



**STATE OF NEW MEXICO  
DEPARTMENT OF EDUCATION – EDUCATION BUILDING  
SANTA FE, NEW MEXICO 87501-2786**

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**MEMORANDUM**

To: Debi Hines  
Special Education Director, Albuquerque Public Schools

From: Sam Howarth  
State Director of Special Education

Date: September 24, 2003

Re: Service to Out-of-State Students in Residential Treatment Facilities

You have asked that the SDE issue guidance on the responsibility of APS to provide FAPE to out-of-state students with disabilities who are placed by their parents in treatment facilities within your district's boundaries. Limitations of time and space do not permit a full analysis of this complex question under state and federal law. However, we discuss below the key laws that the SDE regards as controlling.

As you know, the Individuals with Disabilities Education Act requires each state to ensure that FAPE is available to all children with disabilities who reside within that state. In recurring discussions with the SDE in recent years, APS has argued that (1) an unemancipated minor's legal residence is where the parent or legal guardian lives; (2) the IDEA requires a student's home state to ensure that FAPE is available, even when the student is placed out of state; and (3) therefore, the home state retains the legal and financial responsibility for ensuring that its students with disabilities have FAPE available in other states.

Those arguments may be correct statements of pure federal IDEA law. However, as we have pointed out repeatedly in recent years to APS's attorneys and your predecessors, they do not consider the further requirements of New Mexico law.

NMSA 1978, Section 22-12-4, provides that

All school age persons in the state shall have a right to a free public education as follows:

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A. except for school age persons who are detained or enrolled in state institutions . . . , any school age person shall have a right to attend public school within the school district in which he resides or is present[.]

This statute makes it clear that there are two possible ways -- residence or presence -- for a student to be entitled to attend public school within a given district. In most cases the two coincide, but the statute says plainly that physical presence alone is enough.

The principles of statutory interpretation require that statutes touching on the same subject must be read together and harmonized if possible. In that regard, at least three other statutes must be considered:

NMSA 1978, Section 22-1-4(A), provides as follows:

Except as provided by Section 24-5-2 NMSA 1978 [regarding student immunizations], a free public school education shall be available to any school-age person who is a resident of this state and has not received a high school diploma or its equivalent.

NMSA 1978, Section 22-12-5(C), provides as follows:

Local school boards may charge a tuition fee for the right to attend public school within the school district only to those school-age persons who do not live within the state. The tuition fee shall not exceed the amount generated by the public school fund for a school-age person similarly situated within the school district for the current school year.

NMSA 1978, Section 22-13-5, provides as follows:

School districts shall provide special education and related services appropriate to meet the needs of all children requiring special education and related services.

Sections 22-1-4 and 22-12-5 distinguish between New Mexico residents and nonresidents and place nonresidents on a different legal footing. Section 22-13-5 does not. This office, on the advice of SDE legal counsel, has consistently interpreted Section 22-12-4(A) as the key statute on APS's questions because it is specific on the district's obligation to serve students based on presence alone. However, Sections 22-1-4(A) and 22-12-5(C) express a clear legislative intent to limit out-of-state residents' access to free educational services in New Mexico. The SDE Special Education Office recognizes that greater statutory clarity would be helpful and renews its offer to work with APS and appropriate other entities to seek a consensus on workable approaches and possible language. For now, the statutes limiting out-of-state residents' access to free educational services must be factored into any reasonable interpretation.

As a final consideration, we note that the SDE, with the Legislature's knowledge and tacit approval, has long interpreted the "or is present" language of Section 22-12-4(A) as authorizing New Mexico school districts to educate all students in their districts who need services without regard to their residence, and to receive state funding for doing so. Section 22-12-5(C) says that

school districts *may* charge out-of-state residents tuition, not that they must. The SDE for at least 20 years has allowed students who are attending district programs and meet the other requirements for state and federal funding to be counted for state equalization funding and federal flowthrough funds regardless of their residence. Even so, Section 22-12-5(C) does appear to grant school districts the option of demanding an equivalent amount of funding as tuition from the parents or the home state as a condition of agreeing to provide services. The SDE does not believe that current statutes grant it the authority to dictate which funding approach a district must use.

Thus, unless and until the matter is clarified legislatively or judicially, the SDE believes the following guidance strikes a reasonable balance among the applicable statutory requirements:

- APS must attempt to serve any otherwise eligible nonresident student who is present in the district, who is not enrolled in a public or private educational program meeting state standards, and whose parent, guardian or custodian requests services. APS may choose either of the following funding sources:
  - It may count any student who is enrolled on a count date for state equalization funding, or
  - It may demand equivalent funding (in proportion to the length of each student's stay in APS) from a public agency or the parents in the student's home state. APS may negotiate with public agencies in the student's home state for additional funding, but it may not condition the provision of services on the receipt of funding over and above what Section 22-12-5(C) allows.
- As a condition of agreeing to provide special education services for out-of-state students, APS may require local residential facilities, out-of-state public agencies and parents to sign appropriate agreements that specify the extent of the respective parties' obligations with regard to an out-of-state student's educational needs. However, in no case may such agreements absolve APS of its obligation to ensure that each student it accepts will receive services in compliance with the IDEA while the student is present in the district.
- APS will convene and chair an IEP team for each out-of-state special education student it accepts and will have the ultimate responsibility for deciding what constitutes an appropriate offer of FAPE for each student. Available IEPs, diagnostic information and the current circumstances of the residential placement for each student will be reviewed in designing an appropriate program in the least restrictive environment that is feasible for each student. The appropriateness of IEP team decisions will be subject to review through normal due process and appeal procedures.

We recognize that this guidance does not completely resolve APS's concerns about its potential legal and financial responsibility for serving out-of-state students. However, we believe this guidance provides workable suggestions for addressing those concerns within the context of current state law as best the SDE can reasonably interpret it. Please feel free to call me at 505-827-6541 for further information or discussion.