 300, question 1. Whether a student could continue to attend school in Port Jervis, if a change in program is determined appropriate, is a matter that would have to be determined by the group of knowledgeable persons responsible for making the child's

placement decision, which includes the child's parents. If the IEP and placement teams determine that Port Jervis can appropriately implement the necessary change in the student's special education program, it would not be necessary for Montague to remove the student from Port Jervis. However, if the IEP and placement teams determine that Port Jervis cannot implement the necessary change, Montague, and NJDOE, remain ultimately responsible for ensuring that the student receives the services specified in his or her IEP in the least restrictive environment. 34 CFR §300.600 and §300.300(a).

We trust that the above clarification is sufficient to respond to any remaining questions you have. We consider this a serious matter and request that you provide us, within thirty calendar days of the date of receipt of this certified letter, a written explanation of the steps NJDOE is taking to respond to the concerns raised in our letters to you of October 24, 2003 and May 26, 2004. If you have any questions, please contact Dale King at 202-245-7405 or Dr. JoLeta Reynolds at 202-245-7459 (press 3).

Sincerely,



Stephanie Smith Lee
Director
Office of Special Education Programs

cc: Barbara Gantwerk, Director, Office of Special Education Programs, New Jersey
Department of Education
Diana MTK Autin, Executive Director, Statewide Parent Advocacy Network, Inc.,
Newark, New Jersey