

LETTER OPINION
98-L-171

October 14, 1998

Mr. Gary W. Gronberg
Assistant Superintendent
Department of Public Instruction
600 East Boulevard Avenue
Bismarck, ND 58505-0440

Dear Mr. Gronberg:

Thank you for your letter requesting my opinion on whether the Department of Public Instruction, through its Special Education Division, has authority to enact rules that would differentiate the type of issues that can be addressed by the different types of dispute resolutions provided pursuant to the Individuals with Disabilities Education Act (IDEA). IDEA (20 U.S.C. §§ 1400, et seq.) entitles a disabled child to a free appropriate public education tailored to the child's special needs until the child turns 21. The goal of IDEA is to provide access to public education for all students with disabilities. Parents who believe their child's education falls short of the federal standard may obtain an impartial due process hearing or a complaint investigation.

The Special Education Division is responsible for implementing the dispute resolution options prescribed by IDEA. Your letter explains three types of dispute resolution available to families and local school districts: 1) a due process hearing, 2) a complaint investigation, and 3) mediation services.

N.D.C.C. ch. 28-32, the Administrative Agencies Practice Act, provides that administrative agencies have authority to adopt administrative rules. N.D.C.C. § 28-32-02(1). N.D.C.C. § 28-32-01(2) defines "administrative agency" or "agency" to mean "each board, bureau, commission, department, or other administrative unit of the executive branch of state government, including one or more officers, or employees, or other persons directly or indirectly purporting to act on behalf or under authority of the agency." The definition then excludes as an administrative agency certain state offices, councils, commissions, boards, and departments. The Department of Public Instruction is not excluded from the definition of administrative agency. Accordingly, the Department of Public Instruction is an administrative agency and may adopt administrative rules within the statutory authority of the Department. See N.D.C.C. §§ 15-21-07 ("As an administrative agency under chapter 28-32, the superintendent of public instruction shall adopt rules pertaining to

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the hearing and determination of appeals and rules necessary to render effective the school laws of the state."); 15-59-05 ("[T]he director of special education shall prescribe rules and regulations for the special education of children with disabilities and for the administration of this chapter."); see also 1994 N.D. Op. Att'y Gen. L-110 ("the Superintendent of Public Instruction, as well as the director of special education, has various powers under N.D.C.C. ch. 15-59, including general state policy development, the prescription of rules and regulations for the special education of children with disabilities, the provision of assistance to school districts in the inauguration, administration, and development of special education programs"); 1985 N.D. Op. Att'y Gen. 155 ("As an administrative agency under N.D.C.C. Ch. 28-32, the superintendent of public instruction shall prescribe and cause to be enforced rules and regulations as may be necessary to enforce the school laws of the State of North Dakota.").

The Special Education Division of the Department of Public Instruction has authority to implement the IDEA dispute resolution options. N.D.C.C. ch. 15-59. The Department of Public Instruction is the State Educational Agency (SEA) for purposes of IDEA. See Letter from Attorney General Robert Wefald to Curt Stahl (April 9, 1984) (certifying that "the State Department of Public Instruction has the authority under state law to perform the duties and functions of the state educational agency"). 20 U.S.C. § 1415(a) provides that the SEA "shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies." 20 U.S.C. § 1415(b) outlines the procedures required by section 1415. The procedures required by 20 U.S.C. § 1415 include an opportunity to present complaints, mediation, and the opportunity for an impartial due process hearing. 34 C.F.R. § 300.660 requires the SEA adopt written complaint investigation procedures.

It is my opinion N.D.C.C. §§ 28-32-02, 15-59-05, 20 U.S.C. § 1415(a), and 34 C.F.R. § 300.660 authorize the Department of Public Instruction to adopt administrative rules regarding impartial due process hearings, complaint investigations, and mediation services implemented by the Special Education Division pursuant to IDEA. The administrative rules, of course, must be consistent with state and federal law.

You question whether administrative rules can provide that the Department will handle some types of complaints through investigation and others through an impartial due process hearing. 20 U.S.C.

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§ 1415(f) provides that if a complaint is received under 20 U.S.C. § 1415(b)(6) or (k), the parents "shall have an opportunity for an impartial due process hearing." 34 C.F.R. §§ 300.506-300.513 outlines requirements of the impartial due process hearing.¹ If the complaint is received under 20 U.S.C. § 1415(b)(6) or (k), 20 U.S.C. § 1415(f) requires the due process hearing be provided. The Department's rules cannot deny a parent the mandated impartial due process hearing by replacing it with an alternative dispute resolution method.

Although the Department cannot deny parents the right to an impartial due process hearing, the Department must ensure that procedures are established and implemented to allow parties to disputes to resolve such disputes through a mediation process whenever an impartial due process hearing is requested. 20 U.S.C. § 1415(e). Participation in the mediation process is voluntary on the part of the parties, and cannot be used to deny or delay the parents' right to a due process hearing or to deny any other rights afforded under IDEA.²

20 U.S.C. § 1415 does not address the procedural safeguards of the administrative investigation. 34 C.F.R. § 300.660 specifically provides the SEA shall adopt written procedures for resolving complaints alleging a public agency has violated part B of IDEA or part 300 of the Code of Federal Regulations. 34 C.F.R. § 300.661 requires that SEA include in its complaint procedures a complaint investigation process conducted within 60 calendar days after the

¹ The decision of the Department after an impartial due process hearing is final, except that a party may appeal the decision by bringing a civil action in any state court of competent jurisdiction or in a district court of the United States. 20 U.S.C. § 1415(i). Thus, the right to judicial review found in N.D.C.C. § 28-32-15 does not apply to a hearing officer's decision after an impartial due process hearing pursuant to IDEA. Under the judicial review process created by IDEA, "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415 (e)(2). Thus, judicial review under IDEA differs substantially from judicial review of other agency actions, in which courts generally are confined to the administrative record and are held to a deferential standard of review. See N.D.C.C. § 28-32-19.

² 20 U.S.C. § 1415(e)(2) outlines the requirements for the mediation process. Any rules promulgated by the Department must be consistent with those requirements.

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complaint is filed. As part of the investigation, the SEA can carry out an independent on-site investigation, give the complainant the opportunity to submit additional information, and review all relevant information. The SEA is then required to make an independent determination on whether the public agency is violating a requirement of part B of IDEA or 34 C.F.R. part 300. The SEA's decision may be reviewed by the Secretary.

Pursuant to 34 C.F.R. § 300.660-662, if the complaint alleges a violation of part B of IDEA or of 34 C.F.R. part 300, the complainant has the right to the complaint investigation. The SEA is required to resolve any complaint it receives regardless of whether the complaint concerns a matter that is also an appropriate subject for a request for a due process hearing. (OSERS Letter, 18 IDELR 589 (1991); OSERS Letter, 17 EHLR 468 (1991); OSEP Letter, IDELR 213:242 (1989).) The Department's rules cannot automatically remove complaints from the complaint management system until a due process hearing is conducted.

It is my opinion that the Department does not have the authority to enact rules that would require complaints be addressed through a due process hearing or would require requests for hearings be resolved through the complaint investigation process. A parent must be provided an impartial due process hearing if the request is received under 20 U.S.C. § 1415 (b)(6) or (k). Similarly, the complainant is entitled to a complaint investigation if the complaint alleges a public agency has violated part B of IDEA or 34 C.F.R. part 300. The party making the complaint, not the Department, elects which dispute resolution process will be used to address the complaint. (OSEP Letter, IDELR 213:242 (1989).)

This opinion is consistent with OSEP Memorandum 94-16. The Memorandum points out that parents of children with disabilities have two separate means available to them for resolving disputes with public agencies concerning the education of their children - the complaint investigation process and the impartial due process hearing. 21 IDELR 85. The Memorandum further points out that parents may use the complaint investigation process, in lieu of the due process hearing system, to resolve disagreements with public agencies over any matter concerning the identification, evaluation, or educational placement of their child, or the provision of a free appropriate public education to the child. Id. Finally, the Memorandum explains that it is impermissible for "an SEA (1) to have a procedure that removes complaints about [free appropriate public education to the child] or any other matter concerning the identification, evaluation, or educational placement of a particular child from the jurisdiction of its complaint management system, or

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(2) to advise or require parents to request a due process hearing before the SEA can initiate a complaint investigation. Thus, whenever an SEA receives a complaint that a public agency is violating a requirement under Part B, including any matter for which parents could request a due process hearing, the SEA must resolve the complaint within 60 calendar days." Id.

When 20 U.S.C. § 1415 and 34 C.F.R. § 300.660-662 are read together, it is possible that the SEA can be investigating a complaint while the same complaint is being addressed through a due process hearing. The following guidance has been provided to address issues raised by concurrent investigations and hearings.

The SEA must resolve a complaint even if it is an appropriate subject for a request for due process hearing. (OSERS Letter, 18 IDELR 589 (1991); OSERS Letter, 17 EHLR 468 (1991); OSEP Letter, IDELR 213:242 (1989).) However, if a parent has already filed a request for due process hearing and then files a complaint with the SEA or simultaneously files a request for due process hearing on the same issues raised in the complaint, the SEA may hold the complaint investigation in abeyance and defer to the hearing officer's decision. This does not mean the SEA can refuse to investigate a complaint because a due process hearing is available. The parent must have sought a due process hearing. (OSERS Letter, 18 IDELR 589 (1991); OSEP Letter, IDELR 213:242 (1989); OSEP Letter, 17 IDELR 56 (1990); OSERS Letter, 17 EHLR 468 (1991).) Furthermore, the SEA may not hold in abeyance issues that are included in the complaint but that are not the subject of the concurrent due process hearing. (OSERS Letter, 18 IDELR 589 (1991); OSERS Letter, 17 EHLR 468 (1991).)³

Your letter also questions the type of relief the Department may provide as part of its complaint investigation decision. Specifically, you question whether the Department has authority, through the complaint investigation process, to require a district provide compensatory education for a student or to require a district

³ Because a complaint investigation and due process hearing can be conducted simultaneously, it is possible that conflicting decisions can be reached. If a hearing officer decides an issue in a due process hearing, that decision will prevail over the SEA complaint investigation decision on the same issue. If the complaint investigation decision is rendered before the due process hearing decision, the results of the complaint investigation may be used as evidence at the hearing. (OSERS Letter, 18 IDELR 589 (1991).)

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reimburse parents for expenses incurred for services provided by a private facility.

34 C.F.R. § 300.661 requires that each SEA include in its complaint procedures "[p]rocedures for effective implementation of the SEA's final decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance." The SEA's authority under IDEA and 34 C.F.R. § 300.661 is to grant the necessary relief, including corrective action, to achieve compliance with IDEA. Corrective action includes compensatory education and reimbursement.⁴ Because authority to grant corrective action exists under federal law, the issue is whether the Department has authority under state law to grant corrective action, including compensatory education and reimbursement.

N.D.C.C. § 15-59-05 directs the Director of Special Education to prescribe rules and regulations for the special education of children with disabilities and for the administration of N.D.C.C. ch. 15-59. This broad authority permits the Director of Special Education to promulgate administrative rules regarding the type of relief the Department may provide as part of its complaint investigation process as long as the rules are consistent with federal and state law. Ebach v. Ralston, 469 N.W.2d 801, 804 (N.D. 1991) (the manner and means of exercising statutory powers is discretionary unless prescribed by the Legislature). If done pursuant to properly promulgated administrative rules, the Department may impose corrective action that includes requiring the district provide

⁴ A number of courts have held that compensatory education is an appropriate remedy under IDEA. See, e.g., Jones v. Schneider, 896 F. Supp. 488, 490 (D.V.I. 1995) (protections provided by IDEA, including compensatory education, remain available to students over the age of 21 who were denied services outlined in the IEP; Meiner v. State of Missouri, 800 F.2d 749 (8th Cir. 1986); Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853 (11th Cir. 1988); Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990) (affirming award of compensatory education beyond the age of 21 as appropriate relief under IDEA), cert. denied, 499 U.S. 923 (1991); Brantley v. Independent Sch. Dist. No. 625, 936 F. Supp. 649, 655 (D. Minn. 1996); Board of Educ. of Oak Park & River Forest High School Dist. 200 v. Illinois State Bd. of Educ., 79 F.3d 654, 656 (7th Cir. 1996). The Supreme Court has held that reimbursement for private school tuition and related costs is appropriate provided the IEP calling for placement in a public school was inappropriate and the private placements by the parents was proper under IDEA. Burlington Sch. Comm. v. Dept. of Educ., 471 U.S. 359 (1985).

compensatory education for a student or that a district reimburse parents the expenses of services provided by a private facility.

Under current law, the Department's ability to enforce a decision imposing corrective action is limited. N.D.C.C. ch. 15-59 does not provide a procedure for the Department to seek judicial enforcement of an order issued as a result of a complaint investigation. The Department may have authority under federal law to withhold federal funds. However, some districts receive only state funding. State law does not currently permit withholding state funds from a district for that district's violations of IDEA. See N.D.C.C. §§ 15-40.1-07.6 and 15-59-06. Even if a district complies with a Department order that it provide compensatory education or reimburse parents for the expense incurred as a result of the district's violation of IDEA, state law limits a district's maximum liability for special education. N.D.C.C. § 15-59-06.2. Any costs above the district's maximum liability would be the liability of the state. N.D.C.C. § 15-59-06.2.⁵ Thus, because of state law, the state could be liable to pay some of the costs of providing compensatory education or reimbursing parents for expenses incurred as a direct result of a district's violation of IDEA. The IDEA is not concerned with whether the state or district pays for the education; IDEA requires that the disabled child receive a free appropriate public education tailored to the child's special needs.

Because the Department's complaint investigation process is not adjudicative in nature and because N.D.C.C. ch. 15-59 does not provide a method to judicially enforce the Department's determination of a complaint, I recommend the Department consider proposing legislation addressing its powers as the SEA, as well as the judicial process to enforce its orders.

In conclusion, it is my opinion that the Department of Public Instruction has authority to adopt administrative rules implementing dispute resolution options as prescribed by the Individuals with Disabilities Education Act. The administrative rules must provide for dispute resolution procedures consistent with state and federal laws regarding special education, and cannot require that complaints be addressed through a due process hearing or that requests for

⁵ Whether corrective action is ordered by the SEA or a state or federal court pursuant to 20 U.S.C. § 1415(i), under state law the state is liable for all costs of the special education exceeding the district's maximum liability of "two and one-half times the state average per-pupil elementary or high school costs." N.D.C.C. § 15-59-06.2.

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hearings be addressed by the complaint investigation process. The administrative rules can identify what corrective action may be imposed as part of a complaint investigation decision, including whether the district will provide compensatory education or reimburse parents for the expense incurred as a direct result of the district's violation of IDEA. However, the Department's ability to enforce an order of corrective action is limited under current state law.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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