UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

MAR - 8 2007

Dixie Snow Huefner
Professor, Department of Special Education
University of Utah
1705 E Campus Center Drive, Rm. 221 MBH
Salt Lake City, Utah 84112

Dear Ms. Huefner:

This letter is in response to your letter dated October 3, 2006, in which you request clarification regarding 34 CFR §§300.532(a) and 300.533 of the final regulations for Part B of the Individuals with Disabilities Education Act (Part B). The final Part B regulations, published in the Federal Register on August 14, 2006 at 71 Fed. Reg. 46540 became effective on October 13, 2006.

You ask for clarification of the language in 34 CFR §300.532(a) which gives a parent or a local educational agency (LEA) the right to request an expedited due process hearing. That regulation provides that "[t]he parent of a child with a disability who disagrees with any decision regarding placement under §§300.530 and 300.531 or the manifestation determination under §300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to §§300.507 and 300.508(a) and (b)." 34 CFR §300.532(a). You seek clarification regarding what decision would be the subject of the LEA's appeal in the expedited hearing, since you believe that no change in placement to an interim alternative educational setting could occur until the hearing officer issues a decision in favor of the LEA. We believe that the language "appeal the decision" refers to a situation where a child has been removed from the current placement pending the manifestation determination, and the LEA seeks a hearing officer's intervention to challenge the decision to return the child to the current placement as a result of the manifestation determination.

Except for drugs, weapons, or serious bodily injury offenses under 34 CFR §300.530(g), (where a child can be immediately removed for not more than 45 school days regardless of whether the misconduct is a manifestation of the child's disability), the Part B regulations provide that a child is returned to the placement from which he or she was removed for ten days following a determination that the behavior giving rise to the disciplinary action was a manifestation of the child's disability, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan. 34 CFR §300.530(f)(2). The return of the child to the placement from which the child was removed under these circumstances is tantamount to "maintaining the current placement of the child." If the LEA believes that "maintaining the current placement of the child is substantially likely to result in injury to the child or to others," the LEA may appeal that determination by filing a due process complaint to request an expedited due process hearing under 34 CFR §300.532(a). The hearing officer may order a change of placement under 34 CFR §300.532(b)(2)(ii) to an appropriate interim alternative educational

setting for not more than 45 school days if the hearing officer agrees with the LEA that maintaining the current educational placement of the child is substantially likely to result in injury to the child or to others. Under 34 CFR §300.532(b)(3), these procedures may be repeated if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

Regarding 34 CFR §300.533 (Placement during appeals), you indicate that you do not understand the meaning of this provision when an LEA requests a hearing to remove a child from his or her current placement, and ask why an LEA is permitted to remove the child to an interim educational setting before a hearing decision is issued. The regulation at 34 CFR §300.533 is clear that when an appeal has been made under 34 CFR §300.532, by either the parent or the LEA, the child's "stay-put" placement is the interim alternative educational setting selected by the child's individualized education program (IEP) Team. In most instances, we believe that the child would be placed in an interim alternative educational setting pursuant to the LEA's authority provided under 34 CFR §§300.530 and 300.531 prior to the LEA's request for an expedited due process hearing, and the LEA would be requesting that the hearing officer extend the child's placement in the interim alternative educational setting for an additional 45 school days. As explained in the Analysis of Comments and Changes published with the final Part B regulations, 34 CFR §300.533, which implements section 615(k)(4)(A) of the reauthorized IDEA, reflects ". . . Congress's clear intent that, when there is an appeal under section 615(k)(3) of the Act by the parent or the public agency, the child shall remain in the interim alternative educational setting chosen by the IEP Team pending the hearing officer's decision or until the time period for the disciplinary action expires, whichever occurs first, unless the parent and the public agency agree otherwise." Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, 71 Fed. Reg. 46540, 46726 (Aug. 14, 2006).

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 information is responsive to your request and provides the clarification you need. If you have further questions, please do not hesitate to contact this office.

Sincerely,

Alexa Posny, Ph.D.
Director
Office of Special Education Program