



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY
FOR SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Records
IEE
FILE

JAN 18 1989

[REDACTED]

Dear [REDACTED]:

The Office for Civil Rights of the U.S. Department of Education (OCR), Region X, has referred your letter of June 30, 1988 to this office, the Office of Special Education and Rehabilitative Services (OSERS), for reply.

Your letter raises several questions regarding the requirements of Part B of the Education of the Handicapped Act (EHA-B) and the Family Educational Rights and Privacy Act of 1974 (FERPA) (copies enclosed). The regulations referenced in your inquiry, from Title 45 of the Code of Federal Regulations (CFR), have been recodified at Title 34 CFR. Therefore, the regulations cited in the responses that follow are from Title 34 CFR.

Regarding the regulations on destruction of information at 34 CFR §300.573 your letter asks us to clarify whether:

"... the parents must just be informed about the destruction or must the agency have their permission to destroy records such as L.D. identification testing. Can the school routinely destroy records at their discretion? (i.e., between Elementary School and Junior High school.)"

Under 34 CFR §300.573, public agencies [including local school districts] are required to inform parents of children with handicaps when personally identifiable information in education records "is no longer needed to provide educational services to the child." At the parent's request, the public agency must destroy the information. 34 CFR §300.573(b). Thus, these regulations do not authorize parents to request destruction of the education records of their children when those records are still needed for educational purposes.

When the public agency informs the parents that the records are no longer needed for educational purposes, and the parents do not opt to request destruction, the public agency may destroy the child's education records, since it has determined that the records are no longer needed for educational purposes. Neither the EHA-B nor the FERPA regulations require educational agencies to provide any further notice to parents prior to the destruction of records. However, the records may be needed by the parent or the child at some time in the future in connection with applications for social security or other benefit programs.

Comment to 34 CFR §300.573. Therefore, when the parent is informed that the records are no longer needed, he/she may wish to exercise the right to inspect and review the records and request retention of desired portions. While a request to inspect and review the records is pending, the public agency may not destroy the records. 34 CFR §99.10(e).

In your second question, your letter asks whether the regulation at 34 CFR §300.562 requires school districts to provide parents, upon request, copies of "parent requested tests for L.D., i.e., Slingerland, ITPA, and Kauffman-ABC, etc." We understand from your letter that you have been advised by officials of both the Jackson County Elementary School District and the Oregon State Department of Education that "the school does not have to give the parents copies of the actual tests, only the scores."

Our response is based on the EHA-B confidentiality requirements at 34 CFR §§300.560-300.576 and FERPA at 34 CFR Part 99. Both EHA-B and FERPA contain provisions giving parents the right to inspect and review the education records of their children. See 34 CFR §300.562(a); 34 CFR §99.10(a). FERPA defines "education records" as "records [including documents, files, or other recorded information] that are directly related to a student; ... and maintained by an educational agency or institution." 34 CFR §99.3.

Clearly, the test answer sheets in this situation would be "education records" that you have the right to inspect and review. If there is a separate sheet of questions, which is not incorporated into your child's test answers, you may see this document, even though it is not "directly related" to your child. Because both EHA-B and FERPA require school districts to respond to "reasonable requests for explanations and interpretations of the records," a parent could request that the school district provide an explanation of the test results. 34 CFR §300.562(b)(1); 34 CFR §99.10(c). In many cases, providing a parent access to the test instrument would be the only way to provide an explanation and interpretation of the child's test results. In addition, the school district would be required to respond to the request for access "within a reasonable period of time, but in no case more than 45 days after it has received the request." 34 CFR §99.10(b); 34 CFR §300.562(a).1/

1/ Under EHA-B, each participating agency "shall comply with a request without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made." 34 CFR §300.562(a).

In your letter, you also state that "any record the parent has a right to see, they have the right to have a copy." EHA-B and FERPA afford parents the right to have copies of education records under limited circumstances. Under EHA-B and FERPA, parents have the right to request copies of education records "if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records." 34 CFR §300.562(b)(2); 34 CFR §99.10(d). These regulations do not define "effectively prevent;" however, officials of the U.S. Department of Education have interpreted these regulations to mean that a parent shall receive copies of the records when he or she lives too far from the school district to see the records in person. Thus, parents who have inspected and reviewed the education records of their child in person do not have the right to a copy of those records.

Your letter raises two additional questions regarding procedures for evaluating children with learning disabilities. In Question 3, your letter asks:

"... Can a determination of Learning Disability be denied on the basis that the child is not 6 months, 1 year or 2 years behind grade level or any specific amount behind. Or, could a 130 IQ working at age level only theoretically be determined L.D.?"

The regulations for evaluating children with learning disabilities are found at 34 CFR §§300.530-300.534 and 34 CFR §300.540-300.543, respectively. The Bureau of Education for the Handicapped, the predecessor to the Office of Special Education Programs (OSEP), responded by letter of January 10, 1980, to an inquiry from Susan E. O'Grady, Esq. which raises concerns similar to those in your inquiry. See 2 Education for the Handicapped Law Report at Pages 211:158-160, (copy enclosed). This letter is entirely consistent with OSEP's current policy on procedures for evaluating children with learning disabilities. Particularly relevant to your inquiry is the response to Question 3, regarding the relationship of intelligence to a determination of learning disability. For more information on Oregon's criteria for determining the existence of learning disabilities, you may wish to write to:

Elam Lantz, Jr., Executive Director
Oregon Advocacy Center
625 Board of Trade Building
310 Southwest 4th Avenue, Suite 625
Portland, Oregon 97204-2309

Finally, your letter asks: "Is there any place outside of Oregon where the existing test scores could be sent for analysis with an eye toward Independent Identification? If there is, how would we contact them?"

Under EHA-B, the parent has the right to initiate an independent educational evaluation at public expense if the parent disagrees with the evaluation conducted by the public agency. 34 CFR §300.503. The parent also has the option of initiating an independent educational evaluation at private expense, the results of which must be considered by the public agency in any decision regarding the child's special education program. 34 CFR §300.503(c)(1). Such an evaluation, whether at public or private expense, must be "conducted by a qualified examiner who is not employed by a public agency responsible for the education of the child in question." 34 CFR §300.503(a)(3)(i).

The right to an independent educational evaluation at public expense is not automatic, since a public agency may request a hearing to challenge the parent's request for reimbursement for such an evaluation. If the final decision is that the public agency's evaluation is appropriate, the parent is not entitled to reimbursement. 34 CFR §300.503(b).

For more information about sources outside of Oregon that could analyze your child's test scores, you may inquire of the Oregon Advocacy Center at the address provided above.

We appreciate your bringing these matters to our attention. If we may provide further assistance, please let me know.

Sincerely,



Madeline Will
Assistant Secretary

Enclosures

June 30, 1988

[REDACTED]

Region X - Dept. Health, Education And Welfare
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1321 Second Avenue
Seattle, Washington 98101
(206) 442-0473

REC-
JUL 1988

Sirs:

At this time I do not want to file a complaint. However, there are some questions I would like answered.

Under Title 45 Rules and Regulations for P.L. 94-142:

1). Section 121a.573 discusses the destruction of records. I need a clarification. Does this mean that the parents must just be informed about the destruction or must the agency have their permission to destroy records such as L.D. identification testing. Can the school routinely destroy records at their discretion? (ie. between Elementary School and Jr. High school.)

2). Section 121a.562 - Jackson County ESD's Susan McNamara, Talent Elementary Principal Mr. Wm. Mayer, and Oregon State Dept. of Ed's Bob Clark have all stated that the school does not have to give the parents copies of the actual tests, only the scores (these are the parent requested tests for L.D. ie. Slingerland, ITPA, Kauffman-ABC etc.) Am I reading the Law wrong? I have a copy of the Rules and Regulations and Section 99 of Title 45 and between them it basically seems to say any record the parent has a right to see, they have a right a have a copy. RIGHT? OR WRONG?

3). Section 121a.541 - Can a determination of Learning Disability be denied on the basis that the child is not 6 months, 1 year or 2 years behind grade level or any specific amount behind. Or, could a 130 IQ, working at age level only theoretically be determined L.D.?

This has not happened yet, however, there seems to be some talk flying around about ending 2nd graders not being bad enough until they are 1.5 years behind.

4). One other thing. Is there any place outside Oregon where the existing test scores could be sent for analysis with an eye toward Independent Identification? If there is how would we contact them?

Thank you for any answers you can send.

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