



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

February 10, 2011

Amber Mintz
Non-Attorney Advocate
528 Hill Road
Reading, Pennsylvania 19565

Dear Ms. Mintz:

This is in response to your October 11, 2010 letter in which you request that the Office of Special Education Programs (OSEP) respond to two questions. Your questions and OSEP's responses are below.

Question 1: "Does 'existing,' as used in the IDEA [Individuals with Disabilities Education Act] phrase 'review of existing data' have a reasonable 'physical location' component, and if so, what? For example, should a '*review of existing data*' include a physical review of educational records *not readily available* to IEP [individualized education program] team members (because they are stored in a special ed [*sic*] file in another office/building and adherence to policies to obtain)? Or, can this review activity be satisfied by obtaining and reviewing those that are *readily available*, such as currently implemented IEP, school-wide monitoring (i.e., grade reports attendance records, state-wide testing results), grade-wide progress monitoring and teacher input?"

OSEP's Response:

Requirement

Under 34 CFR §300.305(a)(1), the IEP Team and other qualified professionals, as appropriate, as part of an initial evaluation and as part of any reevaluation under 34 CFR Part 300, must: "Review existing evaluation data on the child, including—(i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers." Once these data are reviewed, the team decides whether additional data are needed to determine whether the child is a child with a disability, as defined in §300.8, and the educational needs of the child, in the case of an initial evaluation. For a reevaluation, the team decides whether additional data are needed to determine whether the child continues to have a disability, as defined in 34 CFR §300.8, and the educational needs of the child, whether the child continues to need special education and related services, and whether any additions or modifications to the special education and related services that the child is receiving are needed to enable the child to meet IEP goals and to participate, as appropriate, in the general education curriculum. 34 CFR §300.305(a)(2).

Analysis and Conclusion

As described in 34 CFR §300.305(a)(1), existing evaluation data on the child consist of both written and observational data. The determination of what constitutes existing evaluation data on the child is left to the IEP Team, which includes the child’s parents, and other qualified professionals, as appropriate. Under this regulation, we do not believe that an IEP Team can refrain from reviewing existing evaluation data on the child solely because it determines that the data are not stored in a location that makes them readily available to the IEP Team.

Question 2: ”May a special education teacher administer formal, standardized individual assessments (for example:, Qualitative Reading Inventory-4 (QRI-4), or Woodcock Reading Mastery Test) to a student on their (IDEA only students) caseload at their discretion *without requiring parent permission for them as a re-evaluation*, instruments that are not identified in any section of the student’s IEP nor identified as district or grade-wide assessments in public documents, **if** the sole stated purpose is to ‘update’ the Present Educational Performance Level section of the student’s IEP?”

OSEP’s Response:

Requirement

The crux of your inquiry is whether the assessment you describe is part of an evaluation, for which parental consent, as defined in 34 CFR §300.9, would be required. The term “evaluation” is defined in 34 CFR §300.15 as “procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.” In contrast, under 34 CFR §300.302, the screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation is not considered to be an evaluation for special education and related services, and parental consent is not required for such screening.

Under 34 CFR §300.303(a), a public agency must conduct a reevaluation of a child with a disability in accordance with §§300.304 through 300.311 “(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child’s parent or teacher requests a reevaluation.” Under 34 CFR §300.300(a) and (c)(1), the public agency must obtain informed parental consent prior to conducting any reevaluation, subject to 34 CFR §300.300(c)(2). One of the purposes of a reevaluation is to determine the present levels of academic achievement and related developmental needs of the child, and whether changes in the special education and related services that the child is receiving would be necessary to enable the child to achieve annual IEP goals and to participate in the general education curriculum. 34 CFR §300.305(a)(2)(ii) and (iv). If the assessment described in your inquiry is being conducted for purposes of determining whether the special education and related services that the child receives

should be changed or modified, OSEP believes it would be considered a reevaluation, for which informed parental consent is required.

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Analysis and Conclusion

You have indicated in your inquiry that the sole purpose of the assessment would be “to update the present levels of educational performance section of the student’s IEP.” Based on your inquiry, OSEP cannot determine whether the assessment you describe would be part of a reevaluation, and therefore cannot advise you specifically as to whether parental consent would be required prior to conducting such an assessment. We are enclosing OSEP’s response to an inquiry from Edward Sarzynski, dated May 6, 2008, which addressed some of the issues posed by your inquiry. We hope you find this clarification helpful in determining whether parental consent would be required prior to conducting the assessment described in your inquiry.

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 additional questions, please do not hesitate to contact Josiah Willey at 202-245-7350 or by email at Josiah.Willey@ed.gov.

Sincerely,

/s/

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

cc: State Director of Special Education
Enclosure

May 6, 2008

Edward J. Sarzynski, Esq.
Hogan, Sarzynski, Lynch, Surowka and DeWind, LLP
P.O. Box 660
Binghamton, NY 13902-0660

Dear Mr. Sarzynski:

This is in response to your January 2, 2008 letter, in which you request further clarification of the position stated in the Office of Special Education Programs' (OSEP's) September 5, 2007 letter, which addressed whether, under Part B of the Individuals with Disabilities Education Act (IDEA), a parent's written consent is required for all evaluations that are not standardized tests administered to all students. OSEP did not take the position that every evaluation and functional behavioral assessment of a child with a disability requires written consent. Section 614(a)(1)(D) and (c)(3) of IDEA and its implementing regulation at 34 CFR §300.300, require a public agency to obtain parental consent prior to conducting an initial evaluation or reevaluation. An "evaluation" is defined at 34 CFR §300.15 as procedures used in accordance with 34 CFR §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.

Based on the definition of evaluation in 34 CFR §300.15, you conclude that parental consent is not required under IDEA if an evaluation is not conducted for the purpose of determining "whether the child has a disability AND the nature and extent of special education and related services that the child needs." That is incorrect. The regulations regarding reevaluations at 34 CFR §300.303 clarify that a public agency is sometimes required to conduct a reevaluation even if there is no dispute regarding the child's eligibility. Under 34 CFR §300.303(a)(1), a public agency must conduct a reevaluation of a child with a disability "if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrants a reevaluation." As part of any reevaluation, the individualized education program (IEP) team and other qualified professionals, as appropriate, must review existing evaluation data. On the basis of that review, and input from the child's parents, the IEP team and other qualified professionals must identify what additional data, if any, 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 related services; 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. See 34 CFR §300.305(a). In some instances, additional data are not needed to determine whether the child continues to be a child with a disability, but are needed to determine whether any modifications to the child's special education and related services are needed. However, that does not mean that the evaluation does not meet the definition of an "evaluation" at 34 CFR §300.15.

You state that "if an evaluation is conducted after an initial evaluation and is NOT done to determine whether the child is still eligible as a child with a disability but rather to determine the extent of the student's progress, e.g., an evaluation by an occupational therapist, physical therapist, or speech language pathologist whose intent is not to determine whether the student still has a disability but rather to determine whether services should be increased or decreased, such an evaluation by definition should not be considered an evaluation requiring written consent." Not every evaluation to determine the extent of a student's progress is considered an "evaluation" under 34 CFR §300.15, requiring written parental consent. As we noted in the September 7, 2007 letter, evaluations of student progress occur as a regular part of instruction for all students in all schools. If such evaluations are designed to assess whether the child has mastered the information in, for example, chapter 10 of the social studies text, and are the same or similar to such evaluations for all children studying chapter 10 of the social studies text, parental consent would not be required for such an evaluation. However, an evaluation to determine whether "services should be increased or decreased" is generally considered an "evaluation" under 34 CFR §300.15; and therefore, written parental consent is required. As we noted in the September 7, 2007 letter, if the evaluation is specific to an individual child and is, "...crucial to determining a child's continuing eligibility for services or changes in those services," OSEP believes such evaluations fall under the provisions of 34 CFR §300.15 and require parental consent under the provisions of 34 CFR §300.300(a) and (c).

You also ask the following question:

If written consent has been given by a parent to an initial evaluation which included a functional behavioral assessment and consent has not been revoked, and if a school district wishes to do a subsequent evaluation or functional behavioral assessment which by definition is not an evaluation because it is not being done to determine the student's continuing eligibility for special education services, is written consent necessary for such subsequent testing?

As noted above, your conclusion that a subsequent evaluation or functional behavioral assessment, conducted after written consent has been given by a parent to an initial evaluation, is not an "evaluation" because it is not being done to determine the student's continuing eligibility for special education services" is incorrect. Typically, ongoing assessment of a child's progress with respect to behavioral goals and the effectiveness of behavioral interventions is provided through progress monitoring, including documented observations, and through interviews with staff members involved with the child on a daily basis. It would be atypical, we believe, for progress to be assessed through conducting a complete functional behavioral assessment. However, as noted in the February 9, 2007 letter to Dr. Kris Christiansen, if the public agency believes it is necessary to conduct a functional behavioral assessment for the purpose of determining whether the positive behavioral interventions and supports set out in the current IEP for a particular child with a disability would be effective in enabling the child to make progress toward the child's IEP goals/objectives, or to determine whether the behavioral component of the child's IEP would need to be revised, we believe the functional behavioral assessment would be considered a reevaluation under Part B for which parental consent would be required under 34 CFR §300.300(c).

Page 3 - Edward Sarzynski, Esq.

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 this provides the clarification you requested. If you have further questions on this matter, please contact Dr. Deborah Morrow, of my staff, at 202-245-7456.

incerely,

A handwritten signature in black ink, appearing to read "William W. Kelly". The signature is fluid and cursive, with a long horizontal stroke at the end.

Acting Director
Office of Special Education Programs

cc: Dr. Rebecca Cort