UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

May 2, 2019

Brittany N. Mills
Gibson, Dunn and Crutcher, LLP
333 South Grand Avenue
Los Angeles, California 90071

Dear Ms. Mills:

This letter responds to your correspondence to Ruth Ryder, former Acting Director of the Office of Special Education Programs (OSEP). In your letter, you ask a series of questions that resulted from your request for a functional vision assessment by an optometrist for a child with a diagnosed visual disability. Each of your questions is answered below. We apologize for the delay in providing this response.

We note that section 607(d) of the Individuals with Disabilities Education Act (IDEA) prohibits the Secretary from issuing policy letters or other statements that establish a rule that is required for compliance with, and eligibility under, IDEA without following the rulemaking requirements of section 553 of the Administrative Procedure Act. Therefore, based on the requirements of IDEA section 607(e), this response is provided as informal guidance and is not legally binding. This response represents an interpretation by the Department of the requirements of IDEA in the context of the specific facts presented, and does not establish a policy or rule that would apply in all circumstances.

Question 1: Does a local educational agency (LEA) violate the procedural protections of 34 C.F.R. § 300.503 by failing to either agree to conduct the assessment requested by a parent or guardian, or to deny that assessment, when it proposes to conduct a "screening" in the same area of suspected disability by different personnel?

Answer: Under IDEA, written notice that meets the requirements of 34 C.F.R. § 300.503(b) must be given to the parents of a child with a disability a reasonable time before the public agency: (1) proposes to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education (FAPE) to the child; or (2) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 20 U.S.C. § 1415(b)(3) and 34 C.F.R. § 300.503(a). If a request for an evaluation has been made, the LEA must respond to the request through prior written notice, which includes among other content, an explanation of why the agency proposes or refuses to take the action. If the LEA believes an evaluation is not necessary because the child is not suspected of having a disability, it must issue written notice to the parent explaining why it is refusing to evaluate the child. If the LEA believes an evaluation is necessary, it must also issue a prior written notice. In the case of an initial evaluation, after

receiving parental consent, the LEA must complete the evaluation within the 60-day timeframe (or, if the State has an established timeframe, within that timeframe) in accordance with 34 C.F.R. § 300.301(c).

There is nothing in IDEA that would prohibit a State educational agency (SEA) or LEA from implementing screening procedures to determine if a child is suspected of having a disability. The use of screening procedures, however, may not be used to delay or deny an evaluation for special education and related services. See OSEP Letter to Torres (April 7, 2009).[1] Therefore, referring a child for screening after a request for an evaluation has been made does not replace the evaluation and does not alleviate the public agency's responsibility to issue a prior written notice that meets the requirements described above.

Question 2: Does an LEA violate the procedural protections of 34 C.F.R. § 300.503 and Cal. Educ. Code § 56321(a) by failing to either agree to conduct the specific assessment by the specific personnel requested by the parent, or to deny that specific assessment by the specific personnel in writing within 15 calendar days?

Answer: Under 34 C.F.R. § 300.503(b) and 20 U.S.C. § 1415 (c)(1), prior written notice must include the evaluation procedures the agency proposes to use, along with an explanation of why the agency proposes to evaluate the child; a description of each evaluation procedure, assessment, record, or report the agency used as a basis for requesting the evaluation; a statement that the parents have protection under the procedural safeguards of the Act, and if this notice is not an initial referral for an evaluation, the means by which a copy of the procedural safeguards can be obtained; sources for the parents to contact to obtain assistance in understanding the provisions of the Act; a description of other options that were considered and why these reasons were rejected; and a description of other factors that are relevant to the agency's proposal to request consent for an evaluation. *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, Final Rule, Analysis of Comments and Changes, 71 FR 46540, 46641-46642 (August 14, 2006). This provision does not require that the specific personnel completing the evaluation be included in the prior written notice.

You also mention California's prior written notice requirement. We take no position on whether the district has complied with those procedures as that is a matter of State law and OSEP does not interpret State law.

Question 3: Are optometrists "qualified personnel" pursuant to 34 C.F.R. § 300.156 who may conduct assessments for children with disabilities or suspected disabilities?

Answer: Under IDEA, the SEA must establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of Part B of IDEA are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and

[1] A copy of this letter is available at: https://sites.ed.gov/idea/idea-files/policy-letter-april-7-2009-to-chula-vista-elementary-school-district-union-representative-johncarlos-torres/.

skills to serve children with disabilities. 20 U.S.C. § 1412(a)(14) and 34 C.F.R. § 300.156(a). In addition, the public agency must ensure that each child's evaluation is conducted by trained and knowledgeable personnel. 34 C.F.R. § 300.304(c)(1)(iv) and 20 U.S.C. § 1414(b)(3)(A)(iv). IDEA does not address which specific providers are considered qualified personnel. LEAs are permitted to obtain a medical diagnosis to determine if a child's medically related disability results in the child's need for special education and related services." In the case of a suspected "visual impairment including blindness," a diagnosis may be made by a medical professional such as the child's pediatrician, an ophthalmologist, or optometrist. See OSEP Memo 17-05: Re: Eligibility Determinations for Children Suspected of Having a Visual Impairment Including Blindness under the Individuals with Disabilities Education Act (May 22, 2017).[2] Therefore, depending on the child's situation, an optometrist could be considered "qualified personnel" under 34 C.F.R. § 300.156.

If you have any further questions, please do not hesitate to contact Lisa Pagano at 202-245-7413 or by email at Lisa.Pagano@ed.gov.

Sincerely,

/s/

Laurie VanderPloeg
Director
Office of Special Education Programs

[2] A copy of OSEP Memo 17-05 is available at: https://sites.ed.gov/idea/files/letter-on-visual-impairment-5-22-17.pdf.