



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

April 9, 2012

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Dear XXXXXXXX:

This letter is in response to your correspondence to the Office of Special Education Programs (OSEP) of the Office of Special Education and Rehabilitative Services (OSERS), U.S. Department of Education (Department). I apologize for the delay in responding to your letters.

You note that your correspondence is in response to a conference call held with you and staff from both OSEP and the Pennsylvania Department of Education's (PDE's) Bureau of Special Education (BSE) on March 23, 2011. We have reviewed your correspondence, and would like to address the principal questions raised during that call in light of the applicable requirements of Part B of the Individuals with Disabilities Education Act (IDEA or Part B). These questions and OSEP's responses are provided below.

Question 1: Must the local educational agency (LEA) provide prior written notice when proposing a functional behavioral assessment (FBA)?

Answer: If a public agency conducts a functional behavioral assessment (FBA) to assist in determining whether an individual child is a child with a disability and the nature and extent of the special education and related services that the child needs, it is considered an evaluation under Part B and the regulation at 34 CFR §300.15. The FBA must be conducted in accordance with the evaluation procedures in 34 CFR §§300.304-300.311. Part B evaluations and reevaluations are subject to the IDEA's notice requirements in 34 CFR §§300.503-300.504, and parental consent requirements in 34 CFR §300.300. Under 34 CFR §300.503(a), whenever a public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of a child with a disability or the provision of a free appropriate public education (FAPE) to the child, that agency must provide written notice to the parents of that child within a reasonable time before such actions occur. See also 34 CFR §300.304(a). This prior written notice must include, among other elements, a description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of each evaluation procedure, assessment, record or report the agency used as a basis for the proposed or refused action. 34 CFR §300.503(b)(1)-(2). Enclosed for your reference is a copy of OSEP's letter to Christiansen dated

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February 9, 2007 regarding functional behavioral assessments. As indicated in that letter, “[I]f the FBA is intended to assess the effectiveness of behavioral interventions in the school as a whole, the parental consent requirements in 34 CFR §300.300(a) and (c) generally would not be applicable to such an FBA because it would not be focused on the educational and behavioral needs of an individual child. If an FBA is used, for example, in the context of positive behavior supports as a process for understanding problem behaviors within the entire school and to improve overall student behavior in the school, it generally would not be considered an evaluation that would require parental consent, unless such consent is required from the parents of all children in the school prior to conducting such an evaluation. 34 CFR §300.300(d)(1)(ii).”

Question 2: When a child transfers from one State to another, in the same school year, with an IEP, if the receiving State decides an evaluation is needed, is that evaluation an initial evaluation or a reevaluation?

Answer: Under 34 CFR §300.323(f), if a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child’s IEP from the previous public agency), until the new public agency: (1) conducts an evaluation pursuant to 34 CFR §§300.304-300.306 (if determined to be necessary by the new public agency); and (2) develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in 34 CFR §§300.320-300.324.

The Part B regulations do not address specifically whether an evaluation is an initial evaluation or a reevaluation if that evaluation takes place after a public agency in a new State has begun to provide services to the child comparable to the services that the child received in the sending State. However, the Department has taken the position that the evaluation conducted by a new public agency in a new State is an initial evaluation. See 71 FR 46682 (Aug. 14, 2006).

Question 3: Are issues related to program appropriateness and FAPE subject to the State Complaint Procedures at 34 CFR §§300.151-300.153? Can complaints be filed on behalf of more than one child?

Answer: State educational agencies (SEAs) must ensure that State complaint procedures under 34 CFR §§300.151-300.153 are available for resolving any complaint that meets the requirements of 34 CFR §300.153, including: (1) complaints that raise systemic issues, and (2) individual child complaints. Thus, if a parent chooses to file a State complaint under 34 CFR §§300.151-300.153, instead of using mediation under 34 CFR §300.506 or the due process procedures under 34 CFR §§300.507 through 300.516, to resolve disagreements with public agencies over any matter relating to the identification, evaluation, or educational placement of the child, or

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the provision of FAPE to the child, the SEA must have procedures for resolving that State complaint.

With regard to the second part of your question, there is nothing in the Part B regulations that would prohibit an organization or individual from filing a State complaint that contains an allegation that a public agency has violated a requirement of Part B or the Part B regulations with respect to one or more children. However, parental consent must be obtained before an SEA may provide personally identifiable information about a child to a non-parent complainant as part of the complaint decision. See 34 CFR §300.622(a).

Question 4: Under what circumstances would session notes taken by an occupational therapist that contain personally identifiable information about a student and indicate educational performance meet the criteria of an education record, as defined by the IDEA?

Answer: Under 34 CFR §300.611(b), the term “education record” means the type of records covered under the definition of the term “education records” in 34 CFR Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA)), which is administered within the Department by the Family Policy Compliance Office (FPCO).

34 CFR §99.3 defines the term “education records” as those records that are: (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution.

Exceptions to the term “education record” include records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record. If notes by a therapist are revealed to any other person, except a temporary substitute, for any reason, those notes would no longer be in the sole possession of the maker, and would therefore meet the definition of “education records.”

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.

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Thank you for sharing your concerns with OSEP. If you have additional questions or concerns, please contact Dr. Josiah Willey, OSEP's Part B State Contact for Pennsylvania, at 202-245-7350.

Sincerely,

A handwritten signature in black ink, appearing to read 'Melody Musgrove', with a stylized flourish at the end.

Melody Musgrove, Ed.D.

Director
Office of Special Education Programs

cc: State Director of Special Education