



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

AUG -9 2005

Ms. Eleanor Hirsh
Educational Consultant
9174 Rosegate
Christiansted, VI 00820

Dear Ms. Hirsh:

This letter is in response to your correspondence to Ms. Maral Taylor, in the Office of Special Education Programs (OSEP), United States Department of Education, seeking clarification on several issues regarding the provision of free appropriate public education to preschool-aged children with disabilities in the Virgin Islands. Subsequent to sending your letter, you and Ms. Nancy Treusch, Office of Special Education Programs, discussed the issues raised in your letter. As explained in that conversation, these issues overlap with some of the issues addressed in OSEP's ongoing compliance and enforcement interventions with the Virgin Islands Department of Education (VIDE). During the conversation, you requested a written explanation of the requirements under the Individuals with Disabilities Education Act (IDEA) on the issues of: (1) pre-referral activities and timeliness of referrals for initial evaluation to determine eligibility for special education and related services; (2) use of evaluations conducted under Part C to determine eligibility under Part B; and (3) placement options for preschool-aged children with disabilities.

On December 3, 2004, President Bush signed into law P.L. 108-446, the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004), which became effective on July 1, 2005. A Notice of Proposed Rulemaking (NPRM) was published in the *Federal Register* on June 21, 2005. 70 FR 35782. You may submit written comments on the proposed regulations until September 6, 2005. Final regulations will be issued subsequent to the Department's analysis and consideration of the public comments.

In its Federal Fiscal Year (FFY) 2005 application, VIDE assured OSEP that throughout the period of the grant award, VIDE will operate consistent with all requirements of PL 108-446 and applicable regulations and VIDE will make such changes to existing policies and procedures as are necessary to bring those policies and procedures into compliance with the requirements of the IDEA, as amended, as soon as possible, and not later than July 1, 2006.

1. Pre-referral activities and timeliness of referrals for initial evaluation to determine eligibility

Under Virgin Islands' law, VIDE makes a free appropriate public education (FAPE) available to all children with disabilities ages 3 through 21 residing in the state consistent with section

612(a)(1) of IDEA. This obligation includes a full and individual initial evaluation of the child, at no cost to parents, to determine a child's eligibility for special education and related services, subject to informed parental consent in accordance with section 614(a)(1) of IDEA. Section 614(a)(1)(C)(i) of IDEA requires that an initial evaluation to determine whether a child is a child with a disability must be conducted within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe.

Section 614(b)(2)(A) of IDEA requires that a variety of assessment tools and strategies be used to gather relevant functional, developmental, and academic information about a child, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's individualized education program (IEP), including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities.) Under section 614(c)(1) of IDEA, as part of an initial evaluation, if appropriate, the IEP team, and other qualified professionals, as appropriate, must review existing evaluation data on the child, including evaluations and information provided by the parents of the child, current classroom-based, local, or State assessments and classroom-based observations, and observations by teachers and related services providers. Information from pre-referral interventions conducted prior to getting parental consent for an initial evaluation can be used in making the eligibility determination

2. Use of evaluations conducted under Part C to determine eligibility under Part B

Section 612(a)(9) of IDEA requires the SEA to ensure that children participating in early intervention programs under Part C, and who will participate in preschool programs under Part B, experience a smooth and effective transition from Part C to preschool programs under Part B. Section 637(a)(9) of Part C of IDEA requires the Part C lead agency to ensure a smooth transition for children receiving early intervention services to preschool, school, or other appropriate services including, in the case of a child who may be eligible for preschool services under Part B, with the approval of the family of the child, convening a conference among the lead agency, the family, and the LEA not less than 90 days (and at the discretion of all such parties, not more than 9 months) before the child is eligible for the preschool services, to discuss any services that the child may receive. OSEP has encouraged States to use results from child assessments completed under Part C when determining eligibility for Part B. Under 34 CFR 300.571 (which applies to Part C through 34 CFR §303.402), parental consent must be obtained before personally identifiable information from evaluation and assessment records under Part C is disclosed by the lead agency to the local educational agency (LEA) (subject to the exceptions identified in 34 CFR §300.571 and 34 CFR Part 99).¹ As noted above, section 614(c)(1) of IDEA permits an LEA to review existing data regarding a child with a disability, including a child who has been referred by the lead agency, as part of an initial evaluation. However, the statutory language does not specifically require the LEA to use Part C assessment information to determine eligibility for preschool special education and related services under

¹ The implementing regulations to IDEA '97 are still in effect, except where changes have occurred due to amendments in IDEA 2004.

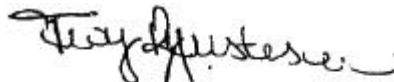
Part B. Parents may make this information available to the Part B eligibility group for their consideration.

3. Placement options for preschool-aged children with disabilities

Under section 612(a)(5)(A) of the IDEA, the SEA must ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The full continuum of alternative placements at 34 CFR §300.551, including integrated placement options, such as community based settings with typically developing peers, must be available to preschool children with disabilities. Under section 614(d)(1)(A)(i)(V) of IDEA, the IEP must contain an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class. If the IEP team determines that a preschool-aged child's IEP is to be implemented in a setting with other nondisabled children and a particular program where non-disabled peers are educated does not have enrollment slots available, then the LEA must locate other placements where the child's IEP can be implemented consistent with the placement decision made by the placement team.

We hope that the information provided in this letter addresses your concerns as expressed in your letter and telephone conversation with OSEP staff. We encourage you to comment on the proposed rules when they are published in the Federal Register.

Sincerely,



Troy R. Justesen
Acting Director
Office of Special Education
Programs

cc:

Dr. Carrie Johns, State Director of Special Education