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State Superintendent of Schools

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MEMORANDUM

TO: Administrative Heads and Education Directors of Nonpublic Schools
Approved Under COMAR 13A.09.10 Educational Programs in Nonpublic
Schools and Child Care and Treatment Facilities

FROM: Jean E. Satterfield, Assistant State Superintendent, Certification and
Accreditation Division *JES*

DATE: October 15, 2010

RE: Advice of Council regarding Related Services and Snow Day Waivers

After last year's record snow fall and in preparation for this year's upcoming winter season, this memorandum is intended to provide clarification regarding the requirements for making up related services for the students enrolled in nonpublic schools when local school systems are open and the nonpublic schools are closed, and vice-versa.

As you know, schools that are approved to provide a special education program are required to implement the current IEP of each student enrolled. The Maryland State Department of Education frequently receives questions as to when the nonpublic school is required to make up a related service. As a general rule, best practice is to make up each missed service.

Enclosed please find a May 7, 2010 Advice of Counsel memo from Demetria T. Tobias, Esq. and William H. Fields, Esq. to Dr. Carol Ann Heath and me, regarding related services and snow day waivers for nonpublic schools. I believe that this memorandum clarifies the response to questions raised during last school year and at the September 20, 2010 and September 24, 2010 training meetings for Education Directors held at MSDE.

If you have any questions, please contact Sarah Spross, Branch Chief or your Nonpublic School Approval Specialist at (410) 767-0407.

Enclosures: May 7, 2010 Advice of Counsel Memo

C: Carol Ann Heath, Assistant State Superintendent, Division of Special
Education/Early Intervention Services, MSDE
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Dorie Flynn, Executive Director, MANSEF
Rosemary King Johnston, Executive Director, GOC
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TO: Sarah Spross
Chief, Nonpublic School Approval Branch

Carol Ann Heath
Assistant State Superintendent, Div. of Special Education/Early Intervention
Services

FROM: Demetria T. Tobias 
William H. Fields 
Assistant Attorneys General

DATE: May 7, 2010

RE: Related Services and Snow Day Waivers for Nonpublic Schools

Following the record snowfall and related school closures this winter, you have received questions from nonpublic schools approved under COMAR 13A.09.10 regarding their obligation to make up related services missed by publicly-placed students on days the schools were closed and the schools have received a waiver from the State Superintendent of Schools. You have also asked about provision of make-up related services when local schools are open and nonpublic schools are closed, and vice-versa. We discuss these issues below. This memo does not address payment to nonpublic schools for days closed for snow or days waived by the State Superintendent related to the 180 day requirement.

I. Waiver of school days and make-up services.

Nonpublic schools have asked whether they must make up related services for special education students if the nonpublic school receives a waiver for those days the school was closed due to snow. Previously our office advised that nonpublic schools must make up related services in case of unscheduled school closure, such as snow days or unanticipated emergencies on school property. (See Apr. 23, 2002 advice memo from Dana Murray to Virginia Cieslicki.)

However, it appears that advice did not address the nonpublic school's obligation if the missed school days were waived.

This issue involves two sources of law – the federal Individuals with Disabilities Education Act (IDEA), and State law governing the number of days nonpublic schools must operate. Under the IDEA, a student placed by a local school system in a nonpublic school must receive special education and related services in conformity with the student's Individualized Education Program (IEP). An IEP specifies the type and amount of special education and related services that must be provided during the school day. *See* 34 C.F.R. §300.320(a)(4) and (7); COMAR 13A.05.01.09A(1)(c), (d), and (h). By providing these services, the school system ensures the student receives a 'free and appropriate public education' (FAPE).

When a school is closed for a snow day, this may impact the number of school days provided to the student and therefore provision of FAPE. Maryland law generally requires public schools to provide a minimum of 180 days of school instruction. Nonpublic schools designated 'Type I' and 'Type III' are similarly required to provide instruction a minimum of 180 days each school year.¹ COMAR 13A.09.10.14B; 13A.09.10.20.

Our office recently advised that the State Superintendent may waive a certain number of school days for these nonpublic schools for snow related closures.² It is foreseeable that many nonpublic schools serving publicly-placed students will have a number of school days waived. These waivers for nonpublic schools will be in proportion to the number of days waived for the local school system in which the nonpublic school is located. By obtaining a waiver, a nonpublic school can provide less than 180 days of school.

When a school is open but services are not provided as set forth in the IEP because of the student's absence from school (e.g., illness, family plans, etc.), these services are not required to

¹ Type II schools are located in public school buildings and operate under the same school calendar as the public school. COMAR 13A.09.10.19F(17).

² The State Superintendent is authorized to waive school days for publicly-funded Type I schools under COMAR 13A.09.10.14(B)(5), and we advised that this authority would also extend that any Type II or Type III school located within a Type I school. In addition, the State Board recently delegated authority to the State Superintendent pursuant to COMAR 13A.01.01.02-1 to waive the 170 day rule for privately funded schools.

be made up. *See* Office of Special Education Programs letter to Dr. John Copenhaver, March 11, 2008, attaching letter to Ms. Kathy Balkman, April 10, 1995.³ However, when a school is open but does not provide services as set forth in the IEP due to some factor within the school's control (e.g., service provider unavailable, student on field trip), the school is responsible for making arrangements to provide IEP services. *Id.*

Where the school or school system is closed (e.g., snow, electrical outage, etc.), provision of make-up services to individual students will depend on whether the school day is waived. (*See* May 19, 2009 letter from Dr. Carol Ann Heath to Local Directors of Special Education.) A waiver effectively cancels the school day and does not require make-up. If no waiver is granted, the school day must be rescheduled, usually by adding a day to the end of the school year. The school is responsible for making alternative arrangements for providing IEP services to the individual student on those added or rescheduled days.

In our view, a nonpublic school is not required to make up related services that were not provided on snow days when the nonpublic school receives a waiver for those days from the State Superintendent. As noted, IDEA and State law require special education and related services to be provided on a "school day", which is defined as a day when the school is open and students are required to attend for instructional purposes. *See* 34 C.F.R. §300.11; COMAR 13A.05.01.03B(66). If the missed school day is waived from the nonpublic school's calendar, the nonpublic school is not obligated to make up missed related services.

II. Make-up services when local schools and nonpublic schools are not open at the same time.

You asked if a nonpublic school's obligation to make up related services would change if (1) the local school system where the nonpublic is located is closed and does not provide bus transportation, but the nonpublic school remained open; or (2) the local school system where the nonpublic is located is open and can provide bus transportation, but the nonpublic school is closed. We address each instance below.

³ *See*: <http://www2.ed.gov/policy/speced/guid/idea/letters/2008-1/copenhaver031108fape1q2008.pdf>

A. Local schools closed; non-public open

Here, the local school system is closed and cannot provide transportation, but the nonpublic school is open for instruction and able to provide all related services (e.g., occupational therapy, physical therapy, etc.) to students. The IDEA and State law includes transportation among related services that may be required to assist a child with a disability to benefit from special education. *See* 20 U.S.C. §1401(26); 34 C.F.R. §300.34; COMAR 13A.05.01.03B(65). Therefore, if a publicly-placed student's IEP requires transportation from the public school as a related service, and that transportation is not provided on a day that the nonpublic school is open, our view is that students who had their transportation canceled may have been denied FAPE. Thus, our advice is that the nonpublic school must make alternative arrangements to provide related services to the individual student, or convene an IEP team meeting to review the IEP and determine if the make-up related services are necessary.

B. Local schools open; non-public closed

Here, the local school system is open but the nonpublic school is closed. Students therefore cannot attend the nonpublic school where they receive services. If the nonpublic school receives a waiver for that day of instruction, the missed related services do not have to be made up. However, if no waiver is granted, our view is that the nonpublic school must make alternative arrangements to provide related services to the individual student, or convene an IEP team meeting to review the IEP and determine if the make-up related services are necessary.

We trust this answers your questions. Please contact our office if you need additional information.

**Advice of Counsel
Not an Opinion of the Attorney General**