

MEMORANDUM

To: Interim study committee on special education at charter schools

From: Gerald M. Zelin, law firm of Drummond Woodsum

Re: Proposed statutory amendments

Date: October 14, 2014

1. Amend RSA 194-B to provide that, whenever a charter school applies to the State Board of Education for approval or to renew approval:
 - (a) the State Board shall provide written notice to the superintendent of schools for the district in which the charter school is located; and
 - (b) the school district shall then have an opportunity to submit written comments before the State Board makes a decision on the application.
2. Amend RSA 194-B by adding that, if over 25 percent of a charter school's students qualify for special education, the school must first obtain approval under RSA 186-C:5 to operate as a special education program.
3. Consider amending RSA 194-B:11, I(b)(1) to conform to the State Department of Education's current practice of paying special education adequacy funds to the district of residence when a special education student attends a charter school.

Explanation:

The State Department of Education's current practice, while well-intentioned, contradicts RSA 194-B:11, II(b)(1).

RSA 198:40-a, the "educational adequacy statute," offers State financial aid to the school district in which a student resides. The basic aid is \$3,450 annually per student. RSA 198:40-a, I. That statute then includes additional bonuses, called "differentiated aid," for students who are English language learners, who have not tested as proficient in reading, who qualify for federal free and reduced-price meal programs, *or who receive special education*. RSA 198:40-a, I-III.

The "special education bonus" totals \$1,856 annually per student with disabilities. RSA 198:40-a, III.

RSA 194-B:11, I(b)(1) reads as follows: "Except as provided in subparagraph (2), for a chartered public school authorized by the state board of education pursuant to RSA 194-B:3-a, the state shall pay tuition pursuant to *RSA 198:40-a* plus an additional grant of \$2,000 directly to the chartered public school for each pupil who is a resident of this state in attendance at such chartered public school." (Emphasis added.)

RSA 198:40-a, III, the special education bonus, is part of RSA 198:40-a. Thus, RSA 194-B:11, I(b)(1) compels the State to pay the special education bonus to the charter school.

The State Department of Education in fact distributes the special education bonus to the school district in which the student resides rather than to the charter school. The Department apparently pays all other forms of adequacy aid under RSA 198:40-a to the student's charter school.

It is unsavory for the Department to violate the statute, which directs the State to pay *all* adequacy funds – including the special education bonus – to the charter school. Either the statute should be amended to conform to the Department's current practice or the Department should change its practice to comply with the current statute.

4. Amend RSA 194-B:8, I, regarding prohibited forms of discrimination.

This statute currently provides as follows: "A chartered public school shall not discriminate nor violate individual civil rights in any manner prohibited by law. *A chartered public school shall not discriminate against any child with a disability as defined in RSA 186-C.* A chartered public school shall provide due process in accordance with state and federal laws and rules." (Emphasis added.)

The italicized language should be deleted and replaced with the following: "A chartered public school shall not discriminate on the basis of disability against any child with a disability as defined in RSA 186-C."

Explanation:

RSA 194-B:8, I currently prohibits a charter school from discriminating against a child who qualifies for special education, even when the discrimination is reasonable and *is unrelated to the fact that the child qualifies for special education.*

The language of Section 504 of the Rehabilitation Act of 1973 provides a more reasonable model. Section 504 says, "No otherwise qualified individual with a disability . . . shall, *solely by reason of her or his disability,* be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (emphasis added).

5. Amend RSA 194-B:6 to immunize school districts from liability for a charter school's acts or omissions regarding implementation of the special education laws.

RSA 194-B:6 currently states: "No host, sending, or receiving district shall be held liable for *damages* in an action to recover for: (a) bodily injury, personal injury, or property damage as defined in RSA 507-B:1, or (b) for failure to educate pupils, where such actions arise out of the establishment or operation of a chartered public school." (Emphasis added.)

Courts have held that claims for compensatory education are not damage claims. This is because an award of compensatory education directs a school district to provide *services* going forward, to make up for services the student missed in the past, not *monetary compensation* for physical or economic injury.

6. Amend RSA 194-B:11, III(a)-(b) as follows (by removing the struck-through language and by adding the italicized language):

“(a) The fact that a child with disabilities attends a chartered public school does not relieve the district of residence of its duty to offer a free appropriate public education under RSA 186-C. In accordance with current department of education standards, While a child with disabilities under RSA 186-C attends a chartered public school, the funding and educational decision-making process for children with disabilities attending a chartered public school shall be the joint responsibility of the resident district and the chartered public school. both of which shall retain all current options available to the parent and to the school district. The district of residence shall ordinarily be obligated to fund the cost of special education, related services, supplementary aids and services, transition services, vocational education, and transportation within the limits set forth in paragraph (b)(6) below, while the chartered public school shall ordinarily be obligated to fund the cost of accommodations, modifications, and courses that satisfy the child’s transition service needs.

(b) When a child is enrolled by a parent in a chartered public school, the local education agency of the child’s resident district shall convene a meeting of the individualized education program (IEP) team and shall invite a representative of the chartered public school to that meeting. The chartered public school shall send at least one representative to that meeting. At the meeting, the IEP team shall determine offer a “charter school IEP” that assumes the child will continue to be enrolled at the chartered public school, that offers a free appropriate public education to the extent feasible given the parent’s decision to enroll the child in the chartered public school, and that clearly identifies for each element of the IEP which entity (the school district or the chartered public school) is responsible for funding and implementing that element of the IEP. how to ensure the provision of a free and appropriate public education in accordance with the child’s IEP. The child’s IEP, including but not limited to special education, and related services, accommodations, modifications, supplementary aids and services, supports for school personnel, transition services, transition services needs, and vocational education, shall be provided using any or all of the methods listed below starting with in the least restrictive appropriate environment:

- (1) The resident district may send staff to the chartered public school; or*
- (2) The resident district may contract with a service provider to provide the services at the chartered public school; or*
- (3) The resident district may provide the services at the resident district school; or*
- (4) The resident district may provide the services at the service provider’s location; or*
- (5) The resident district may contract with a chartered public school to provide the services; and*
- (6) If the child due to his or her disability requires transportation to and/or from the chartered public school before, after, or during the school day in order to receive special education and related services as provided in the IEP, the child’s resident district shall provide transportation for the child, except that the resident district shall not be required to transport the child beyond the resident district’s boundaries.”*

Explanation:

- A. The IDEA requires that an IEP include more than special education and related services. An IEP must also include modifications, accommodations, supplementary aids and services, supports for school personnel, and (starting no later than age 16) transition services. 20 U.S.C. § 1414(d)(1)(A)(IV), (VIII); 34 C.F.R. § 300.320. New Hampshire law adds that an IEP also include vocational education and, if the child is age 14 or older, transition service needs (which means courses to prepare a child for life after elementary and secondary school). N.H. Code of Admin. Rules, Ed 1109.01(a)(10), (11).
- B. Modifications, accommodations, transition service needs, and supports for school personnel are ordinarily not expensive.
- C. Modifications, accommodations, and supports for school personnel tend to permeate the school day. It is unreasonable to expect a school district, which has no control over the charter school, to be responsible for ensuring that the charter school implements those portions of the IEP.
- D. The clause “in accordance with current department of education standards” in RSA 194-B:11, III(a) is nonsense. That clause has been in the statute since 1995 when RSA 194-B was first enacted. Back in 1995, the New Hampshire Board of Education’s special education rules were entitled “State Standards,” but they said nothing about charter schools. The State Board of Education’s special education rules are still silent on charter schools.

7. Amend RSA 194-B:11, III(c) as follows (by removing the struck-through language and by adding the italicized language):

~~“(c) Consistent with section 5210(1) of the Elementary and Secondary Education Act and section 300.209 of the Individuals with Disabilities Education Act, when~~ *When* a parent enrolls a child with a disability in a chartered public school, the child and the child’s parents shall retain all rights under federal and state special education law, including the child’s right to ~~be provided with~~ have a free and appropriate public education *available*, which includes all of the special education and related services included in the child’s IEP. ~~The child’s resident district shall have the responsibility, including financial responsibility, to ensure the provision of the special education and related services in the child’s IEP, and the chartered public school shall cooperate with the child’s resident district in the provision of the child’s special education and related services.”~~

Explanation:

- A. Section 5210(1) of the ESEA merely defines the term “charter school.” The ESEA says nothing about special education at charter schools.
- B. The reference to section 300.209 of the IDEA is nonsense and dishonest. The IDEA contains no such section. The U.S. Department of Education’s regulations implementing the IDEA, at 34 C.F.R. § 300.209(d), impose responsibility on the State, not on school districts, when a student attends a charter school that is not operated by a school district and that is not an LEA.

- C. The IDEA does not confer a right to “be provided” with a FAPE. It requires that every child with disabilities in a participating state have a FAPE “available.” 20 U.S.C. § 1412(a)(1)(A). Parents remain free to spurn a FAPE by opting out of special education or by enrolling their child in a school that does provide a FAPE.
- D. My proposed amendments to RSA 194-B:11, III(a) and (b), set forth in Section 6 of this memorandum, allocate responsibility for services while a special education child attends a charter school.

8. Add the following as RSA 194-B:11, III(d) and (e)

“(d) In the event of a disagreement over what to include in a child’s charter school IEP, or over the allocation of responsibility to implement or fund any element of that IEP, the parent, school district, or charter school may initiate an impartial due process hearing pursuant to the Individuals with Education Disabilities Act, 20 U.S.C. § 1415, and the hearing officer shall have jurisdiction over the school district, the chartered public school, and the State Department of Education.

(e) If a parent refuses to allow the chartered public school to disclose relevant information to the school district in which the student resides, or refuses to allow representatives of that school district to observe their child in chartered public chartered school, the school district shall have no responsibility for the child’s special education while the child attends the chartered public school until the parents cooperate by allowing the disclosure of relevant information and by allowing such observation.”