



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

August 1, 2013

Michael I. Inzelbuch, Esq.
Sovereign Bank Building
555 Madison Avenue
Lakewood, New Jersey 08701

Dear Mr. Inzelbuch:

This is in response to your September 14, 2012 electronic mail (email) correspondence to, and follow up conversation on March 12, 2013 with, staff in the Office of Special Education Programs (OSEP), U.S. Department of Education, regarding provisions in the Individuals with Disabilities Education Act (IDEA) and its implementing regulations at 34 CFR Part 300. You ask for clarification regarding two scenarios, the first pertaining to the dispute resolution procedures in 34 CFR §300.507 and the second pertaining to observations conducted as a part of an independent educational evaluation (IEE) in 34 CFR §300.502. Your specific questions and OSEP's responses follow.

Scenario: An individual files a due process complaint consistent with 34 CFR §300.507 that is deemed sufficient by the due process hearing officer consistent with 34 CFR §300.508(d). Subsequently, the local educational agency (LEA) allegedly violates another IDEA provision when it fails to issue the parent a response to the due process complaint stating why the LEA is refusing to take action as required by 34 CFR §300.508(e)(1)(i).

Question 1: In addressing the subsequent concern, may the parent file a State complaint that could be simultaneously addressed through the State complaint procedures in 34 CFR §§300.151 through 300.153 or must the parent wait to file the State complaint until the first matter is fully adjudicated by the due process hearing officer? Alternately, may the parent include the subsequent allegation as a part of the due process complaint that has already been deemed sufficient?

OSEP's Response: First, it should be noted that under 34 CFR §300.508(e)(1), the requirement to provide a response within 10 days of receiving a due process complaint only applies if the LEA has not sent a prior written notice under 34 CFR §300.503 regarding the subject matter of the complaint. We will address your question under the assumption that, in the scenario above, no prior written notice had been sent and the failure to provide such notice under 34 CFR §300.503 was raised in the due process complaint.

In your inquiry, you stated that your understanding was that the due process complaint procedures would be the appropriate remedy. That understanding is correct. In your scenario, the parent seeks relief because of the LEA's failure to comply with 34 CFR §300.508(e)(1), where the LEA failed to provide the parent with either a prior written notice about the matter that is the subject of the parent's due process complaint, or a response to the due process complaint stating why the LEA is refusing to take the action sought by the complaint. Because this is the type of relief that is related to the due process complaint, and could eventually be the subject of the due process hearing if the matter is not otherwise resolved, we believe that, under the specific scenario you described, this is a matter that falls within the jurisdiction of a due process hearing officer.

Question 2: Where the parents of a student with a disability have selected an evaluator for the purpose of conducting an IEE at public expense pursuant to 34 CFR §300.502, may the LEA prohibit the evaluator from observing the child in the educational setting, or limit the observation by requiring that all of the evaluators questions be pre-approved by the LEAs counsel?¹

OSEP's Response: Section 300.502(e) of the Part B regulations requires that if an IEE is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE. Further, as stated in the *Analysis of Comments and Changes* section of the August 14, 2006 final Part B regulations, the purpose of an evaluation under the IDEA is:

to determine whether the child is a child with a disability, and in the case of a reevaluation, whether the child continues to have a disability, and the educational needs of the child. It would be inconsistent with the IDEA for a public agency to limit the scope of an IEE in a way that would prevent an independent evaluator from fulfilling these purposes.

71 Fed. Reg. 46690 (August 14, 2006).

A determination must be made on a case-by-case basis as to whether public agency criteria prevent an evaluator from fulfilling these purposes.

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 any further questions, please do not hesitate to contact Rebecca Walawender, of my staff, at 202-245-7399 or by email at Rebecca.Walawender@ed.gov.

Sincerely,



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

cc: State Director of Special Education

¹ The wording of this question is reflective of the clarification you verbally posed to staff during your March 12, 2013 phone conversation and differs from that posed in your original email.