

# Special Education Services to Nonpublic School Students

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**REPLACES:** Special Education Services to Nonpublic School Students, BEC 22 Pa. Code §14.45, issued September 1, 1997

### **PURPOSE**

The Bureau of Special Education has received numerous requests asking for clarification concerning the provision of special education services to students enrolled in private, nonpublic schools.

### **PROVISIONS**

In providing guidance on this issue, it is important to emphasize different funding sources available for students at nonpublic schools.

1. Act 89 programs, which are often described as providing services that are health-related, are legally distinct from special education programs. This BEC does not address the appropriate design of Act 89 programs. Act 89 services are funded through the intermediate unit (IU) and questions concerning Act 89 services should be directed to the IU. The school district is not responsible for Act 89 services.
2. In special education programs, there is a difference between what a local education agency (LEA) such as a school district can do and what it must do. This memo pertains to the legal entitlements of the children involved and the obligations of the public educational system.
3. Under relevant special education law, the rights of children whose parents have placed them in a private school notwithstanding the availability of a free appropriate public education (FAPE) from or through a school district are significantly less than the rights of a child for whom FAPE is not available in a public (or publicly funded) setting. The guidance that follows focuses primarily on the group of students whose parents have chosen to place them in a private school although FAPE was available in the school district.

In short, this BEC will clarify what is owed, under special education law, to students with disabilities who are offered FAPE in a public school but who are enrolled by their parents in private, nonpublic schools. What is owed is less than FAPE. Federal regulation calls upon states to ensure that "provision is made for the participation of private school handicapped children" and to provide "a genuine opportunity for equitable participation" in the special education program. To fulfill this requirement, schools will often allow private school children to obtain particular public services by coming to the public school whenever those services are scheduled.

Federal provisions do not confer specific entitlements on particular children who remain in private schools; rather, these provisions require local education agencies to provide some services to private school children in the aggregate. This phrase, "a genuine opportunity for equitable participation" has never been interpreted to entitle a particular private school child to the full range of items that constitute FAPE, or any particular service, at the private site of the parent's choice, when FAPE is available through simple enrollment in a public school.

In this regard, note that the state regulations and standards address only in very brief terms the rights of families who elect private education.

In Pennsylvania, a "genuine opportunity for equitable participation" is often provided through dual enrollment. Special education services may be provided with special education funds only if the routine requirements for special education programming are satisfied. Chief among these requirements are:

1. a two-pronged evaluation concerning the existence of an exceptionality and a consequent need for special education, and
2. enrollment in a school district.

There are legal limits on the options to school districts in site selection when using special education funds. Act 89 funded services are not considered special education services prescribed under 22 Pa. Code Chapters 14. The General Assembly has not enacted a statute that deals explicitly with the use of parochial school sites in special education programs. Nevertheless, in *Meek v. Pittinger*, the Supreme Court suggested that providing diagnostic services on the site of a religious institution would be Constitutional even when providing other services on site would not be Constitutional. This suggests a distinction between diagnostic services and ongoing educational services, with the use of public funds at parochial schools for the latter being prohibited. In addition, the Court in *Lemon v. Kurtzman* said that the state may not use public funds to provide educational services in the nonpublic elementary and secondary schools where the routine need to monitor the provisions of services would foster excessive government entanglement with religion. In the area of special education, we expect school districts to closely supervise any provider or site that the district uses.

Also, the Supreme Court, in cases such as *Anguilar v. Felton*, ruled that instructional services under the federal Chapter 1 program cannot be provided on the premises of religiously affiliated schools. The Supreme Court has not had occasion to deal with the same issue in the context of special education. With respect to this "choice of site" issue, the similarities between Chapter 1 services and special education services are more obvious than the differences. Therefore, it is likely that courts faced with a special education issue would rule as the Supreme Court ruled in *Anguilar v. Felton*. In the absence of completely definitive law in this area, the Department believes that providing special education services (other than purely diagnostic services) on the site of a religious school would subject the school district to significant litigation risks. The Department recommends that school districts find other ways of serving the children of such schools.

The following points must be followed as you review this issue locally:

- There is no individual entitlement to special education services and programs to students whose parents choose to enroll the student in nonpublic schools.
- The school district is responsible for providing "a genuine opportunity for equitable participation."
- The school district may allow nonpublic students to come to the public school during the scheduled times when the special education service is available.
- In order to receive special education services and programs, a student must (1) qualify through the two pronged evaluation concerning the existence of an exceptionality and a consequent need for specially designed instruction, and (2) be enrolled in a school district.
- The intermediate unit may not simply shift funding for a particular service from Act 89 to special education.

- Site selection should be reviewed with your solicitor prior to implementation because of the Constitutional issues involved.
- The Pennsylvania Department of Education will not approve the use of special education funds if Chapter 14 is not followed in determining eligibility for special education services and programs.

School districts have an obligation to conduct a properly inclusive planning process, to provide "a genuine opportunity for equitable participation", and to abide by other elements of the regulations that are cited. State and federal law rules establish minimum requirements and leave considerable discretion to local educators to decide how to serve children in private schools. This memo provides what is technical guidance regarding minimum requirements. Copies of relevant federal regulations cited in this memo are available by contacting the Bureau of Special Education.

## **REFERENCES:**

### **Purdon's Statutes**

24 P.S. §13-1372

### **State Board of Education Regulations**

[22 Pa. Code Section 14.123](#)

[22 Pa. Code Section 14.124](#)

[22 Pa. Code Section 14.131](#)

### **Federal Regulations**

34 C.F.R. §300.320

34 C.F.R. §300.321

34 C.F.R. §300.403

34 C.F.R. §300.340 - .350

34 C.F.R. §300.530 - .536

### **Other**

*Meek v. Pittenger*, 421 U.S. 349 (1975)

*Anguilar v. Fenton*, 433 U.S. 220, 246-47 (1977)

*Lemon v. Kurtzman*, 403 U.S. 602 (1971)

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