



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

NOV - 7 2012

Dorene J. Philpot  
Philpot Law Office,  
P.C. 7314 Offats Pointe  
Galveston, Texas 77551

Dear Ms. Philpot:

This is in response to your letters of March 15, 2011 and August 26, 2011 to the Office of Special Education Programs (OSEP) in the Office of Special Education and Rehabilitative Services at the U.S. Department of Education. I apologize for the delay in responding.

In your letters, you indicate your belief that three specific rules found in the "Texas Commissioner's Rules" pertaining to special education and related services are inconsistent with the Individuals with Disabilities Education Act (IDEA). You indicate "that these three rules... create additional procedural hurdles or restrictions on families of students with disabilities...they are unduly burdensome and are in violation of federal law."

The rules you cite and OSEP's responses are listed below:

Rule #1: §89.1180. Prehearing Procedures, (i) "...However, if a party requests a dismissal or nonsuit of a due process hearing after the Disclosure Deadline has passed and at any time within one year thereafter requests a subsequent due process hearing involving the same substantially similar issues as those alleged in the hearing which was dismissed or nonsuited, then, absent good cause or unless the parties agree otherwise, the Disclosure Deadline for the subsequent due process hearing shall be the same date as was established for the hearing that was dismissed or nonsuited."

Rule #2: §89.1185. Hearing. "(e) Before a document may be offered or admitted into evidence, the document must be identified as an exhibit of the party offering the document. All pages within the exhibit must be numbered, and all personally identifiable information must be redacted from the exhibit."

OSEP's Response: On their face, nothing in these rules appears to violate any specific provision of the IDEA requirements regarding due process complaints and due process hearings. In the context of responding to a comment concerning the role of hearing officers in determining a variety of procedural issues, including issues about production of documents and admissibility of evidence in due process hearings, OSEP noted in the Analysis of Comments and Changes to the Part B regulations that: "...States should have considerable latitude in determining appropriate procedural rules for due process hearings as long as they are not inconsistent with the

basic elements of due process hearings and rights of the parties set out in the Act and these regulations. 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 Act or these regulations that would prohibit a hearing officer from making determinations on procedural matters not addressed in the Act 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 FR 46704 (August 14, 2006).

**Rule #3:** §89.1185. Hearing. "(p) ...School districts must provide services ordered by the hearing officer, but may withhold reimbursement during the pendency of appeals."

**OSEP's Response:** Under 34 CFR §300.518(a) of the Part B regulations, except as provided in 34 CFR §300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under 34 CFR §300.507, and unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement. Under 34 CFR §300.518(d), if the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of 34 CFR §300.518(a).

This issue was further clarified in the Analysis of Comments and Changes to the Part B regulations, stating:

The basis for this regulation is the longstanding judicial interpretation of the Act's pendency provision that when a hearing officer's decision is in agreement with the parent that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parent for purposes of determining the child's current placement during subsequent appeals. See, e.g., *Burlington School Committee v. Dept. of Educ.*, 471 U.S. 359, 372 (1982); *Susquenita School District v. Raelee S.*, 96 F.3d 78, 84 (3rd Cir. 1996); *Clovis Unified Sch. Dist. V. Cal. Office of Administrative Hearings*, 903 F.2d 635, 641 (9<sup>th</sup> Cir. 1990).

With regard to the concern about providing financial relief for prevailing parents when an LEA [local educational agency] appeals the decision of a due process hearing to maintain a child with a disability in a private school setting, we decline to regulate on this issue because such decisions are matters best left to State law, hearing officers, and courts. 71 FR 46710 (August 14, 2006)

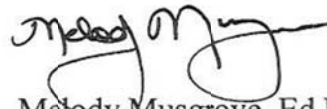
While the second comment is specific to private school settings, given that the IDEA is silent regarding financial remuneration when a hearing officer's decision is appealed, we believe the same principle applies in any appeal. The IDEA leaves the

issue of reimbursement to States, hearing officers and civil courts. Therefore, it is not inconsistent with the IDEA for Texas to have a rule that delays reimbursement until relevant appeals are exhausted and the decision is final.

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 additional questions, please do not hesitate to contact Dr. Marion Crayton at 202245-6474 or by email at [Marion.Crayton@ed.gov](mailto:Marion.Crayton@ed.gov).

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