



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

JUN 26, 2003

This letter is in response to your correspondence to Secretary Paige and Assistant Secretary Robert H. Pasternack requesting clarification of various requirements under the Individuals with Disabilities Education Act (IDEA). In your letter you specifically requested clarification in the following seven areas: (1) statewide high school proficiency assessments; (2) alternative assessments and proficiencies; (3) appropriately configured IEP teams and authority of IEP teams to make decisions; (4) direct services by the State Educational Agency (SEA) and remedies available under state complaint procedures; (5) for the filing of a complaint with the SEA; (6) due process, procedural safeguards and parents with disabilities; and (7) completeness of complaint investigations. Although you enumerated child-specific questions within each of these seven areas, our response is directed only toward those areas of IDEA that we feel specifically address the general topical areas as they relate to your questions. I understand that you have spoken with members of my staff on a number of occasions and may have addressed some of these issues during those conversations.

1. Statewide High School Proficiency Assessments

- *Is it permissible under IDEA for a school district not to include a child with a disability in the statewide high school proficiency assessment solely because the student's special education placement is out-of-state, and/or because the student attends a state-approved private school for students with learning disabilities in another state?*

The Individuals with Disabilities Education Act (IDEA) provides that a State must demonstrate that children with disabilities are included in general State and district-wide assessment programs with appropriate accommodations and modification in administration, if necessary. 34 CFR §300.138. The IEP team is responsible for determining how the child will participate in State and district-wide assessments of student achievement and determines if any individual modifications in administration are needed in order for the child to participate in the assessment. If the IEP team determines that the child will not participate in a particular State or district-wide assessment, the IEP team must state why the assessment is not appropriate for the child and how the child will be assessed. This could include identifying other tests that could be used for the same purpose or that would give the student the opportunity to achieve the same benefit. These

provisions also apply to a child with a disability placed at a private school by the public agency as a means of providing special education and related services. Specifically, if a public agency places or refers a child with a disability to a private school or facility for the purpose of providing a free appropriate public education (FAPE) to that child, the child and his or her parents have all of the rights that they would have if the child were served at the public school. 34 CFR §300.401. Therefore, the IEP team would be responsible for determining how the child will participate in State and district-wide assessments and determining any appropriate modifications or accommodations needed in order for the child to participate in the assessment. If a student is placed by his or her parent in a private school when FAPE from a public agency program or placement is not at issue, even one that has been approved by the State, the child and his or her parents do not have all the rights that they would have if the child were served by the public agency and have no individual entitlement to services under Part B. 34 CFR §§300.403(a) and 300.450-462. Therefore, the IEP team would not be required to determine how a child with a disability will participate in State and district-wide assessments.

2. Alternative Assessments

- *Is it permissible under IDEA to: (1) utilize a student's goals and objectives from the IEP and/or an education plan from the out-of-state state-approved private school as "an alternative assessment" and to serve as "alternative proficiencies" for graduation; (2) utilize "alternative proficiencies" with a student who is deemed able to take a statewide high school proficiency assessment "because the student attends school out-of-state"; and (3) for IEP goals and objectives to be considered "an alternative assessment" for a student who is deemed able to take a statewide high school proficiency assessment?*

IDEA does not address whether or not a student's IEP goals and objectives or an education plan can serve as alternative proficiencies for graduation. This is an issue that can best be addressed by the State or local school system. If a child attends an out of state school because the child is parentally placed, there is no entitlement to the same rights for a student who has been placed by the school district in a private placement.

An alternate assessment is an assessment designed for students with disabilities who are unable to participate in general State or district-wide assessments, even when accommodations or modifications in administration are provided. IDEA does not prescribe a particular alternate assessment.

- *If it is well-documented and determined by the IEP team that the student is able and will take the statewide high school proficiency assessment, is it the school district's responsibility under IDEA to provide either: (i) the required travel and associated costs to get the student to either a place where the state has an approved proctor to administer the assessment within an environment that meets the student's required accommodations; (ii) to send a state approved proctor to the location of the student's placement or (iii) provide for the training of the private school personnel to administer the assessment to the student at his placement within his normal and*

customary environment and assume all associated costs so that the student's absence from school due to travel is minimized?

Although the IDEA requires that the SEA ensures that all children with disabilities are included in general State and district-wide assessment programs, there is no requirement that the local agency provide transportation costs for a child to return from a parentally placed out-of-state placement to the local education agency for the purpose of assessing the child or provide a proctor or train out-of-state private school personnel to administer the State or district-wide assessment to a student placed out of state by the parent.

3. Appropriately Configured IEP Team and Authority of IEP Team to Make Decisions

- *Is it permissible under IDEA for an individual from the school district (such as the ex-case manager and CST supervisor/administrator) to: (1) be considered as a member of the student's IEP team if they have never attended an IEP meeting for this student; has not been identified on the student's IEPs as being present; listed on the sign-in sheet as part of the student's IEP team in any IEP meetings; and has not been invited or listed as a member of the student's IEP team on the meeting notice; (2) limit the authority of the IEP team and/or case manager/agency representative in any way; (3) decide what services and placement the school district will provide prior to the IEP meeting; (4) despite what the team discovers as "needs" in the forthcoming annual review, to decide in advance of the IEP meeting what services and placement the IEP team and/or case manager can approve; (5) limit the areas of discussion, described in IDEA Part B as necessary in an annual review to only certain items; and (6) mandate that the agency representative/case manager wait to approve what the team decided until they speak with administration?*
- *If in fact the IEP meeting outcomes were predetermined unilaterally by anyone in or outside the IEP team, is it possible that: despite the parents and others, including the case manager, actively participation as part of the IEP meeting and team, with all procedural steps taken except for the "authority issue" because of the predetermined set of services and anything beyond that requires permission of the administration, that the administration acted "unilaterally?"*
- *In a situation where the school district or agency representative was not given the authority to approve what the IEP team decided was necessary for the provision of FAPE, or authority to make independent decisions was limited in any way in advance of an IEP meeting, or the agency representative/case manager was told to wait to approve what the team decided until they spoke with administration: (a) is this annual review meeting of the IEP team a properly configured IEP team; (b) is this annual review meeting of the IEP team a valid IEP meeting; and (c) would the IEP document that resulted from this IEP meeting be a valid IEP?*

Under the Part B regulations, the public agency must ensure that the IEP team for each child with a disability consists of-

- 1) the parent of the child;
 - 2) at least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
 - 3) at least one special education teacher of the child, or if appropriate, at least one special education provider of the child;
 - 4) a representative of the public agency who is (i) qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general curriculum; and (iii) is knowledgeable about the availability of resources of the public agency;
 - 5) an individual who can interpret the instructional implications of evaluation results;
 - 6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
 - 7) if appropriate, the child.
- See 34 CFR §300.344(a).

The public agency may designate another public agency member of the IEP team to also serve as the agency representative, if the criteria in 34 CFR §300.344(a)(4) are satisfied. 34 CFR §300.344(d). Appendix A to 34 CFR Part 300, question 22, clarifies that the public agency has the discretion to determine the individual who should serve as the public agency representative, provided that the criteria in 34 CFR §300.344(a)(4) are satisfied. Question 22 also notes that it is important that “the agency representative have the authority to commit agency resources and be able to ensure that whatever services are set out in the IEP will actually be provided.” The Part B regulations, however, do not specify further which individuals may or may not serve as a “representative of the public agency” on the IEP team. There is no specific requirement for a case manager. As long as the Part B regulatory requirements are met, the public agency has the discretion to determine which individual will serve as the public agency representative on the IEP team.

Part B allows the parents or school district to have other persons who have knowledge or special expertise regarding the child to be members of the IEP team. 34 CFR §300.344(a)(6). Question 28 in Appendix A to 34 CFR Part 300 clarifies that the IEP team may, at the discretion of the parent or public agency, invite other individuals who have knowledge or special expertise regarding the child to be participants on their child’s IEP team. Under §300.344(c), the determination as to whether an individual has knowledge or special expertise within the meaning of §300.344(a)(4), shall be made by the parent or public agency who has invited the individual to be a member of the IEP team. The public agency must ensure that all the individuals who are necessary to develop an IEP that will meet the child’s unique needs and ensure the provision of FAPE to the child participate in the child’s IEP meeting.

The Part B regulations lay out the IEP team’s duties when developing and reviewing an IEP. 34 CFR §300.346 and §300.343(c). The IEP team participates in an IEP meeting that enables all participants to make joint informed decisions regarding the child’s needs

and appropriate goals as well as the services needed to support and achieve the agreed upon goals. Decisions regarding a student's special education and related service needs and his or her placement cannot be predetermined prior to the IEP team meeting. Although agency staff may come to an IEP meeting prepared with evaluation findings and proposed recommendations regarding IEP content, the public agency must make it clear to the parents at the beginning of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parent. See Question 32 in Appendix A to 34 CFR Part 300.

The Part B regulations require public agencies to ensure that during a review or revision of a child's IEP, the IEP team determines whether the annual goals are being achieved, revises the IEP if appropriate to address any lack of expected progress toward the annual goals and in the general curriculum, if appropriate, the result of any reevaluation, information about the child provided to, or by, the parents, the child's anticipated needs, and discusses other matters. 34 CFR §300.343(c). Since the regulations provide for the discussion of "other matters" during an annual IEP meeting, in general, most matters concerning the student that a team member raises may be discussed.

Under the IDEA, States are required to provide all children with disabilities with a free appropriate public education (FAPE). FAPE is defined as special education and related services that are provided at public expense, that meet the standards of the State educational agency, include an appropriate preschool, elementary, or secondary school education in the State involved and are provided in conformity with the IEP. 20 U.S.C. §1401(18); 34 CFR §300.13. Further, the Part B regulations require that at the beginning of each school year, each public agency shall have an IEP in effect for each child with a disability within its jurisdiction. Each public agency is required to ensure that an IEP is in effect before special education and related services are provided and that the IEP is implemented as soon as possible following the IEP meetings. 34 CFR §300.342.

4. Direct Services by the SEA and Remedies Available Under State Complaint Procedures

- *Under IDEA state complaint procedures, is it permissible: (1) to provide direct services to a student as a portion of the 'relief' if the state finds that the patterns and practices of the school district are noncompliant over a period of years which justify this action; (2) for the SEA to provide as part of their "individual" relief, an independent child study team either paid for by the LEA or by Direct Services through the SEA; and (3) for the SEA to provide as part of their "individual" relief, an independent child study team either paid for by the LEA or by Direct Services through the SEA if the state finds that the patterns and practices of the school district are noncompliant over a period of years which justify this action?*

IDEA does not address specific remedies for complaints. Under the state complaint procedures defined at 34 CFR §300.660(b) in resolving complaints in which it has found a failure to provide appropriate services, an SEA, pursuant to its general supervisory

authority under Part B of IDEA, must address (1) how to remediate the denial of those services, including as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child; and (2) appropriate future provision of services for all children with disabilities. How a State resolves such matters depends on the specific facts and circumstances. If parents are dissatisfied with the relief provided and the matter is one described in §300.503(a)(1)-(2) (relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child), they can file a due process complaint and seek relief from a due process hearing officer. See 34 CFR §300.507(a).

5. Provide for the Filing of a Complaint with the SEA

- *Is it impermissible under IDEA for an SEA to allow an individual to submit a complaint in “alternative formats”?*
- *Is it permissible under IDEA to provide as an accommodation for a parent with a disability for submission of a state complaint via a personal interview or conversation with the state representative with audiotape backup of the interview as “documentation” of the requested complaint?*
- *Would it be impermissible under IDEA to allow a parent with a disability an extension of time (within 4 days of 1 year statute of limitations) in which to submit the complaint if: (1) the SEA has denied the requested accommodation (e.g. audiotape of verbal filing with the SEA representative for documentation of filing of complaint); (2) the parent provides documentation that the violations are continuing; and (3) the parent requests relief in the form of compensatory services?*

Part B of the IDEA neither requires nor precludes that an SEA allow the filing of a State complaint in an alternative format. There is nothing in Part B of the IDEA that would prevent an SEA from treating as a “complaint” information that is received in an alternative format from individuals with disabilities nor is there anything to prevent the SEA from providing assistance to enable individuals with disabilities to file written complaints. Under the Part B regulations at 34 CFR §300.662(a), an organization or individual may file a signed written complaint under the procedures described in the State complaint procedures at §§300.660-300.661. This provision must be read in conjunction with the requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II) regarding communication with individuals with disabilities. Section 504 prohibits disability discrimination by recipients of Federal financial assistance and Title II prohibits disability discrimination by public entities, regardless of receipt of Federal financial assistance. Section 504 and Title II require that school districts ensure that, among other things, individuals with disabilities are not denied the opportunity to participate in or benefit from an aid, benefit, or service. 34 CFR §104.4(b)(1)(i)-(iv); 28 CFR §35.130(b)(1)(i)-(iv). Under Title II and Section 504, the SEA must take appropriate steps to ensure that communication with individuals with disabilities are as effective as communications with others, including furnishing appropriate auxiliary aids and services

necessary to file a State complaint. Under Title II, the SEA must give primary consideration to the specific types of auxiliary aids or services requested by such individuals. See 28 CFR §35.160 (2002). Therefore, it would not be inconsistent with Part B for an SEA to provide a parent with disabilities who requires it, an auxiliary aid of transcribing a complaint from an alternate format, such as an interview or audiotape, into a written complaint for the parent to sign or otherwise authenticate.

With regard to the time limitation for filing complaints with an SEA or public agency, the Part B regulations require that the complaint:

allege a violation that occurred not more than one year prior to the date that the complaint is received...unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received...

34 CFR §300.662(c). Thus, if a complainant provides evidence of a continuing violation or seeks relief in the form of compensatory services for a violation that occurred not more than three years prior to the date the complaint is received, the regulations would permit the State to accept the complaint even if it was filed more than one year after the alleged violation.

If an individual with disabilities believes that the SEA has violated Section 504 or Title II by failing to provide a needed auxiliary aid or service in order to allow them to file a State complaint, they may contact the Regional Office for Civil Rights at 75 Park Place, 14th Floor, New York, New York 10007-21466 at 212 637-6466, FAX: 212 264-3803; TDD: 870-521-2172; email: OCR_NewYork@ed.gov.

6. Due Process, Procedural Safeguards and Parents with Disabilities

- *Is it permissible under IDEA for an SEA to: (1) make provisions for legal representation (a qualified lay advocate or attorney who specializes in or has experience in the area of special education) in a due process hearing, mediation, or state complaint process as an accommodation for a parent with a disability, which prevents them from representing their child or themselves pro se in a due process hearing; (2) utilize IDEA funds to provide for legal representation (a qualified lay advocate or attorney who specializes in or has experience in the area of special education) in a due process hearing, mediation, or state complaint process as an accommodation for a parent with a disability, which prevents them from representing their child or themselves pro se in a due process hearing?*
- *If it is permissible under IDEA to provide representation as described in #1 and #2 above, and an SEA refused to provide this accommodation, where would a parent appeal for financial assistance in gaining the representation required*

The procedural safeguards provision described at 34 CFR §300.507(a)(3) allows that when a due process hearing is requested, the public agency shall inform the parent of any

free or low-cost legal and other relevant services available in the area if (1) the parent requests the information or (2) the parent or the agency initiates a hearing. The final regulations implementing IDEA do not permit the SEA to use Part B funds to provide or pay for legal representation for any complainant under any circumstances. (See 34 CFR §300.621 for allowable costs.) Funds under Part B of the IDEA may not be used to pay attorneys' fees or costs of a party related to an action under section 615 of the Act and subpart E of this part. (See 34 CFR §300.513(b)(1) for attorney's fees.)

7. Completeness of Complaint Investigations

- *If an individual files a very broad state complaint alleging "denial of FAPE" due to gross procedural violations by the school district, stating in their complaint the violations are "too numerous to delineate here," is the SEA responsible for: (1) identifying all the procedural violations within the documentation given to them by the complainant or must the complainant find and identify/allege every single violation for the SEA; and (2) identifying all the procedural violations within the documentation given to them by the complainant in order to receive a finding of facts on all the violations?*
- *If an individual files a complaint alleging 3 or 4 violations by the LEA and the documentation provided to the SEA contains information which clearly reveals many more serious violations over multiple years, is the SEA responsible for documenting those violations not alleged in the complaint but found during their "investigation" and insuring that the violations are placed in the finding of facts and subsequent corrective action?*
- *An SEA finds a school district in noncompliance for not having a complete IEP in place and issues a corrective action plan directing the school district to hold an IEP meeting and put in place an appropriate and complete IEP, which includes all the components required under IDEA and NJ State Regulations. The LEA develops a corrective action and as part of the approval process the LEA forwards a copy of the student's IEP. In the SEA's review of the IEP for corrective action to insure all components of the IEP are present, is the state also responsible for noting and correcting any blatant violations in the content of the IEP or are they limited to only insuring that the previous violations are corrected?*

See response to #5. In filing a complaint, the state complaint procedures require that for an individual or organization filing a signed written complaint, the complaint must include: (1) a statement that a public agency has violated a requirement of Part B of the Act and (2) the facts on which the statement is based. 34 CFR §300.662(b). The SEA must issue a written decision to the complainant that addresses *each allegation* in the complaint and contains (1) findings of fact and conclusions and (2) the reasons for the SEA's final decision. 34 CFR §300.661(a)(4). Given these requirements, it is incumbent upon the complainant to clearly identify each allegation and supporting facts in order for the SEA to review all relevant information in a timely manner.

The SEA is responsible for monitoring and ensuring that the requirements of the IDEA are met. See 20 U.S.C. §1412(a)(11); 20 U.S.C. §1232d(b)(3). If, in the course of its complaint resolution, the SEA uncovers other violations not alleged in the complaint, the State has a duty to enforce the obligations under the IDEA but there is no requirement that the SEA's decision address or make specific findings with respect to these other violations that were not alleged in the complaint. See 34 CFR §300.661(a)(4). Lastly, the SEA complaint procedures must include procedures for effective implementation of the SEA's final decision, including (1) technical assistance activities with the LEA; (2) negotiations and; (3) additional corrective actions to achieve compliance. 34 CFR §300.661(b)(2).

We hope that the above information is helpful. If you have specific allegations of violations of Part B of IDEA, you may file a signed written complaint with the New Jersey Department of Education, Office of Special Education Programs at P.O. Box 500, Trenton, New Jersey 08625.

Sincerely,



for
Stephanie S. Lee
Director
Office of Special Education Programs

cc: Barbara Gantwerk
New Jersey State Director of Special Education