



**UNITED STATES DEPARTMENT OF EDUCATION**

**OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES**

March 7, 2012

XXXXXXXXXX  
XXXXXXXXXX  
XXXXXXXXXX

Dear XXXXXXXXX:

This letter is in response to your electronic mail (email) correspondence regarding the results of the verification visit to Oregon, conducted by the Office of Special Education Programs (OSEP) the week of September 13, 2010, as part of its monitoring and oversight responsibilities under Parts B and C of the Individuals with Disabilities Education Act (IDEA). In an October 13, 2010 letter to Dr. Marion Crayton, the OSEP Part B State contact for Oregon, you raised specific questions regarding the provision of special education and related services for your children by the Lake Oswego School District (LOSD). In an effort to address your concerns, Dr. Crayton and Cheryl Broady, OSEP's Customer Service Specialist, contacted you on March 15 and March 28, 2011, to provide information and assistance regarding the issues you raised. During those calls, you requested that OSEP respond to you in writing; therefore, the following information is being provided in response to the issues you raised. I apologize for the delay in responding.

**IDEA Survey Findings in Oregon**

In your correspondence, you indicated that the OSEP Survey would be helpful to you and other parents, and you expressed concern that the survey did not address several areas of concern to you. You also stated that your request for the LOSD parent group to meet in person with OSEP's visiting representatives was not acknowledged by OSEP.

As part of its Continuous Improvement and Focused Monitoring System, OSEP conducts verification visits to States on a periodic basis. We apologize for any misunderstanding, but due to time constraints, OSEP does not meet with individual parent groups in connection with verification visits, but does use other mechanisms to obtain input from parents for these visits.

In preparation for the verification visit to Oregon, OSEP sought stakeholder input through the use of surveys. The primary purpose of parent surveys was to give parents and other stakeholders in the State an opportunity to provide OSEP with input relating to the accuracy and effectiveness, as well as the strengths and weaknesses, of the State's general supervision, data collection, and fiscal management systems, the areas to be reviewed during the verification visit.

The surveys focused on the State's system-wide activities rather than local program or child-specific issues.

Prior to the September 2010 verification visit to Oregon, OSEP provided the Oregon Parent Training and Information center (OrPTI) a parent survey to solicit input from parents. OSEP's guidance to the OrPTI was to widely distribute the survey, collect survey responses and summarize the results of the survey, as well as provide the summary to the Oregon Department of Education (ODE) and OSEP at least two weeks prior to OSEP's visit. The survey results were used by OSEP's verification visit team to guide some of the discussion and inquiry that occurred on-site. OrPTI reported that 658 parents completed the survey. It is OSEP's understanding that Ms. Leah Skipworth, an employee of the OrPTI, contacted you to share the results of the Oregon Parent Survey.

During the Oregon verification visit, OSEP conducted interviews with various ODE officials, reviewed the State's data collection and reporting processes and complaint and due process procedures, and reviewed other relevant documents (such as the IDEA policies and procedures that the State developed) to determine compliance with the requirements of the IDEA. OSEP issues letters and enclosures following its verification visits to States that contain the results of the visit. The enclosure contains OSEP's analysis and conclusions regarding the State's general supervision, data collection, and fiscal management systems and, if appropriate, includes findings of noncompliance and specifies the actions required to correct the noncompliance. The letter and enclosure containing the results of OSEP's verification visit to Oregon, dated February 5, 2011, are posted at: <http://www2.ed.gov/fund/data/report/idea/partbvvltr/index.html>.

### **Specific Questions**

The following information is being provided in response to the specific questions and concerns you raised in your October 13, 2010 letter to Dr. Marion Crayton regarding the provision of special education and related services by the LOSD.

**Question 1:** "LOSD maintains that 1 hour of direct tutoring time is equal for a full day of school...ODE is not aware if this is true or not. However, ODE does maintain that all students learn at different rates. In consideration of a stay-put agreement, does 1 hour of direct tutor time represent an appropriate amount for all students equally- no matter the student's disabilities? If no, what parameters are used for a parent to determine the appropriate amount of individual education?"

**OSEP Response:** In general, under Part B of the IDEA (IDEA or Part B), decisions about the amount and types of special education, related services, and supplementary aids and services to be provided to a child with a disability are made through the individualized education program (IEP) process in accordance with 34 CFR §§300.320-300.324. If a child's need for individualized tutoring is raised when the IEP is developed, reviewed, or revised, the participants on each child's IEP Team, which include school officials and parents, would determine whether an individual child with a disability requires this instruction or service in order to receive a free appropriate public education (FAPE). The IEP Team must consider the strengths of

the child and the concerns of the parent for enhancing their child's education. 34 CFR §300.324(a)(1).

You also indicate that your inquiry is "in consideration of a stay-put agreement." We assume you are referring to an agreement that either would be, or has been entered into pursuant to 34 CFR §300.518(a), known as the "pendency" or "stay-put" provision. It provides that during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing, unless the State or local educational agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement. Part B does not address the terms of a stay-put agreement, but rather makes this option available to the parties to Part B proceedings. Therefore, if the parties agree as to a specific amount of individualized tutoring for a child or children during the pendency of a Part B proceeding, that agreement would be controlling.

**Question 2:** "In filing due process as a pro se parent, the Administrative Law Judge (ALJ) insisted that LOSD 'go first' with respect to the due process hearing. The ALJ reasoned that I would then be in a position to 'learn' from the attorneys hired by LOSD. Should ALJ's ever be allowed to insist or even strongly suggest that opposing counsel lead first?"

**OSEP Response:** The IDEA is silent as to the order of presentation of evidence in a due process hearing. Accordingly, hearing officers may determine procedural matters not addressed in Part B, so long as their determinations do not interfere with a party's right to an impartial due process hearing. States also have the flexibility to establish rules for conducting due process hearings, so long as they are not inconsistent with Part B and the basic elements of due process. Questions regarding Oregon's guidelines or procedures for conducting due process hearings or the hearing officer's procedural rulings prompting your inquiry should be addressed to:

Dr. Nancy Latini  
Director, Office of Special Education  
Oregon Department of Education  
255 Capital Street, NE  
C/o Public Services Building  
Salem, Oregon 97310-0203  
Telephone Number: (503) 947-5702

**Question 3:** "School district policy maintains that in a general education setting children who are disruptive to the education of other children shall be removed from the class room. I contacted ODE and explained that my child has no negative/disruptive behaviors but that he was placed with a child that routinely displayed outbursts and had bouts of continual screaming. I was told by ODE that district policy rights are not afforded to children who are disabled. Thus, while general education students

are protected from disruption, disabled students placed in special education programs are not protected. Is this true? If yes, isn't this discrimination?"

**OSEP Response:** We cannot ascertain from the information you have provided whether this matter would fall within the purview of the Department's Office for Civil Rights (OCR). In the public elementary and secondary education context, OCR enforces two Federal laws that prohibit discrimination on the basis of disability—Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act (Title II). For more information about these laws, you can contact the OCR field office that serves Oregon at the following address and telephone number:

Seattle Office  
Office for Civil Rights  
U. S. Department of Education  
915 Second Avenue, Room 3310  
Seattle, Washington 98174-1099  
Telephone Number: (206) 607-1600  
Email Address: OCR.Seattle@ed.gov

**Question 4:** "Can a parent request a new IEP at any time? If new information must be provided upfront prior to a district determination of granting a new IEP, what type of new information is to be considered and how much new information is appropriate?"

**OSEP Response:** Although a public agency is responsible for determining when it is necessary to conduct an IEP Team meeting, the parents of a child with a disability have the right to request an IEP Team meeting at any time. However, if the agency refuses to grant the parent's request, the agency must provide written notice to the parents of the refusal, including an explanation of why the agency has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student. See 64 Fed. Reg. 12476 (Mar. 12, 1999).

You state in your letter that you were required to provide the district with "substantial information" by email before it would grant your request for an IEP Team meeting. Part B does not address the type or amount of information that a public agency can ask a parent to provide prior to granting the parent's request for an IEP Team meeting outside of the annual review meeting. In general, we believe that such requests for information would need to be reasonable based on the individual student's circumstances. However, if the parent receives notice that the public agency has denied their request for a new IEP Team meeting because the parent did not provide certain information requested by the school district, and the parent disagrees with a school district's decision, the parent may use mediation in accordance with 34 CFR §300.506, the due process procedures in accordance with 34 CFR §§300.507 through 300.516, or the State complaint procedures in accordance

with 34 CFR §§300.151 through 300.153. These dispute resolution options are described more fully in the enclosed copy of the applicable Part B regulations.

**Question 5:** “I have repeatedly stated in IEP meetings that the district must first show me measured data that justifies moving my children from less restrictive placement to more restrictive placements. The Special Education Director stated that after several years of reading IEP's he can tell where the student needs to be placed and no data or measurement need be taken. . . . What criteria should be performed prior to moving a child from a less restrictive placement to a more restrictive placement?”

**OSEP Response:** The requirements for determining the placement of a child with a disability are included in the Part B regulations in 34 CFR §§300.114 through 300.118. These regulations require that the placement decision for each child with a disability be made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 CFR §300.116(a)(1). A child’s placement must be determined at least annually on an individual, case-by-case basis, depending on each child’s unique needs and circumstances, must be based on the child’s IEP, and be as close as possible to the child’s home. 34 CFR §300.116(b).

The group making the child’s placement decision must consider the factors addressed in 34 CFR §300.116 in determining whether a child with a disability should be removed from a less restrictive to a more restrictive setting. There is no requirement in Part B or the Part B regulations for data or measurement to document when a child with a disability should be moved from a less restrictive to a more restrictive placement. Rather, the placement group would make this decision for each child on an individual case-by-case basis, and the child’s IEP forms the basis for the placement decision. 34 CFR §300.116(b)(2). The IEP Team is responsible for including in the IEP an explanation of the extent to which the child, if any, cannot participate with nondisabled children in the regular class and in extracurricular and other nonacademic activities. 34 CFR §300.320(a)(5). This explanation would inform the group that makes the child’s placement decision.

**Question 6:** “When are parents considered part of the IEP team? Parents are given the opportunity to include ideas for goals; they can provide information on PLEP [Present Level of Educational Performance] and offer in writing parent concerns. However, when the time for placement is to be considered, parents do not have the final say. The district is allowed to determine the final placement for the child...Shouldn’t parents be allowed to decide where their children should be placed?”

**OSEP Response:** Under Part B, public agencies must ensure that parents are members of their child’s IEP Team and the group that makes the placement decision for their child. 34 CFR §§300.321(a)(1) and 300.327. Further, 34 CFR §300.322 sets out the alternative means for ensuring parent participation in IEP Team meetings, and these

requirements also apply to ensuring parent participation in meetings of the group that makes the placement decision. Nevertheless, even though a public agency must ensure parent participation on the IEP Team and the group that makes the placement decision, a public agency's decisions regarding IEP and placement are team decisions. The parent does not have the power to veto the decision of the IEP Team or the decision of the group that makes the placement for their child. If a parent disagrees with a school district's decision regarding the educational placement of their child, the parent may use mediation in accordance with 34 CFR §300.506, the due process procedures in accordance with 34 CFR §§300.507 through 300.516, or the State complaint procedures in accordance with 34 CFR §§300.151 through 300.153.

**Question 7:** "Is it the policy of the Federal government that parents be denied the opportunity to record their own child's IEP meetings?"

**OSEP Response:** Part B does not address the use of audio or video recording devices at IEP Team meetings, and no other Federal statute either authorizes or prohibits the recording of an IEP Team meeting by either a parent or a school official. Therefore, a State educational agency or public agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP Team meetings. An OSEP letter dated June 4, 2003 regarding tape recording of IEP Team meetings, which discusses this matter in more detail, is enclosed for your information.

**Question 8:** "School districts will 'pool funds' against parents who exercise their right to due process...The LOSD Special Education Director tells committee members that LOSD contributed \$3,000 to help another school district defend itself against parent claims regarding the education of their students. The Special Education Director goes on to state that many other Oregon School Districts are helping fund legal costs of the Forest Grove School. Can school districts which are provided monies by tax payer dollars be able to 'pool' money against a parent's claim?"

**OSEP Response:** Under 34 CFR §300.517(b)(1), funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under section 615 of the Act and subpart E of the Part B regulations. Therefore, school districts may not pool any portion of funds they receive under Part B of the Act to pay attorneys' fees or costs of a party related to any action or proceeding under section 615 of the Act and subpart E of the Part B regulations. However, IDEA does not address the use of State or local funds for this purpose. If you would like further clarification regarding the use of State or local funds in the situation you describe, you may wish to contact the named ODE official whose contact information is provided in our response to question 2 above.

**Question 9:** "Please clearly define Least Restrictive Environment (LRE). The LOSD has written a new definition of LRE which serves as a financial advantage to placing students in programs of [a] district's choosing."

**OSEP Response:** The IDEA requires that each disabled child receive a FAPE in the LRE, but LRE is not defined in the IDEA or the Part B regulations. LRE requirements are found in 34 CFR §§300.114 through 300.120 of the Part B regulations. As specified in the IDEA and the Part B regulations, to the maximum extent appropriate, children with disabilities, including children in public or private institutions, must be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment may occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.114(a)(2). Please refer to our response to question 5 for an explanation of how public agencies make placement decisions in accordance with LRE requirements.

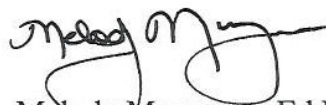
In addition, States may not use financial incentives to circumvent LRE requirements, and a State funding mechanism must not result in placements that violate the LRE requirements. Further, a State may not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability FAPE according to the unique needs of the child as described in the child's IEP. 34 CFR §300.114(b)(1).

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.

Thank you for sharing your concerns with OSEP. I hope that the information provided in this letter addresses your concerns. In addition, you can obtain further clarification concerning the questions you asked by contacting Dr. Nancy Latini, Director, Oregon Office of Special Education using the contact information provided above.

If this Office can be of any further assistance regarding this matter, or in the future, please feel free to contact me or Dr. Crayton, at (202) 245-6474.

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

Enclosures  
cc: Dr. Nancy Latini