AUG 1 9 2003

Geoffrey A. Yudien, Esq.
Legal Counsel
Vermont Department of Education
120 State Street
Montpelier, Vermont 05620-2501

Dear Mr. Yudien:

This letter is in response to your questions regarding incarcerated youth that you asked of Jill Harris in an electronic message. Each of your questions is restated below, followed by the Office of Special Education Program's (OSEP's) response.

Question 1: You cite section 300.311(c)(1) of the Individuals with Disabilities Education Act (IDEA) regulations which states that "...the IEP [individualized education program] team of a student with a disability, who is convicted as an adult under State law and incarcerated in an adult prison, may modify the student's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated." You ask, "Does this apply to people who are incarcerated pre-trial?" (Emphasis added).

Response. Because the statute 20 USC §1414(d)(6) and regulation use specific language referencing students with disabilities who are convicted as adults under State law and incarcerated in an adult prison, OSEP believes that this specific provision contemplates post-conviction incarcerations. This is in contrast to the provisions at 20 USC §1412(a)(1)(B) and 34 CFR §300.122(a)(2) stating that the obligation to make a free appropriate public education (FAPE) available does not apply with respect to children aged 18 through 21 where State law does not require that special education and related services be provided to those youth with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility were not actually identified as being a child with a disability under Part B and those who did not have an individualized education program under Part B.

Question 2: You ask whether there is a child find responsibility with respect to incarcerated students aged 18 through 21 who had not been previously identified as eligible for special education or who had not had an IEP.

Response: Under the IDEA, where State law creates an exception to FAPE for students with disabilities, aged 18 through 21 who in their last educational placement prior to their incarceration in an adult correctional facility were not identified as being a child with a disability under the IDEA and did not have an IEP, there also is no obligation for States

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and LEAs to identify and evaluate such individuals under Part B. However, to the extent consistent with the age ranges established under State law, States must make FAPE available to students with disabilities in adult prisons who do not fall into that exception. Therefore, States and local educational agencies (LEAs) must include in its child find system, those incarcerated youth who would be eligible to receive FAPE.

Question 3: You state that Vermont's correctional system houses inmates from other states, and also, from the federal correctional system, and ask "What are Vermont's obligations, if any, to provide FAPE for the students who are in these groups?"

Response: Individuals in the federal correctional system fall under the jurisdiction of the Federal Bureau of Prisons (BOP) within the Department of Justice. The IDEA makes no specific provision for funding educational services for individuals with disabilities through the BOP. If you would like more information regarding education programs for individuals with disabilities through the BOP, you should contact:

> Federal Bureau of Prisons
> 320 First St., NW.
> Washington, DC 20534

Part B and its implementing regulations specifically apply to all subdivisions of the State involved in the education of children with disabilities, including State and local juvenile and adult correctional facilities. 34 CFR §300.2(b)(1)(iv). Each State must ensure that FAPE is available to all children with disabilities, of eligible ages under State law, who are residing in the State. 34 CFR §300.300(a). Generally, where the student is not emancipated or of the age of majority, residency is determined by the State in which the parent or guardian resides or the State that has designated the youth as a ward of the State. Therefore, under Part B, when a youth with disabilities is referred or placed by the State into an out-of-State facility, the referring State is generally responsible for ensuring that FAPE is available to the youth during the course of the youth's placement in that facility.
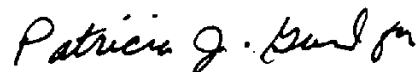
Two Federal laws that are also relevant to your inquiry are Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II). Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department, and Title II prohibits discrimination on the basis of disability by public entities, including public elementary and secondary school systems, regardless of receipt of Federal funds. The Department's Office for Civil Rights (OCR) enforces Section 504 and Title II, as it applies to public elementary and secondary school systems. For more information about Section 504 and Title II with respect to your inquiry, you can contact the OCR Boston Office at the following address and telephone number:

Boston Office
Office for Civil Rights
U.S. Department of Education
J.W. McCormack Post Office and Courthouse
Room 701,01-0061
Boston, MA 02109-4557

Telephone: 617-223-9662
FAX: 617-223-9669; TDD: 617-223-9695
Email: OCR_Boston@ed.gov

If you have any further questions, please feel free to contact Dr. Wendy Tada at 202-205-9094 or Dr. JoLeta Reynolds at 202-205-5507 (press 3).

Sincerely,

Patricia G. Burton

Stephanie Smith Lee
Director
Office of Special Education Programs

cc: Mr. Dennis Kane
Director of Student Support Services
Division of Special Education
Vermont Department of Education

Thomas J. Hibino
Office for Civil Rights Boston Office