



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

THE ASSISTANT SECRETARY

Gerald L. Zahorchak, D.Ed.
Commonwealth of Pennsylvania
Department of Education
333 Market Street
Harrisburg, Pennsylvania 17126-0333

FEB 2 - 2007

Dear Dr. Zahorchak:

I write to respond to your December 14, 2006 letter to Secretary Spellings seeking clarification of the so-called "stay-put" regulation in 34 C.F.R. §300.518(c) under Part B of the Individuals with Disabilities Education Act (IDEA).

The IDEA stay-put regulation, which implements IDEA section 615(j), was added to the final Part B regulations that were issued on August 14, 2006, and became effective on October 13, 2006. It provides that:

If the complaint involves an application for initial services under this part [Part B] from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency [under Part B] is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under §300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency.
34 C.F.R. §300.518(c).

Specifically, you asked how the Pennsylvania Department of Education (PDOE) might implement 34 C.F.R. §300.518(c) in light of the judicial decision of the U.S. Court of Appeals for the Third Circuit in *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181 (3d Cir. 2005), *cert. denied*, 126 S.Ct. 1646 (2006) which held that, under section 615(j) of the IDEA, when there is dispute about the provision of appropriate special education and related services to a child transitioning at age three from Part C to Part B of the IDEA, the Part B public agency must provide the educational services that were provided to the child under Part C by the Part C lead agency as the "current educational placement" while the dispute is pending. As you know, in this litigation, the Department took a position that disagreed with the position ultimately taken by the Court in its opinion in the *Pardini* case, and we believe that the provisions of the new regulations correctly interpret the IDEA.

Your letter referred to a telephone conversation on this issue between Dr. JoLeta Reynolds from our Office of Special Education and Rehabilitative Services (OSERS) and PDOE Acting Chief Counsel Greg Dunlap in late November 2006. Your letter requests further clarification of the State's options given the new regulation. As Dr. Reynolds indicated, if PDOE implemented the interpretation of the IDEA set out in the *Pardini* decision, it would not be in violation of 34 C.F.R. §300.518(c), since, under the regulation, public agencies are not required to, but may if a public agency and parents agree, continue to provide educational services pending the resolution of an administrative hearing or judicial decision filed under IDEA section 615. States may always adopt provisions that are more protective of children with disabilities than the provisions in IDEA (as long as it does not violate other provisions of the IDEA).

As to whether the adoption of 34 C.F.R. §303.518(c) on the stay put provision relieves states in the Third Circuit, including Pennsylvania, from providing services during the pendency of due process hearings to children who are no longer eligible under Part C, we would recommend that each State confer with its legal counsel to assess potential options and the possible litigation risk from failing to provide services. While we certainly believe our regulation is a valid interpretation of IDEA section 615(j), and that courts generally give deference to the Department's regulation, we cannot predict how a court within the jurisdiction of the Third Circuit, or the Third Circuit itself would rule on this issue given its previous opinion.

Please feel free to contact this office if you have further questions. We appreciate your efforts on behalf of children with disabilities.

Sincerely,

A handwritten signature in black ink, appearing to read "John Hager", with a long horizontal flourish extending to the right.

John N. Hager

cc: Dr. JoLeta Reynolds