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

SEP 27 1990

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Assistance
Special Education Section
Arizona Department of Education
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Dear Ms. Breecher:

This is in further response to your letter to the Office of Special Education Programs (OSEP) regarding certain requirements of Part B of the Education of the Handicapped Act (EHA-B). We apologize for the delay in responding. Your questions and OSEP's responses follow:

1. Destruction of Records.

Question: How long must an evaluation center retain records of evaluations conducted on students who were referred from school districts? How long must a school district retain these records prior to their destruction?

EHA-B is a State-administered program. Therefore, the regulations at 34 CFR Part 76, as well as EHA-B's implementing regulations at Part 300, apply to the determination of how long a school district would be required to retain records of student evaluations.

Pursuant to 34 CFR §§76.730 and 76.731, States and subgrantees, i.e. local educational agencies (LEAs), must retain: (1) records to show compliance with EHA-B requirements; (2) records to show how EHA-B funds are used; and (3) other records to facilitate an effective audit. These records must be retained for a minimum period of five years following completion of the activity for which the grant or subgrant was used. See 34 CFR §76.734. However, a State educational agency's (SEA) record retention requirement may exceed the five-year Federal record retention requirement.

The regulations at 34 CFR Parts 76 and 300, do not directly impose record retention requirements on evaluation centers or specify the type of records which a State or subgrantee must provide in order to comply with Federal record retention requirements. Thus, dependent upon the documentation which a State utilizes to satisfy Federal record retention requirements, under State law, an evaluation center or school district may be required to retain records of evaluations for a minimum period of five years.

If there is no outstanding request by a parent or eligible student to review their education records, upon expiration of Federal and State record retention periods, education records may be destroyed. See 34 CFR §99.10(e). Records of evaluations which: (1) are no longer needed for educational purposes; (2) contain personally identifiable information; and (3) are not, or no longer, needed by the State to satisfy record retention requirements, must be destroyed at the request of parents. See 34 CFR §300.573.

2. Question: For those students for whom a valid address is no longer available to the district, is publication in the local newspaper sufficient to notify parents prior to the destruction of records?

The EHA-B regulations do not require a school district to inform parents prior to the destruction of a child's record. However, a parent must be notified when personally identifiable information is no longer needed to provide educational services to the child. See 34 CFR §300.573. State law determines the method by which parents are notified that their child's records are no longer needed for educational purposes.

In developing methods of notifying parents of their option to request destruction of their child's education records, public agencies should consider the confidentiality requirements of EHA-B regulations at 34 CFR §§300.560-300.576 and the Family Educational Rights and Privacy Act of 1974 (FERPA) regulations at 34 CFR §§99.30-99.37, regarding disclosure of personally identifiable information.

Your inquiry does not state the proposed content of the notification which would be placed in the newspaper. Thus, we do not have sufficient information to determine whether, if permitted by State law, notification to parents by newspaper would violate a student's or parent's privacy rights under EHA-B or FERPA.

3. Recording IEP Meetings.

Question: It is my understanding that the recording of IEP meetings is governed by local school district policy. If OSEP has issued a formal ruling on this subject, please advise of the content of that letter.

The issue of tape recording individualized education program (IEP) meetings is addressed in the Department's Interpretation on Individualized Education Program Requirements, published as Appendix C to 34 CFR Part 300. The response to question 12 states:

> The use of tape recorders at IEP meetings is not addressed by either the Act or the regulations. Although taping is clearly not required, it is permissible at the option of either the parents or the agency.

Enclosed please find a copy of OSEP Memorandum 88-17, which further clarifies the policy interpretation contained in Appendix C to 34 CFR Part 300. It is anticipated that in the near future, OSEP will be issuing further guidance clarifying previous policy guidance on this issue. We will forward a copy to you when it becomes available.

4. Children in Chapter 1 Programs.

> Question: A question has recently arisen in one of our districts regarding students, who are both in the Chapter 1 State Operated or Supported Programs for Handicapped Children program (Chapter 1 - Handicapped) and the EHA-B program. Can a student be enrolled in both programs simultaneously? Also, would there be any limitations on the dual enrollment in both Chapter 1 - Handicapped and EHA-B programs?

A student with a handicapping condition cannot be counted for the purpose of generating funds for both Chapter 1 - Handicapped and EHA-B programs. See 34 CFR §300.753(b)(4) and 20 U.S.C. 1411(a)(1)(A); 20 U.S.C. 2791. However, children aged three through twenty-one counted under the Chapter 1 - Handicapped program can receive services through EHA-B. See 34 CFR §300.300(b)(4) and §300.750 and Comment.

Under the Chapter 1 - Handicapped program, services must be provided to handicapped infants, toddlers, and children aged birth through twenty-one: (1) for whom the State is directly responsible for providing special education or early intervention services (including children in programs operated under contract or other arrangements with such a State agency); and (2) who are participating in a State operated or State supported program; or (3) who previously participated in a program described in items (1) and (2) and were receiving and continue to receive a free appropriate public education from a local educational agency program. See 20 U.S.C. 2795(a) and (b) and 20 U.S.C. 2791(d). However, if all of the children described in the preceding sentence are fully served, other handicapped children are eligible for services under the Chapter 1 - Handicapped program,

including children who are counted and served under the EHA-B program. We also refer you to the Notice of Proposed Rulemaking for the Chapter 1 - Handicapped program, published at 54 FR 42704-42714 (copy enclosed).

5. Simultaneous Due Process and Complaint Investigations.

Question: My understanding is that a parent may pursue both a complaint with the State educational agency (SEA) and a due process hearing simultaneously. Our position in Arizona is that those matters which are strictly procedural can be investigated simultaneously; however, if the due process hearing is to address substantive issues, such as "appropriateness," then the complaint investigation is suspended or limited to strictly procedural matters until the due process decision has been rendered. Please advise if this policy is consistent with OSEP policy.

Under the Education Department General Administrative Regulations (EDGAR), within 60 calendar days from the date of receipt, States must resolve any complaint that a State or a subgrantee is violating a Federal statute or regulations that apply to the EHA-B program.

See 34 CFR §76.780(a). This obligation is equally applicable to complaints raising issues regarding the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education (FAPE) to a child. OSEP has advised States that when a due process hearing request and complaint investigation have been filed simultaneously, it is appropriate for the State to postpone the complaint investigation until after the due process proceeding is completed. This is true, regardless of whether the issue in the due process hearing is procedural or substantive. However, Arizona may continue the practice of investigating procedural matters prior to obtaining the results of a due process hearing, which is taking place simultaneously. If you would like additional information regarding procedures used in the State of Arizona, please send us a copy of your State policies and procedures for our review.

I hope that this information is helpful. Please let us know if you have any additional questions.

Sincerely,

Judy A. Schrag

Judy A. Schrag, Ed.D.
Director
Office of Special Education Programs

Enclosure