



STATE OF INDIANA
OFFICE OF THE ATTORNEY GENERAL

INDIANA GOVERNMENT CENTER SOUTH, FIFTH FLOOR
302 W. WASHINGTON STREET • INDIANAPOLIS, IN 46204-2770
www.AttorneyGeneral.IN.gov

GREG ZOELLER
INDIANA ATTORNEY GENERAL

TELEPHONE: 317.232.6201
FAX: 317.232.7979

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OFFICIAL OPINION 2013-01

Hon. Glenda S. Ritz
State Superintendent of Public Instruction
Director, Department of Education
Chair, State Board of Education
Room 229, Statehouse
Indianapolis, IN 46204

RE: Choice Scholarship Program and Students With Disabilities

Dear Superintendent Ritz:

By letter of June 20, 2013, and later refined through further communications, you requested the Attorney General's opinion regarding several amendments to the Choice Scholarship Program, Indiana Code § 20-51-4 *et seq.*, occasioned by P.L. 211-2013, particularly with regard to a student with a disability enrolled in a nonpublic school that is an "eligible school" for the Choice Scholarship Program (CSP), as this term is defined at I.C. § 20-51-1-4.7. The specific questions raised are as follows:¹

1. With respect to an "eligible student" (as that term is defined at I.C. § 20-51-1-5) who has a disability, must the choice scholarship include both the state tuition support and the special education grant under I.C. § 20-43-7 *et seq.*, or may a parent or guardian elect to utilize only the state tuition support and continue to receive special education and related services from the school corporation where the "eligible school"² is located, with the understanding that, under the latter circumstance, the special education grant would be awarded to the school corporation serving the eligible student?

¹ Issues relating to possible application of the Americans with Disabilities Act are outside the scope of this opinion and are not addressed herein.

² It is understood that an "eligible school" could include both a nonpublic and public school. I.C. § 20-51-1-4.7. However, for the purposes of this opinion, only a nonpublic "eligible school" will be addressed.

2. Can a nonpublic eligible school determine that it does not have the capacity or resources to provide special education and related services to an eligible student with a disability and require the eligible student to receive special education and related services from the school corporation where the nonpublic eligible school is located, thus limiting the student's choice scholarship to only the state tuition support?

BRIEF ANSWERS

1. A parent or guardian of an "eligible choice scholarship student," as defined at I.C. § 20-51-1-4.3(3), is not required to accept both the state tuition support and the special education grant under I.C. § 20-43-7 *et seq.* To construe the CSP as requiring a parent to accept both the state tuition support and the special education grant or neither would be contrary to legislative intent based on my review of the statutes. Notwithstanding, the parent or guardian should be fully informed of the ramifications of directing the special education grant to the nonpublic eligible school. The parent or guardian could elect not to direct the special education grant to the nonpublic eligible school and continue to receive services for the eligible student via a service plan implemented by the school corporation where the nonpublic eligible school is located.
2. A nonpublic eligible school that accepts for enrollment an eligible student with disabilities who has a service plan cannot make the election for the parent or guardian as to whether the student's service plan would be implemented by the nonpublic eligible school or by the school corporation where the nonpublic school is located. Such decisions are reserved to the parent or the guardian. Likewise, a parent or guardian cannot require a nonpublic eligible school to implement a service plan where the nonpublic eligible school has not agreed to or received funds to do so.

LEGAL ANALYSIS

Background

The Indiana Supreme Court's recent decision in *Meredith, et al. v. Pence, et al.*, 984 N.E.2d 1213 (Ind. 2013) provides a succinct background of the CSP.

The school voucher program (denominated by the legislature as the "Choice Scholarship Program") was enacted by the General Assembly in 2011, Pub. L. No. 92-2011, § 10, 2011 Ind. Acts 1024, and permits eligible students to obtain scholarships (also called "vouchers") that may be used toward tuition at participating nonpublic schools in Indiana. *See* Ind. Code § 20-51-1-4.5 (defining "Eligible individual")³; *id.* §

³ Repealed, P.L. 211-2013, Sec. 5. *See* I.C. § 20-51-1-4.3 for current criteria for "eligible choice scholarship student."

20-51-1-4.7 (defining "Eligible school").⁴ To be eligible for the voucher program, a student must live in a "household with an annual income of not more than one hundred fifty percent (150%) of the amount required for the individual to qualify for the federal free or reduced price lunch program." *Id.* § 20-51-1-4.5. The voucher amount is determined from statutorily defined criteria pegged to the federal free or reduced price lunch program with the maximum [footnote omitted] voucher being "ninety percent (90%) of the state tuition support amount," *id.* § 20-51-4-4,⁵ designated for the student in the public "school corporation in which the eligible individual has legal settlement." *Id.* § 20-51-4-5.⁶ To be eligible to receive program students, a nonpublic school must meet several criteria, including accreditation from the Indiana State Board of Education ("Board of Education") or other recognized accreditation agency, administration of the Indiana statewide testing for educational progress (ISTEP), and participation in the Board of Education's school improvement program under Indiana Code Section 20-31-8-3. *Id.* § 20-51-1-4.7. Participation in the program does not subject participating schools to "regulation of curriculum content, religious instruction or activities, classroom teaching, teacher and staff hiring requirements, and other activities carried out by the eligible school," *id.* § 20-51-4-1(a)(1), except that the school must meet certain minimum instructional requirements which correspond to the mandatory curriculum in Indiana public schools and nonpublic schools accredited by the Board of Education. *Compare id.* § 20-51-4-1(b) to (h) (providing the instructional requirements for voucher-program schools), *with id.* § 20-30-5-0.5 to -19 (providing the mandatory curriculum for Indiana public schools and nonpublic schools accredited by the Board of Education). The requirements include instruction in Indiana and United States history and government, social studies, language arts, mathematics, sciences, fine arts, and health. *Id.* § 20-51-4-1(b) to (h).

Participation in the school voucher program is entirely voluntary with respect to eligible students and their families. In order to participate, in addition to the eligibility requirements, students and schools must submit an application to the Indiana Department of Education ("Department"). *See* 512 Ind. Admin. Code 4-1-2, -3, *available at* <http://www.in.gov/legislative/iac/T05120/A00040.PDF>; *see also* Ind. Code § 20-51-4-7 (requiring the Department to adopt rules to implement the voucher program).⁷ The fact that a student's family might meet the statutory eligibility qualifications does not require them to participate in the voucher program and to select a program-eligible school. The parents of an eligible student are thus free to select any program-eligible school [footnote omitted] or none at all. The voucher program does not alter the makeup or availability of Indiana public or charter schools. In accepting program students, eligible schools are free to maintain and apply their preexisting admissions standards except that "[a]n eligible school may not discriminate on the basis

⁴ Amended by P.L. 211-2013, Sec. 6.

⁵ Amended by P.L. 211-2013, Sec. 11.

⁶ Amended by P.L. 211-2013, Sec. 14.

⁷ Amended by P.L. 211-2013, Sec. 16.

of race, color, or national origin." Ind. Code § 20-51-4-3(a), (b). The program statute is silent with respect to religion, imposing no religious requirement or restriction upon student or school eligibility, *see generally id.* § 20-51-4-1 to -11; § 20-51-1-4.5, -4.7, and as of October 2011, most of the schools that had sought and received approval from the Department to participate in the voucher program were religiously affiliated, Appellants' App'x at 209-14. When a voucher is awarded, the Department distributes the funds, provided that the distribution is endorsed by both the parent [footnote omitted] and the eligible school. *Id.* § 20-51-4-10;⁸ 512 I.A.C. 4-1-4(b). Once distributed, the voucher program places no specific restrictions on the use of the funds.

Id. at 2018-1220. The Supreme Court noted that "[t]he school voucher program does not replace the public school system, which remains in place and available to all Indiana schoolchildren in accordance with the dictates of the Education Clause [Article 8, Section 1 of the Indiana Constitution]." *Id.* at 1223. It is also noteworthy that "the principal actors and direct beneficiaries under the voucher program are neither the State nor program-eligible schools, but lower-income Indiana families with school-age children." *Id.* at 1228.

The direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents for their children to attend... [N]o funds may be dispersed to *any* program-eligible school without the *private, independent selection by the parents of a program-eligible student*. Participation in the voucher program is entirely voluntary for parents of eligible students. Beyond the requirement that the nonpublic schools meet the benchmark curriculum requirements in order to be eligible to receive program students...[,] the State plays no role in the selection of program schools. The funds are provided for the eligible students' education, and the parents determine where that education will be received. Thus, any benefits that may be derived by program-eligible schools are ancillary to the benefit conferred on families with program-eligible children.... The voucher program helps alleviate this [income] barrier by providing lower-income Indiana families with the educational options generally available primarily to higher-income Indiana families. The result is a direct benefit to these lower-income families—the provision of wider array of education options, a valid secular purpose. Any benefit to the program-eligible schools, religious or non-religious, derives from the private, independent choice of the parents of program-eligible students, not the decree of the State, and is thus ancillary and incidental to the benefit conferred on these families.

Id. at 1228-29 (emphasis original).

As the Supreme Court observed, "[a]n eligible school may not discriminate on the basis of race, color, or national origin." The legislature has not included disability as a protected category. I.C. § 20-51-4-3(a). Eligible schools may have written admission policies, but they are required to abide by these admission policies "fairly and without discrimination with regard to students

⁸ Amended by P.L. 211-2013, Sec. 17.

who... (1) apply for... or (2) are awarded... scholarships under this chapter.” I.C. § 20-51-4-3(b). Enforcement is by random visits by the Indiana Department of Education (DOE), which are intended “to verify that the eligible school...complies with the provisions of this chapter” and the Indiana and U.S. Constitutions. Eligible schools are required to grant the DOE “reasonable access to its premises, including access to the school’s grounds, buildings, and property.” I.C. § 20-51-4-3(d), (e).

Balanced with the need to ensure eligible schools do not discriminate is the expressed legislative intent that the CSP “honor the autonomy of nonpublic schools that choose to become eligible schools[.]” I.C. § 20-51-4-1(a). A nonpublic “eligible school” is declared not to be an agent of the state or federal government, and, as a consequence:

- (1) the department or any other state agency may not in any way regulate the educational program of a nonpublic eligible school that accepts a choice scholarship under this chapter, including the regulation of curriculum content, religious instruction or activities, classroom teaching, teacher and staff hiring requirements, and other activities carried out by the eligible school;
- (2) the creation of the choice scholarship program does not expand the regulatory authority of the state, the state's officers, or a school corporation to impose additional regulation of nonpublic schools beyond those necessary to enforce the requirements of the choice scholarship program in place on July 1, 2011; and
- (3) a nonpublic eligible school shall be given the freedom to provide for the educational needs of students without governmental control.

I.C. § 20-51-4-1(a)(1)-(3).

The Effect of P.L. 211-2013

Subsequent to the Supreme Court’s March 26, 2013, decision, the legislature passed P.L. 211-2013, which specifically addresses students with disabilities and their families. The following components of P.L. 211-2013 are pertinent to your questions:

P.L. 2011, 2013, Sec. 4 (expanding the definition of an “eligible choice scholarship student” to include a student with disability):

IC 20-51-1-4.3 "Eligible choice scholarship student"

Sec. 4.3. "Eligible choice scholarship student" refers to an individual who:

- (1) has legal settlement in Indiana;
- (2) is at least five (5) years of age and less than twenty-two (22) years of age on the date in the school year specified in IC 20-33-2-7; and
- (3) meets at least one (1) of the following conditions:
 - (A) The individual is:
 - (i) a child with a disability who requires special education and for whom an

individualized education program has been developed under IC 20-35 or a service plan developed under 511 IAC 7-34;⁹ and

(ii) a member of a household with an annual income of not more than two hundred percent (200%) of the amount required for the individual to qualify for the federal free or reduced price lunch program....

P.L. 211-2013, Sec. 11 (amending I.C. § 20-51-4-4 to include special education grants as part of the amount an “eligible choice scholarship student is entitled to receive”):

IC 20-51-4-4 Maximum amount of scholarship

...

(2) In addition, if applicable, any amount that a school corporation would receive under IC 20-43-7 [Special Education Grant] for the student if the student attended the school corporation.

P.L. 211-2013, Sec. 12 (adding language purporting to excuse a public school corporation from making available special education and related services to a child with a disability unilaterally enrolled in a nonpublic school who receives the special education grant; prohibits the school corporation from including such a student in its child count):

IC 20-51-4-4.5 Provision of special education services by public school not required; prohibition against including certain children in public school count

Sec. 4.5. (a) Notwithstanding 511 IAC 7-34-1(d)(4),¹⁰ a public school is not required to make available special education and related services to an eligible choice scholarship student who receives funds under section 4(2) of this chapter.

(b) A school corporation may not include an eligible choice scholarship student who receives an amount under section 4(2) of this chapter in the school corporation's count under IC 20-43-7.

P.L. 211-2013, Sec. 13 (adding responsibility of the State Board of Education to adopt rules that, *inter alia*, address the “provision of special education or related services to an eligible choice scholarship student” who receives the special education grant in addition to the state tuition support; the rules must also “include annual reporting requirements, monitoring, and consequences for noncompliance by an eligible school”):

IC 20-51-4-4.6 State board; rulemaking for provision of special education services

Sec. 4.6. (a) The state board shall adopt rules under IC 4-22-2, including emergency rules adopted in the manner provided under IC 4-22-2-37.1, for the provision of special

⁹ 511 IAC 7-34 are the regulations of the State Board of Education addressing the provision of special education and related services to students with disabilities unilaterally enrolled in nonpublic schools.

¹⁰ 511 IAC 7-34-1(d)(4) reads: “Each public agency shall, with regard to any nonpublic school...within its boundaries...make available special education and related services to all students with disabilities.”

education or related services to an eligible choice scholarship student who receives an amount under section 4(2) of this chapter. The rules adopted under this section shall include annual reporting requirements, monitoring, and consequences for noncompliance by an eligible school. ...

The “Service Plan”

The General Assembly has accepted, on behalf of the State, the “provisions and benefits of laws enacted by the Congress of the United States that provide for aid to children with disabilities” and designated the State Board of Education (“State Board”) as the entity authorized to accept federal funds in order to comply with congressional dictates in this regard. The State Board is required to “comply with all the requirements of...federal law concerning any federal funds relating to special educational activities[.]” I.C. § 20-19-2-16(a), (b).

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, as implemented through 34 C.F.R. Part 300, is the primary federal law affecting the education of children with disabilities. The IDEA, at 20 U.S.C. § 1412(a)(10) and 34 C.F.R. §§ 300.130-300.147, addresses the various requirements a State must meet in order to serve the needs of students with disabilities who have been placed in nonpublic schools by their parents or guardians. The State Board reflects these federal requirements in its rules at 511 IAC 7-34.

A school-aged child with a disability unilaterally placed by the child’s parent or guardian in a nonpublic school is not entitled to a “free appropriate public education”¹¹ (FAPE) provided pursuant to an Individualized Education Program (IEP),¹² which the child would have been entitled to had the child been enrolled in a public school. Rather, following a consultation process with representatives of nonpublic schools and parents, see 511 IAC 7-34-4, a school corporation will decide what services will be made available to nonpublic school students with disabilities. See 511 IAC 7-34-5. These services are provided pursuant to a “service plan.”¹³

The service plan is designed by a “Case Conference Committee” (CCC), which is convened by the public agency.¹⁴ The service plan must describe the special education and related services the public agency will provide to the eligible child in the nonpublic school. 511 IAC 7-34-5(c), (e). Any review or revision to the service plan is the responsibility of the CCC and must be conducted through the public agency. Nonpublic schools are not authorized to convene CCC

¹¹ See 511 IAC 7-32-40.

¹² See I.C. § 20-18-2-9, 511 IAC 7-32-48.

¹³ See 511 IAC 7-32-84, defining “service plan” in relevant part as “the written document that describes the specific special education and related services the public agency will provide to a parentally-placed nonpublic school student with a disability.”

¹⁴ “Public agency” is defined at 511 IAC 7-32-77 as including public school corporations, acting individually or through cooperative ventures. While there are other entities that qualify as a “public agency,” a nonpublic school will not. For the purpose of this opinion, “public agency” will refer to the school corporation where the nonpublic school is located as this is the entity charged by IDEA and reflected in the State Board’s rules with making such services available to nonpublic students with disabilities. See 511 IAC 7-34-1(d).

meetings or devise or revise service plans. However, the public agency must ensure that a representative of the nonpublic school attends the CCC meeting for one of its students, either in person or via other means. 511 IAC 7-34-5(d)(2). See also 511 IAC 7-42-3(c)(5). The parent is always a member of the CCC. See 511 IAC 7-42-3(b)(5), (c)(5).¹⁵

While federal law does not indicate how often a service plan must be reviewed, Indiana law would require a service plan to be reviewed (and revised, where necessary) on at least an annual basis. See 511 IAC 7-34-5(e)(2) (requiring a service plan have measurable annual goals for a student over a 12-month period) and 511 IAC 7-42-8(d)(2) (requiring a service plan to be in effect at the beginning of each school year).

As noted *supra*, a student with a disability who has a service plan is not entitled to a FAPE. A FAPE is provided only “in conformity with an IEP.” 511 IAC 7-32-40(4). The procedural safeguards are also limited for such students and their families. There are few issues for which mediation and administrative due process are available (child find, appropriateness of an evaluation or reevaluation, or determination of eligibility). 511 IAC 7-34-6(a), (b), (c). A parent or guardian—in fact, anyone—can request a complaint investigation pursuant to 511 IAC 7-45-1 where a complainant believes a public agency has failed to meet the legal requirements under federal and state law. 511 IAC 7-34-6(d). See also 34 C.F.R. §§ 300.151-300.153.¹⁶

“Proportionate Share” and Special Education Grants

The IDEA also requires a public agency to expend a “proportionate share” of its federal grant on providing equitable services to students with disabilities unilaterally enrolled in nonpublic schools. See 20 U.S.C. § 1412(a)(10)(A)(i); 34 C.F.R. §§ 300.132(a), 300.133; 511 IAC 7-34-7.

“State and local funds may be used to supplement, but not supplant, [a public agency’s] proportionate share of Federal funds required to be expended on children with disabilities placed by their parents in private schools.”¹⁷ See also 511 IAC 7-34-7(g). In 2011, the Indiana legislature did supplement the federal “proportionate share” by adding I.C. § 20-43-7-9 to the Indiana Code. The statute reads in relevant part:

IC 20-43-7-9 Special education grants; use for students in nonpublic schools

...
(b) Each calendar year, a school corporation shall expend part of the school

¹⁵ It is also the CCC that determines, based on evaluative data, whether a student is a “student with a disability” entitled to special education and related services. 511 IAC 7-32-92.

¹⁶ There is also the right of nonpublic school officials to initiate complaint investigations where they assert the public agency has failed to satisfy the consultation process. See, e.g., 511 IAC 7-34-4(f), (g), (h); 7-34-6(d).

¹⁷ *Letter to Apostle* (Office of Special Education Programs, August 8, 2012) available at <http://www2.ed.gov/policy/speced/guid/idea/memosdeltrs/11-020686r-mt-apostle-eqserv-8-8-12.pdf> (last visited August 21, 2013). The Office of Special Education Programs (OSEP), as created by 20 U.S.C. § 1402, is authorized to issue policy letters and statements on issues of national importance and to widely disseminate these interpretations. See 20 U.S.C. § 1406(d), (e), (f).

corporation's state special education grant on the provision of special education and related services to parentally placed nonpublic school students with disabilities. The school corporation shall, at a minimum, expend an amount from the state special education grant equal to the amount attributable to the number of parentally placed nonpublic school students with disabilities included in the school corporation's count conducted under section 1 of this chapter.

(c) In determining compliance with this section, a school corporation may include state special education grant expenditures on the following:

(1) Activities and services for which the school corporation may expend federal grants under Part B of the federal Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.).

(2) Child find activities, including the cost of initial educational evaluations and reevaluations.

(d) A school corporation shall maintain sufficient and accurate records to demonstrate compliance with this section.

(e) The state board shall adopt rules to implement this section, including, but not limited to, annual reporting requirements, monitoring, and consequences for noncompliance.¹⁸ The consequences may include requiring expenditure of additional state funds in a subsequent year if the school fails to expend the requisite amount in a prior year that occurs after June 30, 2011.

...

The special education grants are designed to afford funding for the excess costs of providing an education to a school-aged child with a disability. The amount of financial support is typically dependent upon the degree of involvement. Students with more significant disabilities tend to generate more financial support. See, e.g., I.C. § 20-43-7-6. The addition of I.C. § 20-43-7-9 supplemented the "proportionate share" requirement for federal funds under the IDEA, increasing the amount of funds available to provide special education and related services to students with disabilities unilaterally placed in nonpublic schools by their parents or guardians, including placements in nonpublic "eligible schools" under the CSP. Such funds, however, are not to be used for the benefit of the nonpublic school or to address the general needs of other students enrolled in the nonpublic school. 511 IAC 7-34-7(j). The specific uses for the special education grants are detailed at 511 IAC 7-48-3(c).

As required by I.C. § 20-43-7-9(e), the State Board has adopted rules to implement the statutory provisions. A "child count" must be conducted on December 1 of each year to determine how many students are eligible to receive special education and related services on that date and

¹⁸ This is language similar to that employed by the legislature with respect to receipt by an "eligible school," including a nonpublic "eligible school," of special education grant funds under P.L. 211-2013. See P.L. 211-2013, Sec. 13, requiring the State Board to adopt rules with respect to receipt of a special education grant by an "eligible school," with such rules including "annual reporting requirements, monitoring, and consequences for noncompliance by an eligible school." I.C. § 20-51-4-4.6(a). The State Board's rules implementing the state "proportionate share" are found at 511 IAC 7-48. This also includes the delegation to the DOE to establish monitoring procedures to ensure compliance. See 511 IAC 7-48-3(d)(2), (e), (f), (g).

receiving services. 511 IAC 7-46-1(a). The count also includes students with disabilities enrolled in nonpublic schools and who are eligible for (and are receiving) services pursuant to a service plan. 511 IAC 7-46-1(c)(2), 511 IAC 7-34-7(a)(3). This “additional pupil count” (APC) is used to determine “the amount of additional state special education funds available to public agencies for the operation of special education programs.” 511 IAC 7-46-2(b)(2). It is this same APC that is used to determine what the “proportionate share” of state funds must be expended on providing services to students with disabilities placed by their parents in nonpublic schools. I.C. § 20-43-7-9(b), 511 IAC 7-34-7(a)(3). See also 511 IAC 7-48.

“General Supervisory” Responsibility

The IDEA requires the “state educational agency” (SEA) to exercise general supervisory responsibility within the SEA’s state to ensure that students with disabilities are afforded the services and protections available under the federal law, including equitable participation in services for students with disabilities unilaterally placed in nonpublic schools by their parents. See 20 U.S.C. § 1412(a)(11), 34 C.F.R. § 300.149. This general supervisory responsibility includes monitoring for compliance with IDEA’s requirements. See 20 U.S.C. § 1416, 34 C.F.R. § 300.149(b).

The State Board has designated the DOE as the SEA in Indiana, 511 IAC 7-32-89, 511 IAC 7-33-1. The DOE monitors public agencies that receive “federal *or state* monies for special education to ensure compliance with and implementation of the requirements of federal and state laws, rules, regulations, and policies” with respect to, *inter alia*, the provision of programs, services, and protections to students with disabilities. 511 IAC 7-35-1(a) (emphasis added). Such “monitoring activities” may include complaint investigations under 511 IAC 7-45-1 as well as data collection and analysis, audits, on-site reviews, accreditation information, and measurement of performance indicators. 511 IAC 7-35-1(b). The DOE has been the designated agency to ensure compliance with I.C. § 20-43-7. See 511 IAC 7-48-3(d)-(g).

Parental Consent

A last consideration is parental consent. The IDEA requires that “informed consent” be obtained by the public agency responsible for a FAPE before providing special education and related services to the parent’s child. 20 U.S.C. § 1414(a)(1)(D)(i)(II). The federal regulation further refines this concept by indicating a parent has to be “fully informed of all information relevant to the activity for which consent is sought,” and that this understanding be “in writing.” The parent must also be advised that the consent provided is voluntary and can be revoked at any time. 34 C.F.R. § 300.9. The State Board mirrors these requirements at 511 IAC 7-32-17, noting that the parent is to be fully informed “of all information relevant to the activity for which consent is sought.” 511 IAC 7-32-17(1). The consent must be “in writing” and with regard “to the activity for which consent has been sought.” 511 IAC 7-32-17(2).

Analysis of P.L. 211-2013

The Indiana General Assembly has created another avenue for students with disabilities to receive equitable services pursuant to a service plan, albeit not a FAPE the student would be entitled to through an IEP had the student attended a public school. The definition for “eligible choice scholarship student” indicates that the criteria for eligibility of a student with a disability includes a determination of eligibility for such services and for whom an IEP or service plan has been developed. I.C. § 20-51-1-4.3(3)(A)(i). This would mean that the student had already been evaluated and determined by a CCC to be eligible for special education and related services. For an “eligible student” electing to enroll in a nonpublic “eligible school,” the parent or guardian would have had to decline a FAPE offered in the public school and elected to proceed with a service plan. Either way, the CCC remains involved because the student, in order to remain an “eligible choice scholarship student,” must continue to have an IEP or service plan, and these documents cannot be developed or revised by nonpublic schools, only by a “public agency.” For an “eligible choice scholarship student,” the responsibility to convene the CCC to review (and revise, if necessary) the student’s service plan remains the responsibility of the public agency where the nonpublic school is located.

Continuing eligibility for the special education grant under I.C. § 20-51-4-4(2) would also require that the student continue to have an active service plan, as the funds are available to defray excess costs for the student’s education.

While I.C. § 20-51-4-4.5 indicates a “public school is not required to make available special education and related services to an eligible choice scholarship student who receives” the special education grant under I.C. § 20-51-4-4(2), this would be so only where a parent or guardian has made an informed decision to accept the special education grant and apply it to the educational costs at the nonpublic “eligible school.”¹⁹

This conclusion is based in part upon the general supervisory role of the DOE as the SEA and the utilization of IDEA procedures in determining eligibility for services and designing and implementing service plans. The students affected by the special education grant remain eligible for services, including a FAPE should they elect to attend a public school. The DOE is also charged with administration of the CSP. See I.C. § 20-51-4-7. Because of the intermingling of state and federal law, this is essentially a program administered, at least with respect to students with disabilities, by the SEA.

¹⁹ While I.C. § 20-51-4-4.5(a) indicates a “public school is not required to make available special education and related services to an eligible choice scholarship student who receives” the special education grant under I.C. § 20-51-4-4(2), this applies only to the state funds. The statutory provision does not negate the responsibility of the public school to expend a proportionate amount of its federal subgrant under the IDEA (Part B funds) in serving parentally-placed nonpublic school students with disabilities within the area served by the public school. A student with a disability placed in a nonpublic “eligible school” under the CSP could still have a proportionate share of the public school’s federal part B funds applied even though the nonpublic “eligible school” is implementing the service plan. See 20 U.S.C. § 1412(a)(10)(A); 34 C.F.R. §§ 300.132, 300.133; 511 IAC 7-34-7.

While parental consent is not required to implement a service plan at a nonpublic school, a parent or guardian should be fully informed regarding the potential ramifications where a parent or guardian is considering whether to elect to have the special education grant under I.C. § 20-51-4-4(2) directed to the nonpublic “eligible school” to implement the service plan. A parent or guardian would need to be fully informed of the consequences of making such an election, and may decide to continue to receive equitable services for the child via a service plan implemented by the public agency where the nonpublic “eligible school” is located.

With regard to compliance activities, the DOE previously had the responsibility to make random visits to a random sampling of eligible schools to ensure compliance with the CSP’s anti-discrimination provisions as well as the Indiana and U.S. Constitutions. I.C. § 20-51-4-3(d), (e). With the addition of specific language regarding students with disabilities, the DOE’s SEA general supervisory responsibility is also invoked to some extent. The legislature recognized that, in providing parents with the election to direct the special education grant to an “eligible school,” there would need to be some method to ensure compliance. Under I.C. § 20-51-4-4.6(a), the State Board is to adopt rules that would require annual reporting requirements by “eligible schools” receiving such special education grants. The State Board is also to ensure that there be “monitoring” to ensure compliance, and that there be “consequences for noncompliance by an eligible school.”

The DOE already engages in such activities pursuant to the State Board’s rules, specifically with reference to the special education grants under I.C. § 20-43-7 *et seq.* Also see 511 IAC 7-48. Such monitoring includes complaint investigations under 511 IAC 7-45-1. This does not run afoul of the autonomy the legislature wishes to maintain for the nonpublic schools participating in the CSP. The legislature has specifically directed the DOE and the State Board to engage in certain compliance activities designed “to enforce the requirements of the choice scholarship program[.]” I.C. § 20-51-4-1(a)(2). Such compliance activities must necessarily extend to ensure the requirements for a special education grant under I.C. § 20-43-7 are met, not only for current implementation but also for determination of continuing eligibility of the student.

CONCLUSIONS

Based on the foregoing and with respect to your specific questions, it is my opinion that:

1. The primary goal of statutory construction is to determine and give effect to the intent of the legislative body. *Freeman v. State*, 658 N.E.2d 68, 70 (Ind. 1995). *State v. Oddi-Smith*, 878 N.E.2d 1245, 1248 (Ind. 2008). “The legislative intent as ascertained from the whole prevails over the strict, literal meaning of any word or term used therein.” (That is: the words of a single section of a statute must be construed with due regard for all other sections of the statute and with regard for the legislative intent to carry out the spirit and purpose of the statute.) *B.K.C. v. Indiana*, 781 N.E.2d 1157, 1167 (Ind. Ct. App. 2003).

Courts will construe a statute in such a way so as to prevent absurdity and hardship and to favor public convenience. Consideration of the repercussions of interpretations is necessary. *Bushong v. Williamson*, 790 N.E.2d 467, 471 (Ind. 2003).

The intent of P.L. 211-2013, when considered within the general context of the CSP, was to increase educational opportunities for children with disabilities from lower-income households and not to restrict such opportunities. There is likewise no indication the legislature meant to strip the parents or guardians of children with disabilities from making decisions regarding how service plans for their children will be implemented within nonpublic “eligible schools.” To do so would be contrary to the IDEA, as implemented in Indiana through the State Board’s rules, specifically 511 IAC 7-34. The legislative intent was to provide the parents of children with disabilities more choices, not fewer, and it would be inconsistent with the thrust of the CSP to require a parent of a child with a disability to direct both the state tuition support and the special education grant to the nonpublic eligible school. Such a requirement would actually reduce opportunities for children with disabilities as nonpublic eligible schools are not required to accept children with disabilities and would likely refuse enrollment because (1) the nonpublic school lacks resources to implement the service plan; or (2) the nonpublic school does not wish to be subject to compliance activities related to the grant itself.

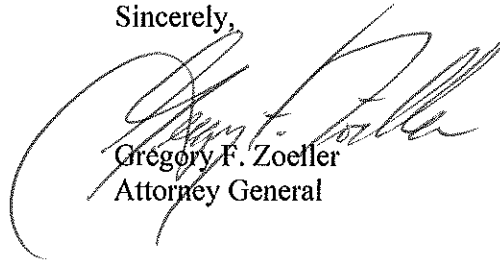
A parent or guardian of an “eligible choice scholarship student,” as defined at I.C. § 20-51-1-4.3(3), is not required to accept both the state tuition support and the special education grant under I.C. § 20-43-7 *et seq.* This would be inconsistent with legislative intent as divined from consideration of the CSP itself. The parent or guardian should be fully informed of the ramifications of directing the special education grant to the nonpublic eligible school. The parent or guardian could elect not to direct the special education grant to the nonpublic “eligible school” and continue to receive services for the “eligible student” via a service plan implemented by the school corporation where the nonpublic eligible school is located.

2. A nonpublic eligible school that accepts for enrollment an “eligible student” with disabilities who has a service plan cannot make the election for the parent or guardian as to whether the student’s service plan would be implemented by the nonpublic eligible school or by the school corporation where the nonpublic school is located. Such decisions are reserved to the parent or the guardian.

The Indiana Supreme Court noted that the CSP was created to benefit lower-income families with school-aged children and not the State or the eligible schools. *Meredith*, 984 N.E.2d at 1228. The amendments occasioned by P.L. 211-2013 evince no intent to move from this assessment. Rather, the legislative intent is to expand the CSP to provide more choices for low-income families with children who have disabilities.

While a nonpublic eligible school cannot require a parent or guardian to elect the service mode for the parent or guardian, neither can the parent or guardian require the nonpublic eligible school to implement the service plan. The distribution of state tuition support under I.C. § 20-51-4-4(1), to be valid, requires endorsement by both the parent (or the student) and the eligible school providing the educational services to the student. I.C. § 20-51-4-10. Although the statute does not address a distribution method for the special education grant under I.C. § 20-51-4-4(2), the CSP also does not affect the admission policies of the nonpublic schools participating in the program, except as to certain protected categories (race, color, national origin). I.C. § 20-51-4-3(a), (b). The parent or guardian and the nonpublic eligible school would have to agree that the nonpublic school would implement the service plan. The parent could then direct the special education grant to the nonpublic eligible school for use in providing the identified educational services to the student.

Sincerely,

A handwritten signature in black ink, appearing to read "Gregory F. Zoeller", is written over the typed name and title.

Gregory F. Zoeller
Attorney General

Kevin C. McDowell
Deputy Attorney General
Advisory and ADR Services