



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

APR 16 2001

Mr. Perry A. Zirkel
College of Education
111 Research Drive
Bethlehem, PA 18015-4794

Dear Mr. Zirkel:

This is in response to your letter to the Office of Special Education Programs (OSEP), in which you ask for clarification about the following scenario you provided regarding Part B of the Individuals with Disabilities Education Act (IDEA). The scenario is:

“Mary is an IDEA-eligible student with a full inclusive IEP [individualized education program]. During the fall semester of the school year 1999-2000, she received three suspensions, each for three days, as a result of incidents separated from each other by at least two weeks. The IEP team meets at the end of the semester, with due notice to and participating agreement by the parents, and changes the IEP to increase the special education services from itinerant support to 50% resource room and to add the related services of one hour of counseling per week and one hour of consultation by a behavior specialist for a functional behavioral assessment and behavior intervention plan. During the first week in February, the principal suspends Mary for ten days.”

Specifically, you ask in your letter if “the total of Mary’s cumulative days in AY 1999-2000, for determining whether the latest suspension constitutes a removal, amount to 18 or only 10 days?”

Your question requires a two-part response. It is not clear from your question whether you are asking whether the suspensions constitute a change of placement under 34 CFR §300.519, which triggers certain procedural protections (required under 34 CFR §§300.520 through 300.526) or whether Mary is entitled to educational services under 34 CFR §300.121. As a result, we will address both questions. As a preliminary matter, we note that your scenario uses “days” that we interpret you to mean school days because of the context in which you use the term in the above scenario. The regulations at 34 CFR §300.9 define the meaning of day to be calendar day and the meaning of school day to mean any day, including a partial day, that children are in attendance at school for instructional purposes. However, it appears that you intend your scenario to mean school days. In addition we also interpret “AY” to mean academic year for the purposes of our response. Based on these assumptions, the total number of Mary’s cumulative days in AY 1999-2000 under both §300.519 and 300.121 are 19 school days in a school year, not 18 or 10.

First, we respond to your question as to what constitutes a disciplinary “removal” under 34 CFR §300.519. Second, we address whether Mary must be provided a free appropriate public education (FAPE) during the period that she is suspended or expelled from school as required under 34 CFR §300.121 of the Part B IDEA regulations.

While you provided us with information regarding the factors set forth in the regulation, there are other factors that an IEP team may determine to be relevant to whether Mary's suspensions cumulatively constitute a change in placement such that the removal will result in application of the disciplinary procedures of 34 CFR §300.519 *et seq.* Under §300.519, a change in placement occurs if:

- (1) the removal is for more than 10 consecutive school days; or
- (2) the child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and amount to a change in placement because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another. 34 CFR § 300.519.

In other words, for purposes of a change in placement, the days of a suspension must be more than 10 *consecutive* school days. Or, alternatively, there must be a series of removals within one school year (that may individually be less than 10 school days) but cumulatively constitute a pattern based on the described factors and add up to more than 10 school days in a school year. The regulatory factors affecting the determination of whether there is a "pattern" under §300.519 are not exclusive and are only provided as examples. Here, for example, other factors that the IEP team may determine to be relevant are why Mary was suspended for each removal and whether there was consideration by the IEP team that Mary's behavior or actions were not a manifestation of her disability during any of the four separate suspensions. These factors may affect whether the removals would constitute a pattern when considered in the aggregate. Ultimately, it is the IEP team for the child (or a hearing officer or judge in the event of a disagreement between the school and the parents) that makes the individual determination as to whether a series of removals constitutes a pattern when considered in the aggregate for purposes of 34 CFR §300.519. Thus, OSEP cannot definitely answer the question you posed regarding Mary's suspensions.

Secondly, with respect to providing FAPE to children with disabilities suspended or expelled from school, 34 CFR §300.121 states that a public agency need not provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if services are not provided to a child without a disability who has been similarly removed. In the case of a child with a disability who has been removed from his or her current placement for more than 10 school days in that school year, the public agency, for the remainder of the removals must provide services consistent with section 300.121. In other words, services consistent with section 300.121 must be provided to a child with a disability, if he or she is suspended or expelled from school for more than 10 school days in a school year regardless of whether the removal is more or less than 10 school days. Thus, under your scenario, Mary must be provided services consistent with section 300.121 on the second day of her 10 school day suspension that began in the first week of February because this would be her eleventh day of suspension in the same school year.

As a final matter, your understanding of OSEP's position as outlined in our letter to Mr. Bieker dated August 3, 2000, is correct. You confirmed that the clock does not start again in calculating the number of days of suspension for purposes of determining a change in placement under §300.519 or determining whether services must be provided under §300.121 when a child's IEP or placement is revised mid-school year. For example, if a child is suspended early in a school year, the child's IEP and/or placement is subsequently revised, and the child is suspended again later in the same school year, the days the child was suspended prior to the revision must be considered in calculating the aggregate number of suspended school days during that school year under both §300.519 and §300.121.

We hope that you find this explanation helpful. If you need further assistance, please call Dr. JoLeta Reynolds or Mr. Troy Justesen, at 202-205-5507 or 202-205-9053, respectively.

Sincerely,



Patricia J. Guard
Acting Director
Office of Special Education Programs

cc: Pennsylvania State Special Education Director