



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

MAY 26 2004

William L. Librera, Ed.D.
Commissioner
Department of Education
P.O. Box 500
Trenton, New Jersey 08625-0500

Dear Commissioner Librera:

The Office of Special Education Programs (OSEP) received your letter of January 26, 2004, which was sent in response to our request for an explanation of how the New Jersey Department of Education (NJDOE) is meeting the requirements of the Individuals with Disabilities Education Act (IDEA) for students with disabilities under the contract between the Montague School District in New Jersey and the Port Jervis City School District in New York. This issue was raised by Ms. Diana Autin of the Statewide Parent Advocacy Network in Newark, New Jersey who requested OSEP clarification on whether, for these students, evaluations are to be conducted and eligibility determinations made consistent with New Jersey's policies, and whether the New Jersey Department of Education must provide access to dispute resolution procedures (e.g., due process hearings, mediation) that are available to all parents of children with disabilities who live in New Jersey. Ms. Autin's letter was prompted by a student who was receiving services under the IDEA while in a middle school in New Jersey, but who was declassified upon enrollment in high school in New York.

In our October 24, 2003 letter, we requested that you address how the NJDOE and the Montague School District are meeting responsibilities under the IDEA to ensure the provision of a free appropriate public education (FAPE) to students with disabilities living in New Jersey and attending school in Port Jervis, New York. You responded that the NJDOE and the Montague School District are in compliance with the IDEA because (a) "the Port Jervis School District is required to comply with all of the same IDEA mandates with which a New Jersey school district is required to comply;" (b) "the sending-receiving contract specifically states that Port Jervis' special education program is designed and implemented in compliance with the IDEA;" (c) "the Port Jervis School District is governed by all requirements of the IDEA, and is subject to oversight and monitoring by the New York State Department of Education to ensure such compliance;" and (d) "just as New Jersey school districts are under the jurisdiction of the United States Department of Education (USDOE), so too is a school district in New York, such as Port Jervis."

Your response appears, on the one hand, to assume that the NJDOE can relinquish its responsibility for general supervision of education programs for children with disabilities living in New Jersey, but attending a school in New York, to New York, while at the same time arguing that NJDOE treats Port Jervis “as it would any receiving school in New Jersey,” noting the application of New Jersey regulations to “receiving schools” and the responsibilities of “district boards of education” (defined as the school district of residence by 6A:14-1.3) for the education of children placed in ‘receiving schools.’ Frankly, we are unable to see how these two concepts can be reconciled.

As we attempted to clarify in our October 24, 2003 letter, although the IDEA does not prohibit NJDOE or Montague School District from entering into an agreement with Port Jervis School District in New York to provide special education and related services, NJDOE *remains responsible* for ensuring that each educational program for children administered by the Port Jervis School District through an agreement is under the general supervision of the persons responsible for educational programs for children with disabilities in New Jersey, and meets the educational standards of New Jersey, including the requirements of Part B of the IDEA. (20 U.S.C. 1412(a)(11); 34 CFR §300.600). Nothing in the IDEA or its implementing regulations would allow the NJDOE to turn over its responsibility for ensuring the provision of FAPE for children with disabilities living in New Jersey to New York State. Nor, in fact, do your own regulations seem to support that proposition.

In our view, the relationship between the Montague, New Jersey school district and the Port Jervis, New York school district is most closely akin to a public school district’s contract with a private school to provide education services. It is very clear under the IDEA that in those situations the SEA remains responsible for ensuring that those children are provided an education that meets the standards that apply to education provided by the SEA and LEAs and that those children have all the rights that apply to children served by public agencies. (20 U.S.C. 1412(a)(10)(B); 34 CFR §300.401). See also, *St. Johnsberry Academy v. D.H.*, 240 F. 3d 163 (2nd Cir. 2001). Port Jervis is serving Montague students as a contractor for Montague, but Montague, and NJDOE, remain ultimately responsible for ensuring that the requirements of IDEA are met for these students, including the requirement that their education meet the standards that apply to education provided by NJDOE and New Jersey school districts. See *P.N. and G.N. v. Greco*, 282 F. Supp.2d 221, 238-9 (D.N.J. 2003) (“state and local educational authorities are ultimately responsible for ensuring that a student’s rights under the IDEA are protected, and they cannot divest themselves of that responsibility * * * * [the school district] had a non-delegable obligation to ensure that the [student’s] rights under the IDEA were not infringed”).

We also asked that you address how children with disabilities living in New Jersey and attending school in New York, and their parents, are afforded their procedural safeguards under the IDEA. You responded that (a) the sending-receiving agreement between the NJDOE and New York states that the Port Jervis School District in New York is the local educational agency (LEA) responsible for the individualized education programs (IEPs) of the Montague students attending its schools, and, as such, procedural protections are

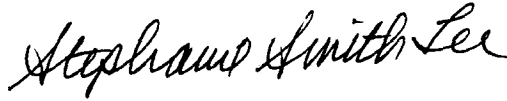
provided pursuant to New York law, as that State has jurisdiction over the Port Jervis School District; (b) the New York Department of Education agrees that procedural protections for all students in the Port Jervis School District, including those who reside in Montague, New Jersey, are in accordance with New York law, not New Jersey; (c) the NJDOE lacks jurisdiction over the Port Jervis School District to compel action by Port Jervis School District in the event that it declined to submit to its jurisdiction and authority; and (d) the procedural actions afforded in New York are fully enforceable by the New York Department of Education. You further state that the parents of Montague students attending Port Jervis are able to bring all due process claims through the New York due process system, which is subject to the same IDEA mandates as the New Jersey due process system. For the reasons stated above, we do not believe that the contractual relationship between Port Jervis and Montague is sufficient to divest New Jersey students and their parents of their rights, under the IDEA, to procedural safeguards in accordance with NJDOE rules.

You did not explain how New Jersey parents who disagree with a hearing officer's decision in a due process hearing are provided the opportunity to pursue complaints against Montague or the NJDOE through the New Jersey due process system and, if necessary, civil actions through the State of New Jersey courts of competent jurisdiction or Federal court. The information in your letter appears to suggest that New Jersey parents wishing to pursue complaints in a civil action following a due process hearing would have to do so in New York. It is unclear how a New York court would have jurisdiction over a conflict regarding a New Jersey LEA's failure to provide FAPE to a New Jersey resident.

As noted above (and in our previous correspondence), the State Educational Agency (SEA) is ultimately responsible for ensuring that all Part B requirements, including eligibility, evaluation, and procedural safeguards, are met for eligible children residing within the State, including those children served by a public agency other than an LEA. We are providing you with an additional 30 days to explain in writing how New Jersey is fulfilling its responsibilities under the IDEA for children living in New Jersey and attending school in New York. We ask again that you specifically address the concerns raised in our initial letter of October 24, 2003 and in this letter regarding how the State will change its policies and practices to ensure the availability of FAPE, the implementation of the child find and evaluation requirements, and the procedural safeguards afforded to New Jersey parents and children consistent with the IDEA. If you determine that other LEAs in New Jersey have contracts with provisions similar to those in the contract between the Montague School District and the Port Jervis City School District, please also address how the State will fulfill its responsibilities under the IDEA for children covered under those contracts.

Thank you, in advance, for your prompt attention to this matter. If we do not receive your response within 30 days of the receipt of this letter, we will consider our options to compel compliance. If you have any questions, please call Dr. Wendy Tada at 202-205-9094 or Dr. JoLeta Reynolds at 202-205-5507 (press 3) and ask to be transferred to Dr. Reynolds.

Sincerely,

A handwritten signature in black ink that reads "Stephanie Smith Lee". The signature is written in a cursive style with a large initial 'S'.

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