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Dr. Rebecca Cort  
Deputy Commissioner, VESID  
New York State Education Department  
Albany, New York

Dear Dr. Cort;

Thank you for inviting The Council of New York Special Education Administrators (CNYSEA) to review and comment on the proposed legislation in relationship to the implementation of the federal Individuals with Disabilities Education Improvement Act (IDEIA). The federal statute and regulations associated with the reauthorization of the (IDEIA) in 2004 are now official. CNYSEA is pleased with a number of the improvements contained in the new Federal education policy as well as several of the policy changes taking place in New York. However, the issue that concerns us the most is the amalgamation of the current dual enrollment provisions of New York State Law and IDEA provisions for parentally placed students in non-public schools.

The lead paragraph of the draft legislation states this is ...”An Act to amend the education law and the public health law, in relation to implementation of the federal individuals with disabilities education improvement act of 2004...” We are particularly concerned that the proposed provisions dealing with parentally placed students in non-public schools and charter schools seek to impose new burdens on an already overregulated system that are not required by federal law. We therefore, write to urge, once again that the Department propose only those changes that are necessary to enable the State to conform its statute to the federal law.

**§1. New Obligations on Public Schools for Children with Disabilities Enrolled in Charter Schools**

The proposal to amend state law to require that where a charter school arranges to have the school district of residence provide special education programs or services, the district “shall provide them in the same manner as it serves students with disabilities in other public schools in the district...” is not required by federal law.

The IDEIA only imposes this obligation upon public schools where the charter school is a public school of the LEA. [20 U.S.C §1413(a)(5) and 34 CFR §300.209(b)(I)]. (Emphasis added). Education Law § 2853(1)(c) provides that "a charter school shall be deemed an independent and autonomous public school, except where, it is considered a private school for purposes enumerated in statute. According to Education Law §2853(4), special education services are to be provided to students with disabilities who attend charter schools pursuant to an IEP developed by the CSE of the district of residence. The law provides that the charter school may decide to provide the services itself, arrange to have the district of residence provide them or may contract with another provider to do so. By definition, nothing in the state's enabling legislation makes a charter school a public school of the district. Federal law does not mandate the proposal. Consequently, it imposes upon those districts that already serve the most disadvantaged students in our state, a new and costly mandate on public schools without justification. We therefore, urge the Department to remove the language from its proposal to the legislature

In the event the department continues to support this legislative proposal, we urge that, at a minimum, you include the recommendations that we provided to you when you first shared with us the Department's proposal. We have included for your review, another copy.

## **§2. Parentally Placed Students in Non-public Schools**

Congress took several years to rewrite the federal law governing the provision of services to children with disabilities parentally placed in nonpublic schools. In 1997, Congress amended the federal law to clarify the obligations of LEAs to such children by mandating consultation with private schools and parents and the development of service plans as opposed to IEPs for children attending nonpublic schools. In 2004, it amended the law further and identified the school district of location as the district responsible for child find and the development of service plans for students enrolled in private schools. 20 USC 1412(A)(10)(A). For the next two years, the Department, to its credit, attempted, without success, to preserve New York's entitlement model which provided an IEP for every resident child regardless of where the child attended school. Ed Law §3602-c.

Without the support of Congress or the federal agency to maintain its current system of entitlements, New York must amend its law to conform to the federal mandates. Instead of doing so, however, it proposes to maintain the prior mandate of developing IEPs for such children while shifting the responsibility to develop them to the district where the private school is located.

The legislative proposal will force those districts traditionally left with the least resources to serve the State's neediest students and to now develop IEP's (ISP's) for nonresident children whose districts of residence will continue to be required to do so as well. The proposal is unnecessarily burdensome and duplicative. Establishing regional rates that provide for reimbursement long after services are provided and evaluations are conducted does not solve the problem.

The provision governing Due Process for Parentally Placed Students is equally problematic. The regulations at 34 CFR §300.137(a) explicitly provide that children with disabilities enrolled in private schools by their parents do not have an individual right to receive some or all of the special education and related services they would receive if enrolled in the public school. More specifically, the due process provisions at 20 USC §1415 and 34 CFR §§300.504 through 300.519 of the regulations do not apply to issues regarding the provision of services to a particular parentally placed non-public school student.

While eliminating the parents' right to a due process hearing, the state's proposal gives parents of children enrolled in private schools virtually the same protections through the state complaint process which proposes to authorize the Department to review "the recommendation of the committee or other actions or omissions of the committee relating to the development, content or implementation of an individualized education services plan" (which the proposal defines as the same as an IEP). The proposed review process gives to the Department sole authority "to direct the school district to take appropriate remedial action wherever "the department determines that the committee has not developed an individualized education services plan that complies with the requirements of this section or the school district has not provided special education programs and services to the student in accordance with the individualized education services plan, or that special education programs and services are not being provided to students attending nonpublic school located in the school district on an equitable basis." In accordance with state and federal law, the Department is authorized through the complaint process to impose monetary reimbursement, compensatory services or take other corrective actions appropriate to the needs of the student (8 NYCRR 200.5(1)(2)(v)(e)) and therefore, have the identical remedial powers as hearing officers, the state review officer and the courts have following a full hearing and several levels of review.

The imposition of such remedies is not appropriate particularly where the federal law does not require a district of location to develop IEPs for students who are not residents and the federal complaint process governing such students is limited to a review of the process by which the service plan is developed and does not provide for the comprehensive review of an IEP, that the state proposal would provide. 20 U.S.C. §1412(a) (10)(A); 34 C.F.R. §300.140.

We are also concerned that the federal mandate to provide equitable services" will not support the state's proposal that only requires districts to comply with the federal requirements for out of state students while it requires the districts to provide the equivalent of IEP services for in state students. We therefore ask the Department to obtain the assurance necessary from the USDOE that treating instate and out of state children differently will not result in a claim that services are not offered in an "equitable manner."

The National Association of State Directors is on record stating its strong opposition to the federal amendment that shifted responsibility from the district of residence to the district of location for child find and other obligations for children placed in private school. New York's legislative proposal promises changes far beyond those mandated by federal law that has presented major problems for districts around the country.

At a minimum, we urge the state legislature to require parents placing children in nonpublic schools to notify the responsible district by April 1. Waiting until June 1, as our current statute provides, is far too late and does not provide districts of location the time it would need to plan or to conduct meetings to develop IEPs or service plans for students who do not reside there prior to the end of the 10 month school year. Further, just as existing law provides for contracts between districts, the proposed amendments to state law should maintain current provisions which authorize the same and modify them only to the extent necessary to conform with the federal law which also authorizes contracts between the district of location and other districts, private agencies and organizations. (20 U.S.C. §1412 (a) (10) (C) (VI) (I)).

While we urge the Department to develop a legislative proposal that goes no further than the federal mandate, if the Department has been directed to do otherwise, we urge the Department to build the foundation of any proposal on the fact that, regardless of what a district of location is obligated to do, the child's district of residence remains responsible to offer an IEP for that child each year, unless the parents specifically waive their right to receive one. From the IEP developed by the child's district of residence, the district of location, with the parent and a representative of the private school would meet to develop the plan for services which would be based on the IEP developed by the child's district of residence, on criteria established in legislation.

**Federal Excusal Provision:** §§7, 12, 23 which refers to, the federal excusal provision excludes from the provision "..... the parents or persons in parental relations to the student" which may easily be misinterpreted. While we understand the intent, it can be misconstrued to mean that a parent must always attend a meeting. That interpretation is contrary to other provisions of the law. We therefore suggest that the proposed language be conformed to the federal law and regulation and cite to the proper state law provision. 20 USC §1414(d) (1) (B)(I); 34 C.F.R. §300.322.

We also urge the Department to propose that the provision in state law that includes the additional parent member be repealed. Since 1997, parents of children with disabilities and anyone they elect to bring who they designate as having special knowledge or expertise about the child, automatically becomes a member of the committee on special education. Moreover, both the State Review Office and the courts have held that the additional parent member is not required. We therefore, urge the Department to include in its proposal an amendment to Education Law §4402.1.b.1(a)(viii) to conform to federal law and the recent court decision that recognizes that the additional parent member is not a required member of the federally mandated team.

§14. We ask that the provision referring to changes in IEP without meetings should include subcommittees. Therefore we recommend that in order to avoid any confusion, the words "subcommittee, as authorized by law" be included in the statutory reference to agreements to change IEPs without meetings.

§17. This provision should include the temporary guardian as well, where applicable.

§19. We support the state's proposal to return the statute of limitations in New York to one year as it was prior to the federal 2004 amendments, which gave states, the option, through legislation to impose its own statute of limitations. Assuming that the parent is aware of his/her rights, there is virtually no reason to give a parent the right to wait up to two years before filing a complaint. Moreover, a two-year statute of limitations is entirely inconsistent with the district's obligation to review and revise, as appropriate, an IEP on an annual basis.

**§26-29. Proposed changes in preschool legislation and provisions governing private approved schools and child care institutions.**

According to the latest amendments to state law, we understand that the Governor will be assembling a task force to report to him on recommendations involving the delivery of special education services to preschool children with disabilities. Over the years, the State legislature and the State Education Department have embarked on a series of piecemeal changes to Education Law §4410. Given the overarching review of the statutory and regulatory scheme we urge that any proposed changes to New York's preschool statute, except where federally driven, be postponed until the task force completes its work.

We are unaware of any abuses in the current system that warrants the changes proposed herein. Furthermore, we are against any amendment that would place a licensed professional in an educational role without requiring the individual to meet the same educational coursework required for certified teachers of the speech and hearing handicapped and certified school psychologists to meet in order to be qualified to provide educationally related services and evaluations. We also question the basis for requiring approved private schools and childcare institutions to become registered. If a conflict with other provisions of state law exists, we urge that instead of requiring schools and providers of preschool itinerant services to meet state licensing requirements, the licensing provisions be amended to provide for a recognized exception, as the proposal seems to be aimed at center based preschool programs.

We would like to thank you for the opportunity to respond to proposed legislation and look forward to working with you to ensure that appropriate services are provided to students with disabilities in a cost effective and efficient manner.

Sincerely,

*David Grapka*

David Grapka



Michael Kohlhagen

cc: James DeLorenzo  
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