September 16, 2015

Matthew D. Cohen
155 North Michigan Avenue, Suite 715
Chicago, Illinois 60601

Dear Mr. Cohen:

This is in response to your February 23, 2015 correspondence requesting clarification from the Office of Special Education Programs (OSEP) regarding impartial due process hearings under 34 CFR §300.511(d) of the regulations implementing the Individuals with Disabilities Education Act (IDEA).

First, you ask whether a local educational agency (LEA) can, during a resolution meeting, "unilaterally" amend an individualized education program (IEP) and make the revised IEP the subject of the due process hearing. As you know, the purpose of the resolution meeting is to achieve a prompt and early resolution of a parent's due process complaint to avoid the need for a more costly, adversarial, and time-consuming due process hearing and the potential for civil litigation. 34 CFR §300.510(a)(1) provides that within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of an impartial due process hearing under 34 CFR §300.511, the LEA must convene a meeting with the parent and the relevant members of the IEP Team who have specific knowledge of the facts identified in the due process complaint. See Question D-1 of the *Questions and Answers on IDEA Part B Dispute Resolution Procedures* issued July 2013 (Q&A)**.** Pursuant to 34 CFR §300.510(a)(2), the resolution meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint. Further, 34 CFR §300.324(a)(4) allows a parent and a public agency to agree not to convene an IEP Team meeting to make changes to the child's IEP, and instead, to develop a written document to amend or modify the child's current IEP. The IDEA does not place any restrictions on the types of changes that may be made, so long as the parent and the public agency agree. 71 Fed. Reg. 46540, 46685 (August 14, 2006). OSEP would encourage discussion of a child's IEP during a resolution meeting in an effort to provide the LEA the opportunity to resolve the dispute that is the basis for the due process complaint.

Unlike mediation, the IDEA and the implementing regulations contain no requirement for discussions in resolution meetings to be kept confidential and not be introduced in a subsequent due process hearing or civil proceeding. See Question D-17 of the Q&A. Absent an enforceable agreement by the parties requiring that these discussions remain confidential, either party may introduce information discussed during the resolution meeting at a due process hearing or civil proceeding when presenting evidence and confronting or cross-examining witnesses consistent with 34 CFR §300.512(a)(2). See Question D-18 of the Q&A. As you correctly noted in your correspondence, pursuant to 34 CFR §300.511(d), the party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under 34 CFR §300.508(b), unless the other party agrees. However, the IDEA does not address whether the non-complaining party may raise other issues at the hearing that were not raised in the due process complaint. Therefore, the decision as to whether such matters can be

raised at the hearing should be left to the discretion of the hearing officer in light of the particular facts and circumstances of the case. 71 Fed. Reg. 46540, 46706 (August 14, 2006). See also Question C-18 of the Q&A**.**

Second, you ask whether an LEA may submit, as evidence at a due process hearing, an IEP that was drafted and put into place subsequent to filing the hearing request as its prospective offer of a free appropriate public education (FAPE). Under 34 CFR §300.512(a)(2), any party to a hearing conducted pursuant to 34 CFR §§300.507 through 300.513 or 34 CFR §§300.530 through 300.534, or an appeal conducted pursuant to 34 CFR §300.514, has the right to present evidence and confront, cross-examine, and compel the attendance of witnesses. According to 34 CFR §300.512(b)(1), at least five business days prior to a hearing conducted pursuant to 34 CFR §300.511(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. Beyond the basic elements of due process hearings and rights of the parties set out in the IDEA and implementing regulations, States have latitude in determining appropriate procedural rules for due process hearings as long as they are not inconsistent with the IDEA. The specific application of those procedures to particular cases generally should be left to the discretion of hearing officers who have the knowledge and ability to conduct hearings in accordance with standard legal practice. There is nothing in the IDEA and implementing regulations that would prohibit a hearing officer from making determinations on procedural matters not addressed in the IDEA so long as such determinations are made in a manner that is consistent with a parent's or a public agency's right to a timely due process hearing. 71 Fed. Reg. 46540, 46704 (August 14, 2006).

Further, with regards to convening a meeting of the IEP Team while a due process complaint is pending, the State and its public agencies must ensure that a FAPE is made available to a child while administrative or judicial proceedings regarding a due process complaint are pending. 34 CFR §§300.101 and 300.17. OSEP has previously stated in its *Letter to Watson*, dated April 2007:

> [T]here is nothing in the regulation at 34 CFR §300.518 that relieves a public agency of its responsibility under 34 CFR §300.324(b)(1) to convene a meeting of the IEP Team, periodically, but not less than annually, to review, and if appropriate, revise, an IEP for a child with a disability, even if the public agency is required to maintain the child's current educational placement while administrative or judicial proceedings are pending. This could include, among other matters, review and revision of the child's present levels of academic achievement and functional performance and modification of the child's annual goals, if appropriate. If the new IEP that the IEP Team develops for the child for the current school year is different from the IEP developed for the child when pendency attached to the child's current educational placement, the public agency must ensure that the child still receives the complete program of special education and related services contained in the IEP developed for the child when pendency attached, unless the parents and the public agency agree otherwise.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have questions, please do not hesitate to contact Jennifer Wolfsheimer at 202-245-6090 or by email at Jennifer.Wolfsheimer@ed.gov.

Sincerely,

/s/
Melody Musgrove, Ed.D.
Director
Office of Special Education Programs