



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

OCT 13 2010

Lynne Marie Price, Part C Coordinator
Early Steps Program, Children's Medical Services Network
Florida Department of Health
4052 Bald Cypress Way SE, Bin A06
Tallahassee, Florida 32399-1701

Dear Ms. Price:

This is in response to the December 7, 2009, letter from the Florida Department of Health (FDOH) to the Office of Special Education Programs (OSEP) requesting clarification about whether FDOH must provide parents with a copy of a test protocol that contains personally identifiable information about their child as part of their child's education records¹ under Part C of the Individuals with Disabilities Education Act (IDEA). The letter also asked whether: (1) Federal copyright laws prohibit the copying and distribution of copies of the test protocol that contains personally identifiable information, if the protocol is copyrighted; (2) FDOH and its early intervention service (EIS) providers may provide parents with a copy of the test protocol that contains personally identifiable information if it is protected under copyright law; and (3) FDOH may provide an original or a copy of the test protocol that contains personally identifiable information to the local educational agency (LEA), with parental consent, upon a child's transition at age three from the IDEA Part C program to the IDEA Part B preschool program.

COPYRIGHT LAW

Test protocols commonly refer to written instructions on how a test must be administered and the questions posed. Generally, these test protocols are original creations of independent authors and/or organizations. Therefore, they may be protected by the U.S. Copyright Act of 1976, the Digital Millennium Copyright Act of 1988, as well as other State, Federal, and international acts and conventions. If a given test protocol is copyrighted, it may not be reproduced, transmitted, distributed, publicly displayed, nor may a derivative work be created therefrom, without express permission from the copyright owner, unless such use is allowed under the Fair Use Doctrine.

The Office of Special Education and Rehabilitative Services (OSERS) has noted that if a document is copyrighted, the IDEA's inspection and review rights generally do not implicate copyright law. Specifically, the Analysis of Comments and Changes to the 1999 IDEA Part B regulations states:

¹ The child records referenced in the IDEA Part C regulations in 34 CFR §303.402, which refer to "records . . . dealing with the child" and "records about the child" has the same meaning as "education records" in 34 CFR §§300.560-300.576 (of the IDEA Part B regulations in effect prior to October 13, 2006). The IDEA Part C regulations in 34 CFR §§303.402 and 303.460(b) incorporate the confidentiality procedures in 34 CFR §§300.560-300.576 of the previous IDEA Part B regulations in effect prior to October 13, 2006. These provisions are now found in the revised IDEA Part B regulations currently in effect at 34 CFR §§300.610-300.627. (Where applicable, we will refer to the current regulations in the text of this response and reference the previous regulations in a footnote). Under IDEA sections 617(c) and 639(a)(2), codified in 20 U.S.C. §§1417(c) and 1439(a)(2), and applicable IDEA Part C regulations in 34 CFR §§303.402 and 303.460, each State must include in its statewide Part C system procedural safeguards that the State will follow to ensure the protection and confidentiality of personally identifiable information collected, used, or maintained under IDEA Part C.

[P]ublic agencies are required to comply with the provisions of IDEA and FERPA [Family Educational Rights and Privacy Act of 1974], and must ensure that State law and other contractual obligations do not interfere with compliance with IDEA and FERPA. Federal copyright law protects against the distribution of copies of a copyrighted document, such as a test protocol. Since IDEA and FERPA generally do not require the distribution of copies of an education record, but rather parental access to inspect and review, Federal copyright law generally should not be implicated under these regulations.

There is nothing in the legislative history of section 615(b)(1) of the [IDEA] to suggest that it expanded the scope of information available to parent examination beyond those records that they would have access to under FERPA.

64 Fed. Reg. 12606, 12641 (March 12, 1999) (Analysis). However, because the question here is not about a test protocol document, but rather a test protocol that contains personally identifiable information about a child and is part of a child's education records, we address this question further below and note that our discussion below is consistent with OSERS's Analysis in 1999.

CONDITIONS UNDER WHICH A TEST PROTOCOL IS CONSIDERED PART OF A CHILD'S EDUCATION RECORD

The term "education records" under IDEA is defined as "the type of records covered under the definition of 'education records' in the regulations implementing the [FERPA]."² Under the FERPA regulations, the term "education records" means those records that are ... directly related to the student... 34 CFR §99.3 ("Education records").

A document such as the test protocol by itself is not part of a child's education record unless it includes personally identifiable information about a child. "A test protocol or question booklet which is separate from the sheet on which a student records answers and which is not personally identifiable to the student would not be part of his or her 'education records'." Analysis, 64 Fed. Reg. at 12641. FDOH's letter indicates that the child's information is integrated throughout the test protocol that is the subject of FDOH's inquiry. This child-specific information is factual, personally identifiable information and reflects the child's level of functioning in the five major developmental areas reflected in IDEA sections 632(5)(A)(i) and 636(d)(1), and 34 CFR §§303.322 and 303.344(a). This child-specific information is used to determine a child's eligibility and need for services under Part C of the IDEA. Thus, we conclude that as described by FDOH, the test protocol that contains personally identifiable information in this case is an "education record" under IDEA Part C.

RIGHT TO INSPECT AND REVIEW CHILD'S RECORDS

Under the IDEA Part C regulations, which incorporate relevant confidentiality provisions under the Part B regulations, parents must be

² Both 34 CFR §300.560(b) of the previous IDEA Part B regulations (which applies to IDEA Part C through 34 CFR §303.402) and 34 CFR §300.611(b) in the current regulations refer to the definition of "education records" in FERPA. FERPA is codified in 20 U.S.C. §1232g and the FERPA regulations are in 34 CFR Part 99. The provisions in 34 CFR §303.402 and the note following 34 CFR §303.460 confirm that, under IDEA Part C, these FERPA definitions and regulations apply to Part C of the IDEA.

afforded the opportunity to **inspect and review their child's records relating to evaluations and assessments, eligibility determinations**, development and implementation of IFSPs, individual complaints dealing with the child, and any other area under . . . [Part C] involving records about the child and the child's family.

34 CFR §303.402 (emphasis added). The right to inspect and review a child's records includes the right to request that the State provide copies of the child's records "if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records." 34 CFR §300.613(b)(2).³ The right to inspect and review the child's education records also includes the "right to a response from the participating agency to reasonable requests for explanations and interpretations of the records." 34 CFR §300.613(b)(1).⁴

In a situation where a copyrighted document has been made part of a child's education record because it includes child-specific information, the State lead agency may wish to contact the copyright holder to discuss whether a summary or report of the child's evaluation and assessment results can be prepared that can be provided to the parents as part of the child's education record, in lieu of providing a copy of the copyrighted document. Such a summary or report would provide parents with the necessary and pertinent information regarding their child's developmental functioning and areas of strengths and need. The State lead agency may identify other alternatives to provide parents with the rights under IDEA Part C to inspect and review their child's test protocol that contains personally identifiable information, if such records are copyrighted documents.

Separately, we note that the State lead agency must provide parents with an explanation of the results of their child's evaluation and assessment as part of the notice that must be provided to parents under 34 CFR §303.403(b) before the agency proposes or refuses to initiate or change the identification, evaluation, or placement their child, or the provision of appropriate early intervention services to the child and the child's family. This notice pursuant to 34 CFR §303.403(b) must provide an explanation of the child's evaluation and assessment results in a manner that would adequately inform the parent about how and in what areas the child was evaluated and assessed, and include the child's data or performance against such measures in order to explain the basis of the child's eligibility determination. A summary or report would both meet this requirement and not require the State lead agency to provide a copy of the test protocol that includes both questions and child-specific personally identifiable information.

ORIGINALS vs. COPIES

FDOH also asked whether it could provide an original or a copy to the LEA when a child receiving services under IDEA Part C transitions at age three from the IDEA Part C program to the IDEA Part B program and the State lead agency is not the SEA. As part of this transition period, if the parent consents, the State lead agency must provide the LEA the specific education

³ The language in the current Part B regulation at 34 CFR §300.613(b)(2) was previously in 34 CFR §300.562(b)(2) of the Part B regulations in effect prior to October 13, 2005, which is incorporated by reference by 34 CFR §303.402.

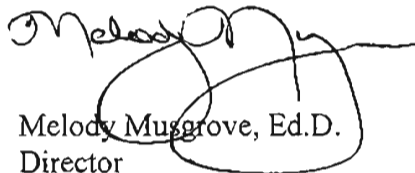
⁴ The language in the current Part B regulation at 34 CFR §300.613(b)(1) was previously in 34 CFR §300.562(b)(1) and (3) of the Part B regulations in effect prior to October 13, 2006, which is incorporated by reference by 34 CFR §303.402.

records (including the test protocol that contains personally identifiable information) that the parent has requested be sent to the LEA. The LEA, upon receipt of the child's education records, must protect the records under the applicable confidentiality requirements in Part B of the IDEA and FERPA. However, the IDEA is silent regarding whether the State lead agency must provide the original or a copy of a child's education records when the child transitions from IDEA Part C to Part B. In addition, the document retention provisions in the General Education Provisions Act (GEPA) and the Education Department General Administrative Regulations (EDGAR) do not require that original documents be maintained. *See*, 20 U.S.C. §1232f(a); 34 CFR §80.42(b). Thus, although the State lead agency must maintain certain records under the IDEA, GEPA, EDGAR (and possibly other applicable statute of limitations and records retention laws), IDEA, GEPA and EDGAR do not require the State lead agency to maintain originals of documents.

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 appreciate FDOH's commitment to ensure the provision of early intervention services to infants and toddlers with disabilities and their families. If you have further questions, please contact Hillary Tabor at (202) 245-7813, the OSEP Part C State Contact for Florida.

Sincerely,

A handwritten signature in black ink, appearing to read "Melody Musgrove", with a large, stylized flourish underneath.

Melody Musgrove, Ed.D.
Director
Office of Special Education Programs