UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

MAY 0 5 2010

Mr. Jerrold Miller, Esq.
Miller and Neely PC
6900 Wisconsin Ave., Suite 704
Bethesda, MD 20815

Dear Mr. Miller:

This is in response to your electronic mail (email) inquiry of March 10, 2010 regarding limitations on reimbursement under 34 CFR §300.148 of the implementing regulations of the Individuals with Disabilities Education Act (IDEA). Specifically, you ask whether the IDEA limits reimbursement to the parent of a child with a disability, who had an individualized education program (IEP) in the public school, and placed that child in a private school because she believed the public agency did not offer her child a free appropriate public education (FAPE) under the IDEA. You indicate that the parent rejected the public agency's IEP in the spring of 2008 and stated at that meeting that she would be placing her child in a private school and requesting that the public agency reimburse her for that placement. The child was in the private school for the 2008-2009 school year and remained in that placement for the 2009-2010 school year. Having not received reimbursement, the parent requested a due process hearing seeking reimbursement for the pubic agency's failure to provide FAPE. Based on the findings of the Administrative Law Judge, you ask whether each year's attendance at a private school constitutes a separate enrollment for the purposes of 34 CFR §300.148(c) and whether the parent was required to provide additional notice to the public agency prior to the 2009-2010 school year in order to seek reimbursement for that year.

Under 34 CFR §300.148(c), if the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, 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. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the State educational agency and local educational agencies. See Florence County School Dist. Four v. Carter, 510 U. S. 7 (1993).

Because reimbursement is an equitable remedy, a court or hearing officer generally has discretion to determine both the appropriateness and the amount of reimbursement of a unilateral parental private school placement based on the equities of a particular situation. See School Comm. of Burlington v. Department of Ed. of Mass., 471 U. S. 359 (1985); Carter, supra; and Forest Grove School Dist. v. T.A., 129 S. Ct. 2484 (2009). The only specific limitation on reimbursement in the IDEA regulations is found at 34 CFR §300.148(d), which states that the cost of reimbursement described in 34 CFR §300.148(c) may be reduced or denied: (1) if (a) at the most recent IEP Team meeting that the parent attended prior to removal of the child from the public

school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (b) at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph 34 CFR §300.148(d)(1)(i); (2) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in 34 CFR §300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or (3) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

Further, under 34 CFR §300.148(e), notwithstanding the notice requirement in paragraph 34 CFR §300.148(d)(1), the cost of reimbursement: (1) must not be reduced or denied for failure to provide the notice if: (a) the school prevented the parents from providing the notice; (b) the parents had not received notice, pursuant to 34 CFR §300.504, of the notice requirement in paragraph 34 CFR §300.148(d)(1); or (c) compliance with paragraph (d)(1) of this section would likely result in physical harm to the child; and (2) may, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if: (a) the parents are not literate or cannot write in English; or (b) compliance with paragraph (d)(1) would likely result in serious emotional harm to the child.

Although you ask for clarification on the IDEA's definition of enrollment, the limitation cited above focuses on the child's removal from public school. Specifically, the above-cited provision refers to "the most recent IEP Team meeting that the parent attended prior to *removal* of the child from the public school" and "at least ten (10) business days ...prior to the *removal* of the child from the public school" (emphasis added). Thus, removal and not enrollment, establishes the regulatory benchmark when determining compliance with the parental notice provision. However, as previously noted, a court or hearing officer may also consider other equitable factors when making a decision on parental reimbursement.

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.

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,

Alexa Posny, Ph.D.
Acting Director
Office of Special Education Programs

cc: Carol Ann Heath-Baglin