UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

THE ASSISTANT SECRETARY

FEB -6 2007

Kathryn M. Daugherty, Ph.D.
704 Breckland Drive
Seven Fields, Pennsylvania 16046

Dear Dr. Daugherty:

This letter is in response to your correspondence of September 25, 2006,which was forwarded to us by Senator Santorum. You requested clarification on 12 questions related to language in the final Part B regulations in 34 CFR Part 300 implementing changes made by the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). Your questions specifically address the areas of reevaluation and the provision of a free appropriate public education (FAPE). A summary of your questions, and our responses, appear below:

Question 1: Must a public agency obtain parental permission before initiating the review of existing data?

- Response: No. The public agency is not required to obtain parental consent before reviewing existing data as part of an evaluation or a reevaluation. 34 CFR §300.300(d)(1)(i). The review of existing data is part of the evaluation process. Section 300.305(a), consistent with section 614(c)(1) of IDEA, states that, as part of any reevaluation, the individualized education program (IEP) Team and other qualified professionals, as appropriate, must review existing evaluation data on the child, and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child continues to have a disability, and the educational needs of the child.

Question 2: May a public agency pursue permission to waive the reevaluation before any review of extant data occurs?

- Response: Yes. A reevaluation must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 CFR §300.303(b)(2). The opportunity for a parent and the public agency to agree that a reevaluation is unnecessary occurs before a reevaluation begins. Therefore, a parent and a public agency may agree that a reevaluation is unnecessary before the review of existing evaluation data occurs. The review of existing data is part of the reevaluation process and does not occur if the parent and public agency agree that a reevaluation is unnecessary.

Question 3: May a review of extant data alone, with the finding that no additional data are needed, constitute a reevaluation in toto?

- Response: Yes. Based on the review of existing evaluation data, and input from the child's parents, the IEP Team and other qualified professionals, as appropriate, must determine whether additional data are needed to determine whether the child continues to be a child with a disability, and the educational needs of the child; the present levels of academic achievement and related developmental needs of the child; whether the child continues to need special education; and whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum. 34 CFR §300.305(a)(2). If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of: (i) that determination and the reasons for the determination; and (ii) the right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs. 34 CFR §300.305(d)(1). Under these circumstances, the public agency is not required to conduct an assessment unless requested to do so by the child's parents. 34 CFR §300.305(d)(2). If the parents do not request an assessment, then the review of existing data may constitute the reevaluation.

Question 4: If the opportunity to waive a reevaluation occurs only after the IEP Team has reviewed extant data, how can the review of existing data be part of the reevaluation process?

- Response: As noted above, a parent and a public agency may agree that a reevaluation is unnecessary before the review of existing evaluation data.

Question 5: Is the Office of Special Education Programs (OSEP) distinguishing between two different types of reevaluation--one that is coterminous with the review of extant data by the IEP Team and another that occurs after the review of extant data indicates the need for additional data?

- Response: No, OSEP is not distinguishing between two different types of reevaluation. As noted above, the review of existing data is part of the reevaluation process. If the review of existing evaluation data indicates additional data are needed, the public agency must administer such assessments and other evaluation measures as may to be needed to produce the necessary data. 34 CFR § 300.305(c).

Questions 6 & 7: When does the reevaluation commence: when the extant data are reviewed or after they are reviewed and it is determined that more data are needed? Also, where in this process is the permission to reevaluate issued to the parent (before or after the review of extant data)?

- Response: The reevaluation commences with the review of existing data in accordance with 34 CFR §300.305(a). As noted above, the public agency is not required to obtain parental consent before reviewing existing data as part of an evaluation or a reevaluation. 34 CFR §300.300(d)(1)(i). After the review of existing evaluation data, the public agency must obtain informed parental consent, in accordance with 34 CFR §300.300(a)(1), prior to conducting any additional assessments needed for a reevaluation. Additional assessments may be necessary if the IEP Team and other qualified professionals determine that additional data are needed or the parent requests an assessment to determine whether the child continues to have a disability and to determine the educational needs of the child.

Questions 8 & 9: In every third year, must the IEP Team be convened twice, once to review extant data, and the second to renew the yearly IEP? Should the student's file contain documentation that two IEP invitations (and related follow-up calls) were made--one for the first IEP conference to review extant data, and the second for the IEP conference to develop the IEP?

- Response: No. There is no requirement in the statute or the regulations that the IEP Team must be convened twice. Section 300.305(b) states that the group described in paragraph (a) of 34 CFR §300.305 (e.g. the IEP Team and other qualified professionals, as appropriate) may conduct its review without a meeting. Therefore, it is not necessary to convene the IEP Team twice every third year in order to review existing data and to renew the yearly IEP. In addition, 34 CFR §300.324(a)(5) states that to the extent possible, the public agency must encourage the consolidation of reevaluation meetings for the child and other IEP meetings for the child.

Question 10: How is the agreement or "understanding" between a parent and the public agency to be documented that a reevaluation is unnecessary?

- Response: When a parent and public agency agree that a reevaluation is unnecessary, there is no requirement in the statute or the final regulations that the public agency document the agreement.

Questions 11 & 12: Scenario: Parents who reside in school district A unilaterally (and without expressing a need for FAPE from their district of residence) enroll their child in school district B in a private school. After enrollment, the child's inability to function at this school's level of expectations, the parents contact school district B and request an evaluation. School district B conducts the evaluation and finds that the child is eligible as mentally retarded. School district B (fulfilling the original statutory requirements of all of the IDEA legislation) invites the parents to an IEP conference within thirty days after the completion of the Evaluation Report. The parents do not want "equitable" participation at the private school; they want an IEP (not in their district of residence) but in school district B. Is school district B (the district of non-residence) then required to place the child outside of her regular district, providing all of the programs and services in the IEP including transportation from the child's home in school district A to

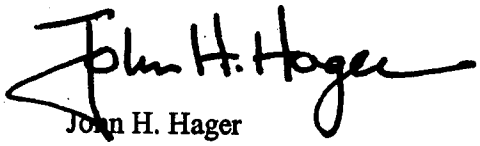
school district B? If so, may school district B charge back to school district A (the district of residence) for these services?

- Response: While school district B where the private school is located has an obligation to consider the child for equitable participation services in accordance with 34 CFR §§300.130 through 300.144, it does not have an obligation to make FAPE available to the child. Because the district of residence is generally responsible for making FAPE available, if the parents desire FAPE, school district A, the district of residence, would be responsible for making FAPE available to the child. Subject to parental consent, school district B could provide school district A with a copy of the child's evaluation. See 34 CFR §300.622(b)(3).

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.

We hope that you find the responses to your questions helpful. If you need further assistance, please feel free to contact my office.

Sincerely,



John H. Hager