GEORGE JEPSEN
ATTORNEY GENERAL

55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Office of the Attorney General
State of Connecticut

January 25, 2016

Morna A. Murray, Commissioner
Connecticut Department of Developmental Services
460 Capitol Avenue
Hartford, CT 06106

Dear Commissioner Murray:

In a memorandum from your agency's Director of Legal & Governmental Affairs, written on your behalf, you have inquired about the responsibility of local school districts to provide and pay for residential services when such residential services are necessary for a developmentally delayed, school aged student to receive an appropriate education if the student is receiving servicesfrom the Connecticut Department of Developmental Services ("DDS").

The answer to your question is found in the general policy determinations of our Legislature as reflected in our general statutes. Therefore, we review those statutes and the cases interpreting them as a way to address your question.

Conn. Gen. Stat. § 10-76d codifies the legal obligations of school districts to provide and pay for the special education programming needed for disabled students in their respective public schools, subject to certain state statutory reimbursements for particular programs and costs (see, e.g., Conn. Gen. Stat. § 10-76g). This detailed statutory scheme, set forth in Conn. Gen. Stat. §§ 10-76a through 10-76h, is consonant and compliant with the federal special education law known as the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et. seq. ("IDEA") and its underlying regulations, as reflected in the full approval status of Connecticut IDEA Part B plan by the United States Department of Education.[1]

Under Connecticut's statutory scheme, local school districts (referred to as "local education agencies" ("LEAs") under the IDEA; 20 U.S.C. § 1401(19)) bear

[1] http://www.sde.ct.gov/sde/lib/sde/pdf/deps/special/SPP/2015_response_letter_and_determination.pdf

the legal obligation to provide the necessary "special education" (specially designed instruction (Conn. Gen. Stat. § 10-76a(4)) and "related services" (Conn. Gen. Stat. § 10-76a(7)) to enable a child to attain educational progress. Collectively, this concept of necessary special education and possible related services designed to enable a child to obtain education benefit, is referred to as a "free and appropriate public education" ("FAPE"). 20 U.S.C. § 1401(9). LEA "planning and placement teams" ("PPTs"), whose makeup is mandated by law, must make individualized, fact based determinations as to whether a child is in need of special education (which may include related services (20 U.S.C. § 1401(26)), and if so, what those special education (*e.g.,* modified instructional goals and strategies) and possible related services should be. A parent or guardian aggrieved by a PPT decision on these issues, or by an LEA's identification of the student as disabled and/or in need of special education, has various avenues to seek review. These avenues include review after a full hearing by an independent hearing officer appointed by the State Department of Education ("SDE"), followed by possible review by a state or federal court, or mediation with the assistance of SDE. Conn. Gen. Stat. § 10-76h, 20 U.S.C. § 1415(e), (f). State educational agencies must also offer a complaint resolution process ("CRP"). 34 CFR §§ 300.151 et. seq. In addition to providing an alternative avenue for reviewing a PPT's decision, the CRP also offers an expeditious means for enforcing determinations made by a PPT, a due process hearing officer or a court regarding which special education and related services are required for a particular child.

In Connecticut, there are only limited circumstances in which the state is responsible for providing necessary special education and related services to students so entitled. These include students served under state law by state operated "unified school districts" ("USD"), including USD #1 (serving students in the custody of the Department of Corrections, Conn. Gen. Stat. §§ 18-99a et seq.); USD #2 (serving students in certain Department of Children and Families ("DCF") facilities, Conn. Gen. Stat. § 17a-37); and DDS' Birth to Three program, Conn. Gen. Stat. §§ 17a-248d et seq. (which no longer uses the "unified school district" moniker). In Connecticut the LEA responsible for providing any necessary special education and related services is the district in which the school-aged student (up to the end of the school year in which he or she turn 21 or until graduation, whichever occurs first) resides.

As your inquiries suggest, because developmental delay qualifies as a "disability" cognizable under the state and federal special education laws and

regulations, instances can and do occur where DDS has been or will be providing services to a school-aged child who also qualifies for special education, and thus is entitled to FAPE from his or her school district. The question then arises whether the services DDS may have been providing or is planning to provide are in fact "necessary related services" under the IDEA, and thus the programmatic and fiscal responsibility of the LEA, and not DDS. The nature of such services can be quite varied, depending on the needs of the child, but can certainly include residential services.

In determining whether a particular service, possibly including residential services, is a necessary related service under the special education laws, and thus the fiscal and programmatic responsibility of the LEA, the key factual inquiry a PPT must address is whether the service is necessary for the child to obtain education benefit from his or her education program. Mrs. B. v. Milford, 103 F.3d 1114, 1120-22 (2d Cir.1997) (If a residential placement is needed to enable the student to achieve meaningful education progress, it is a necessary related service and the school district must pay for it); M.K. v. Sergi, 554 F.Supp.2d 201, 222-5 (D.Conn.2008).

The interplay of the provision of non-educational services by a state agency and the provision of special education and related services by an LEA to the same child was explained at length in Fetto v. Sergi, 181 F.Supp.2d 53 (D.Conn.2001). In Fetto, which involved DCF, the Court aptly noted that

> the fact that the DCF arranged for services that impacted the plaintiff's educational performance and abilities does not result in its being responsible for the child's education under the IDEA. Even if some of the services provided by the DCF would also qualify as "related services" under the IDEA, the fact that the DCF provided them does not make the DCF the LEA for the plaintiff, even though the West Haven Board of Education may have benefitted because it did not need to provide the services directly. Doing so would burden the DCF with the financial responsibility for providing an appropriate education to children assisted by its programs. It also may discourage state agencies like the DCF from providing support services for children whose education is subject to the IDEA .... If [plaintiff] .... believed that the related services were deficient, he could pursue his remedies against the Board, his LEA. Even though the Board may benefit at times from the

> involvement of the DCF, it still is ultimately responsible for compliance with the IDEA, including assuring that the related services are appropriate and properly delivered.

Id. at 71. Equally instructive on this point is the Court's decision in Naugatuck Board of Education v. Mrs. D., 10 F.Supp.2d 170 (D.Conn.1998). At issue in Naugatuck was whether a residential placement, initially made by DCF, was actually required as a related service under the IDEA and thus the responsibility of the LEA. The due process hearing officer had ruled that the student needed a residential placement in order to benefit from his educational program, and thus was the fiscal and programmatic responsibility of the school district. Affirming the hearing officer's decision, the District Court determined the school district was attempting to "shift its potential financial responsibility for M.L.'s residential placement onto DCF." The Court was "not persuaded by Naugatuck's claims." Id. at 177-178. As the Naugatuck Court described it:

> DCF's involvement in M.L.'s residential placement does not lessen Naugatuck's responsibilities under the IDEA .... had .... Naugatuck .... placed M.L. in a residential facility, DCF likely would never have gotten involved in this case. DCF became involved at Mrs. D.'s behest, only after Naugatuck determined that a residential placement was not necessary for educational reasons. If the court were to overturn the hearing officer's decision, in the future Naugatuck could refuse to place any special education students in a residential placement and instead wait for another state agency, such as DCF, to step in and pay for placement in a residential facility. Such a perverse incentive would be most harmful to those students in need of immediate residential placement.

Id. at 179-180.

Succinctly stated, where a PPT, a due process hearing officer or a court determines that a residential environment is needed for a student to make educational progress, it is the school district's duty to provide it. Mrs. B. v. Milford Board of Education, 103 F.3d at 1121. This conclusion does not rest on any change in the law governing allocation of responsibility for funding a residential placement. The relevant statutes have never imposed that responsibility on DDS (or its predecessor agencies) as a legal obligation.

Our understanding is that on occasion DDS or other agencies have chosen as a matter of policy to provide fiscal support for residential placements. That policy choice was and remains one that the agency may properly make and nothing in our legal opinion should be read to suggest that state agencies and officials should not when they can seek to identify available and appropriate resources to support children, their families and the districts that serve them. But it is not, for the reasons set forth above, compelled to do so by law.

The determination of a PPT, a hearing officer or a reviewing court that an LEA is fiscally responsible under our special education laws for a particular child's residential services can of course place significant financial pressure on a school district. This can especially be so where the responsibility for a particular child is new to a school district, such as when a child's needs have changed or when the child's residential placement has previously been provided and/or paid for by others, including parents or state agencies like DDS.[2] However, in my view the statutes are quite clear and the General Assembly is free to assign the responsibility for these services elsewhere if it chooses to do so as a matter of policy.

Also, although DDS has no legal obligation to provide or pay for any special education or related services under Connecticut law (leaving aside the Birth to Three program) it may of course have valuable insights and information regarding a particular child, including the child's history with DDS. This information may assist and guide an LEA's PPT in planning special education and

---

[2] We note that local school districts sometimes assert that IDEA responsibilities devolve onto state agencies, noting the IDEA regulations, which provide that the law's requirements "are binding on each public agency in the State," and public agencies are defined to include "state educational agencies" (in Connecticut SDE), LEAs, and "other state agencies and schools." 34 C.F.R. § 300.2(b). The key however is that the public agency must be "provid[ing] special education and related services to children with disabilities ...." Id. Thus special education duties *do* devolve onto SDE at the state operated vocational high schools, DCF at USD # 2 schools, the Department of Corrections at USD #1 schools, and DDS in its the Birth to Three program, but not otherwise, since under Connecticut's approved IDEA Part B plan, as reflected in Conn. Gen. Stat. § 10-76d, with these exceptions, the duty to provide special education and related services is assigned to LEAs

related services for that child and help ensure proper coordination between any DDS non-educational services and the school district's special education and related services. As you know DDS personnel often are invited to participate in PPTs, and they may, with appropriate releases, share such insights and information.

We trust this addresses your question. Please let us know if you require further information.

Very truly yours,

GEORGE JEPSEN
ATTORNEY GENERAL