



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

Dated January 15, 2008

Mr. Allen Brumbaugh, CEO
Coalition of Learning Disabled
4871 Morgan Road
Angels Camp, CA 95222

Dear Mr. Brumbaugh:

This letter is in response to your letter to the Office of Special Education Programs (OSEP), dated October 18, 2007. Your letter expresses your concern that "[c]urrent regulations [for Part B of the Individuals with Disabilities Education Act (Part B)] lack acknowledgement of records of impairment and/or IEPs [individualized education programs] determined by qualified professionals."

Under 34 CFR §300.8(a) of the Part B regulations, a child must be evaluated in accordance with 34 CFR 300.304 through 300.311 and found to have a specified impairment and to be in need of special education and related services because of that impairment. There are some jurisdictions that do not classify children based on a disability category. There is nothing in Part B of the Act that requires that a child be classified by his or her disability so long as each child who has a disability listed in 34 CFR §300.8(c) of the Part B regulations who needs special education and related services is regarded as a child with a disability. 34 CFR §300.111(d). Under Part B, a child cannot be considered an eligible child with a disability solely because the child has a record of impairment. "Record of impairment," which is used in Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act (ADA), is not a term used in the Part B regulations. Rather, under Part B, the child's current need for special education and related services is the relevant consideration.

There are a number of provisions in the Part B regulations that safeguard IEPs for children with disabilities served under Part B. In order to receive assistance under Part B, each State must ensure that a free appropriate public education (FAPE) is made available to eligible children with disabilities. FAPE includes, among other elements, the provision of special education and related services, in conformity with an IEP. 34 CFR §300.17. Once a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with 34 CFR §§300.320 through 300.324. 34 CFR §300.306(b)(2). Under 34 CFR §300.323(a), each public agency must have in effect an IEP that meets the definition in 34 CFR §300.320 for each child with a disability within its jurisdiction at the beginning of each school year. The IEP is a written document, developed at a meeting between parents and school officials, which contains statements of the child's present levels of educational performance, measurable annual goals designed to meet the child's needs that result

from the child's disability, the special education and related services and supplementary aids and services to enable the child to participate in the general education curriculum and in nonacademic and extracurricular services and activities and to participate with children with and without disabilities in those activities. For children age 16 and older, and for younger children if determined appropriate by the IEP Team, the child's IEP must contain a statement of postsecondary goals and transition services needed to assist the child in reaching those goals. Each child's IEP Team must review the child's IEP periodically, but not less than annually, to determine whether the annual goals are being achieved, and must revise its provisions, if appropriate. 34 CFR §300.324(b). The IEP, which also forms the basis for the child's placement, is integral to each disabled child's entitlement to FAPE under Part B. These provisions underscore that it is the child's unique educational needs, and not the child's disability category, that determine the services to be provided to the child.

Your letter also expresses a concern that Colorado's proposed regulations do not use the same terminology as used in the Federal regulations. It appears that your concern is that children whose disabilities would be recognized under the Federal Part B regulations would not be found eligible for services under Part B under the State's proposed regulatory definitions of disability categories. A State is not required to use the precise terminology used in Part B in describing children who meet the criteria for "child with a disability," provided that all children who are in need of special education and related services who have impairments listed in the Part B definition of "child with a disability" are identified, located, and evaluated and appropriate instruction and services are provided to eligible children.

You also believe that there is a need for recognition of IEPs across States under the ADA guidelines. Part B includes new provisions on IEPs for children with disabilities who move into a different State and change school districts. 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 through 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 through 300.324.

Within the U.S. Department of Education, the Office for Civil Rights (OCR) enforces laws that prohibit discrimination on the basis of disability. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. The Americans with Disabilities Act (ADA), Title II, prohibits discrimination on the basis of disability by public entities, regardless of receipt of Federal funds. If you would like guidance on the requirements of Section 504 and the ADA, Title II, that are applicable when a child transfers to a new State and changes school districts, you should contact the OCR Customer Service Team at the following address and telephone number:

U.S. Department of Education
Office for Civil Rights
Customer Service Team
400 Maryland Avenue SW
Washington, DC 20202
Telephone: 1-800-421-3481

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

We hope this information is helpful to you. If you have further questions, please do not hesitate to contact Dr. Perry Williams at 202-245-7575.

Sincerely,

A handwritten signature in black ink that reads "Patricia J. Guard". The signature is written in a cursive, flowing style.

Patricia J. Guard
Acting Director
Office of Special Education
Programs

cc: Mary Hudler Jo O'Brien