



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

March 30, 2001

Dr. Lorrie Harkness
Director
Special Education Services Unit
Colorado Department of Education
201 East Colfax Avenue
Denver, Colorado 80203

Dear Dr. Harkness:

This letter is in further response to the request for Secretarial review of the Colorado Department of Education's (CDE) decision regarding a complaint filed by (blacked out) on behalf of (blacked out) against the School District on May 8, 1998. CDE issued its letter of findings on July 27, 1998, with amendments made on August 4, 1998. We apologize for the delay in issuing a decision on this request.

When (blacked out) filed (blacked out) complaint with CDE, the complaint procedures applicable to Part B of the Individuals with Disabilities Education Act (Part B), at 34 CFR §§300.660-300.662, included a provision that after a complaint had been filed with the State and the State had acted on it, either party to the complaint could request the U.S. Secretary of Education to review the State's final decision. On March 12, 1999, new final regulations were published reflecting revisions to the then existing Part B regulations. These new regulations no longer include a Secretarial review process. However, since (blacked out) filed (blacked out) request prior to March 12, 1999, the Office of Special Education Programs (OSEP) has reviewed (blacked out) request.

The Secretary has delegated the responsibility for administering Part B to the Assistant Secretary for Special Education and Rehabilitative Services. Included within this delegation is the responsibility for determining whether to grant or to deny requests for Secretarial review of issues involving Part B. Additionally, if the State agency has failed to address or to resolve all of the issues raised by the complaint, the complaint may be remanded to the State for a new decision on these issues.

OSEP has decided to deny Secretarial review because the issues raised in the request involve State law or because they are largely dependent on resolution of disputed factual issues. Although OSEP affirms the State's decision, we take this opportunity to correct misstatements of law made by the State in addressing two issues raised by the complainant.

The first issue involves Child Find requirements under Part B.

CDE's response includes the following statements: "The law does not require identification of Attention Deficit Hyperactivity Disorder (ADHD) because it is not one of the identified disabilities," and "It cannot be assumed that schools have responsibility for the identification of ADHD." CDE goes on to conclude that, "It is not the responsibility of the District to refer or evaluate for ADHD" (CDE Decision at page 24). While it is true that ADD/ADHD is not one of the specified disabilities in and of itself, children with ADD/ADHD may have a disability under one or more of the specified disabilities such as Other Health Impaired, Specific Learning Disability or Serious Emotional Disturbance. Children with ADD/ADHD may be considered disabled under Part B solely on the basis of this disorder within the "other health impaired" category in situations where special education and related services are needed because of the ADD/ADHD. An OSEP Memorandum dated September 16, 1991, entitled "Policy to Address the Needs of Children with Attention Deficit Disorders within General and/or Special Education" and in effect at the time of this investigation, explains the local education agency's (LEA) responsibilities to children with ADD/ADHD. This memo clearly provides that local education agencies have an affirmative obligation to locate, identify and evaluate a child who is suspected of having a disability to determine eligibility for special education and related services. Since ADD/ADHD can adversely effect a child's educational performance in a variety of ways, such an evaluation must be conducted that meets the requirements of 34 CFR §§300.530-300.534. In this case, however, it was not the District that asserted it had no obligation to identify and evaluate children who may have ADD/ADHD, rather it was the CDE investigator who formed that erroneous legal conclusion. There is a factual dispute over whether the District should have identified the child's disability earlier, with the District contending that the behaviors exhibited by the child did not warrant a referral to special education, but the District does not claim that it had no legal obligation to identify and evaluate a child with ADD/ADHD. Therefore, OSEP clarifies its legal interpretation of the District's Child Find responsibilities under Part B, but affirms the CDE's ultimate decision that the District did not violate the Child Find requirements of Part B since that decision is largely dependent upon the facts of the case.

The second finding to which the CDE appears to have applied the incorrect legal standard is related to the parents' access to the educational records of x.

The LOF indicated that the delay of the LEA in providing access to copies of the child's discipline records did not violate the IDEA. The investigator found that discipline files are not part of "special education records" unless they are "...specifically related to goals and objectives in an IEP...." This legal conclusion is not consistent with Part B, in light of the definition of educational records found in the Family Educational Rights and Privacy Act and incorporated by reference in 34 CFR §300.560, which states that educational records are records that are directly related to a student and are maintained by an educational agency or institution or by a party acting for the agency or institution. No exception for disciplinary records or medical logs is listed and there is no distinction between "special education" records and general education records. See the regulations implementing FERPA at 34 CFR §99.3. The CDE must communicate to the District its obligations under FERPA when providing parents access to educational records. Because the records sought by the parent, in this case, were ultimately obtained, no corrective action specific to this complaint is necessary.

OSEP would also like to point out to CDE that this LOF failed to meet the requirements of the "State Complaint Procedures" of Part B at 34 CFR §§300.660-300.662. Several allegations raised in the complainant's letters were paraphrased by the State investigator leading to concern, on the part of the complainant, that allegations were mischaracterized and some allegations were not addressed with the appropriate specificity. In addition, findings of facts and conclusions and the reasons for the SEA's final decision were not provided for each allegation in the LOF as

required by 34 CFR §300.661(a)(4)(i) and (ii). In this LOF, most of the allegations had only a general discussion of each party's views and a few sentences recitation of the investigator's interpretation of the law, instead of findings of fact. The LOF's "Conclusions" section at the end of the document also did not provide conclusions for each allegation. The CDE should follow-up on the corrective action required of the District in order to ensure that it was appropriately implemented.

Thank you in advance for you attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Patricia J. Guard". The signature is written in a cursive, flowing style.

Patricia J. Guard
Acting Director
Office of Special Education Programs

Enclosure

cc: x