No. 18-1591

In the
Supreme Court of the United States

R.F., a minor child, by and through her PARENTS and next friends, E.F. and H.F.; E.F.; H.F., on their own behalves,
Petitioners,

v.

CECIL COUNTY PUBLIC SCHOOLS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Petition asserts that the circuits are divided and in disarray on the question of whether specific violations of the procedural mandates of the Individuals with Disabilities Act ("IDEA") can, themselves, constitute a denial of a free appropriate public education ("FAPE"). Respondents, Cecil County Public Schools (CCPS), in their Brief In Opposition (hereinafter "BIO") argue that the Petition should be denied because (1) there is no split among the circuits, and (2) the decision below does not misinterpret the applicable provision of the statute. For the reasons set forth below and as stated in the Petition, Respondents' arguments are without merit. This Court should grant review.

Although the question presented for certiorari is narrowly focused, Respondents obfuscate the issue, focusing on holdings regarding the treatment of procedural violations under the IDEA in general, rather than analyzing the application of the specific statutory provision which Petitioners set forth for review. The Petition asks this Court to determine whether a Hearing Officer may find, pursuant to 20 U.S.C. § 1415(E)(ii), that a child was denied a FAPE when a school district's procedural violation significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child, or whether the parents must prove separately and additionally that the child was denied a FAPE or deprived educational benefit as a matter of fact. In so doing, Petitioners request a review of the Fourth Circuit's recently crafted

three-part inquiry[1] for determining whether "a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA," Pet. App. A at 21, and a review of the Fourth Circuit's application of that test to the findings in this case.

A. There Is A Split Among The Circuits On The Issue Set Forth

In claiming that there is no split among the circuits, Respondents interject throughout their brief the argument that no circuit has held that every procedural violation is a *per se* denial of FAPE. Petitioners have not advanced such an argument and do not dispute Respondents' claim. The Petition before this Court rests on the provisions of 20 U.S.C. § 1415(E)(ii) which carve out the *exceptions* to the rule that a determination of whether the child received a free appropriate public education must generally be made on substantive, not purely procedural, grounds. Next, in arguing that there is no split among the circuits, Respondents claim that in assessing procedural inadequacies, each circuit takes a "flexible approach" and "examines the facts and circumstances of each case to determine if there was an adverse effect constituting a denial of FAPE flowing from the procedural violation." BIO at 13. However, Respondents' use of the term "flexible approach" is merely a euphemistic attempt to disguise the split

[1] As noted in the Petition for Writ of Certiorari, the Fourth Circuit has recently applied this new "three-step inquiry" to find that a school district's predetermination of a child's educational program was not a denial of FAPE. *E.S. Ex Rel. B.S. v. Smith,* No. 18-1977 (4th Cir., May 24, 2019). Pet. App. E at 243-244.

among the circuits. Respondents actually describe substantial inconsistencies between the circuits related to the question presented for certiorari – whether significantly impeding parents' participation in the decisionmaking process is itself a denial of FAPE, independent of an analysis of the extent of deprivation of educational benefit resulting from that interference.

Respondents acknowledge that the First, Second, and Eighth Circuits have held that an IEP may be considered defective if the procedural violations seriously impede the parents' opportunity to participate in the formulation process without a co-occurring loss of educational opportunity or substantively defective IEP. BIO at 14-16 citing *Roland M. v. Concord Sch. Comm.,* 910 F.2d 983 (1st Cir. 1990); *T.K. v. New York City Dep't of Educ.*, 810 F.3d 875 (2nd Cir. 2016); *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648 (8th Cir. 1999). Although the Third and Sixth Circuits reach the same finding, Respondents note that their means of getting there differs from the First, Second, and Eighth Circuits. Respondents note that in *Sch. Dist. of Philadelphia v. Kirsch*, 722 F. App'x 215 (3rd Cir. 2018) and *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755 (6th Cir. 2001), the Third Circuit and Sixth Circuit, respectively, held that a procedural violation does not constitute a denial of FAPE unless it results in substantive harm. BIO at 16-19. However, both Courts held that substantive harm exists when the school district's violation significantly impedes the parents' opportunity to participate in the decisionmaking process. *Id.*

Contrary to Respondents' claim, the Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits' decisions depart significantly from holdings in the aforementioned circuits, which is illuminated in Respondents' Brief. Respondents cite to *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997) and *DiBuo v. Bd. of Educ. of Worcester Co.,* 309 F.3d 184 (4th Cir. 2002), for the proposition that "a violation of a procedural requirement of the IDEA…must actually interfere with the provision of a FAPE." BIO at 21-22 quoting *DiBuo* at 190. Neither *Gadsby* nor *DiBuo* recognize significantly impeding parent participation in the decisionmaking process as a substantive harm. Respondents note that the Fifth Circuit adopted the Fourth Circuit's approach in *DiBuo* holding that procedural violations do not constitute a denial of FAPE "unless they result in the loss of an educational opportunity." BIO at 23 quoting *R.P. ex re. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 810 (5th Cir. 2012). Respondents further note that the Seventh and Tenth Circuits have held that procedural violations do not deny FAPE unless they result in loss of educational opportunity. BIO at 23-24 citing *M.B. ex rel. Berns v. Hamilton Se. Sch.*, 668 F.3d 851 (7th Cir. 2011) and *Sytsema ex rel. Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). The Eleventh Circuit, in *L.M.P. on behalf of E.P. v. Sch. Bd. of Broward Cty., Fla.*, 879 F.3d 1274, 1278 (11th Cir. 2018) held that "[o]nly procedural violations that cause a party substantive harm will entitle plaintiffs to relief." BIO at 25. Thus, what Respondents call a "flexible approach" is actually a clear split among the circuits, with the First, Second, Third, Sixth and Eighth Circuits holding that a procedural violation that

significantly impedes the parents' opportunity to participate in the decisionmaking process is a denial of a FAPE in and of itself, while the Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits hold that a procedural violation does not deny a FAPE unless it is additionally found to result in a substantive harm or loss of educational opportunity to the child. Even Respondents' Brief in Opposition sets forth the split among the circuits.

B. The Fourth Circuit Erred In Its Application of 20 U.S.C. § 1415(E)(ii).

1. The Fourth Circuit's "Three-Part Inquiry" Misapplies The Statutory Standard.

In arguing that the Fourth Circuit did not misinterpret the IDEA, Respondents paraphrase the court's decision, stating "'[o]ur analysis here starts and ends with' the determination that CCPS' violation had not 'significantly impeded' R.F.'s parents *[sic]* opportunity to participate in the IEP process." BIO at 29, paraphrasing Pet. App. A at 22. Notably absent from Respondents' argument is the prefatory language which controlled the court's findings. The court required separate affirmative answers to three questions: (1) whether the plaintiffs "alleg[ed] a procedural violation," (2) whether that violation "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child," and (3) whether the child "did not receive a [FAPE]" as a result. Pet. App. A at 21-22. This third step is a misreading of the statute, and it adds another element

to satisfy rather than recognizing that satisfaction of the first two steps may independently yield a finding that the child did not receive a free appropriate public education.

The plain language of the statute establishes that any one of the listed conditions is sufficient to establish a denial of a FAPE. When the statutory language is unambiguous, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States,* 242 U.S. 470, 485 (1917). The illogic of the third prong of the Fourth Circuit's test is evident if applying the same process of analysis to sections (I) and (III) of 1415(f)(3)(E)(ii). After identifying a procedural violation which "impeded the child's right to a free appropriate public education," or "caused a deprivation of educational benefit," would the court again have to analyze whether the child "did not receive [FAPE] as a result"? It is evident that the statute intends that if the procedural inadequacies meet one of the enumerated conditions, the procedural violation can be found to have constituted a denial of FAPE. If one of the specific exceptions to 1415(f)(3)(E)(i) has been established, parents are not tasked with the burden of additionally proving elements of a substantive denial of FAPE. Were that to be true, section (ii) would be completely unnecessary and meaningless; the "substantive grounds" referenced in (E)(i) alone would be the basis of the determination that FAPE had been denied, and no exceptions to the rule regarding procedural issues would be needed.

2. The Fourth Circuit Erred In Its Analysis of Whether Parents' Opportunity to Participate In The Decisionmaking Process Was Significantly Impeded.

The undisputed facts establish that CCPS changed R.F.'s placement and program without any notice to or involvement of the parents, and that data which formed the bases of summaries regarding R.F.'s progress were destroyed. The Fourth Circuit's opinion asserts that "R.F.'s parents' opportunity to participate in decisionmaking regarding R.F.'s education was not 'significantly impeded'" by CCPS's actions. Pet. App. A at 23. However, it reaches this conclusion only after conflating the analysis as to whether the violations rose to the level of significant interference with parents' involvement in the process together with questions as to whether or not those violations *also* yielded a particular result in depriving educational benefit to R.F. In discussing whether CCPS significantly impeded R.F.'s parents' rights to participate, the opinion relies on a list of questionable factors, including an assessment that increased time removed to the ICSC classroom resulted in "more special education services," that parents had objected to the number of hours in the general education classroom, and that the change in placement was "in line with [parents'] express wishes." Pet. App. A at 23. It is undisputed that the parents disagreed with R.F.'s placement at Gilpin Manor Elementary School and repeatedly requested a change of placement. Pet. App. C at 132-33. They never requested additional time in the ICSC, maintaining that R.F. had not made progress there. Their concerns were validated by the ALJ's

factual findings that R.F. made no progress toward her academic and behavioral goals. Pet. App. C at 122. Even assuming, *arguendo*, that the Fourth Circuit's characterizations were accurate, those facts are distinct from the determination as to whether the unilateral changing of R.F.'s educational services, with no notice to parents, interfered with parents' rights to participate in the development and assessment of their child's educational program.

The Fourth Circuit predicated its holding on a misstatement of the Act finding that excluding parents entirely from decisions regarding their child's placement and hours of service did not significantly impede their opportunity to participate in the decisionmaking because it did not *also* impede the child's right to a FAPE.

Respondents' mischaracterization of the facts to which the "significantly impeded" standard should be applied is misleading. Respondents argue that only the period from September 2016 into December 2016 can be considered by this Court because Petitioners did not specify in their due process complaint that the violation was ongoing. BIO at 1, fn 1. This argument is disingenuous; at the time the complaint was filed, Petitioners were unaware that the violations had recurred and were ongoing. Parents do not have daily access to information about the actions of school personnel, and they were kept unaware that CCPS had continued to make changes to R.F.'s educational programming without their involvement or knowledge. Because Maryland rules severely limit discovery in administrative hearings to only Requests for

Production of Documents, parents are denied access to the same information the school system has regarding the child's education. See COMAR §28.02.01.13. Pre-hearing depositions are prohibited, thus it was not until the testimony of a CCPS witness during the hearing that R.F.'s parents learned that R.F. had been placed back in general education academic classes—which had previously been determined to be inappropriate for her. The unilateral changes to R.F.'s service hours and placement were ongoing and had continued past the date of the last IEP meeting. See Pet. App. F at 248-250.

This Court noted in *Schaffer v. Weast*, 546 U.S. 49, 61 (2005), that the Act's procedural protections "ensure that the school bears no unique informational advantage." However, during the administrative proceedings, Respondents had a clear upper hand in access and control of information about continuing violations which R.F.'s parents, to their great disadvantage, had no opportunity to discover prior to the hearing.

Respondents pronounce that

> the Fourth Circuit was, on these facts, unable to conclude that CCPS' interference with R.F.'s participation rights was a *[sic]* significant enough to constitute a substantive violation of the IDEA that could be cured by the requested remedy of a private placement.

BIO at 30 citing Pet. App. A at 23-24. Given that R.F.'s parents were excluded from the decision to change her educational program, it is hard to imagine what the

Court would consider a more significant impediment to parent participation. In essence, the Fourth Circuit held that CCPS' change of R.F.'s educational program without any parent participation in the decisionmaking process did not significantly impede the parents' opportunity to participate in the decisionmaking process.

Respondents' Brief rewords the Fourth Circuit's holding regarding the school's destruction of the data used to evaluate R.F.'s progress in a manner that is somewhat misleading. Respondents state that the court "noted that the quarterly progress reports compiled using data sheets were available to R.F.'s parents" and did not significantly interfere with the parents' participation rights. BIO at 30. The Court's opinion does not state that progress reports were "compiled using data sheets." Rather it states that the progress reports were summaries of the data Mr. K. had collected. Pet. App. at 24. The opinion makes no reference to "data sheets," only raw data, which Mr. K. summarized. *Id.* If R.F.'s parents had been provided data sheets they could have conducted an independent assessment of R.F.'s progress. Mr. K's summaries were his interpretation of the data he collected, and he testified that he destroyed the raw data because someone else could have interpreted it differently. Pet. App. F at 247.

Data collection is identified on R.F.'s IEP as the means by which progress toward her goals was to be measured. Thus, interpretation of the data was central to any assessment of R.F.'s progress and considered an educational record. The Act specifically notes the

parents right to "examine all records relating to …the provision of a free appropriate public education to the child." § 1415(b)(1). Access to *all* records is key to the parents' opportunity to participate in the decisionmaking process. When records are destroyed, as in this case, that access is denied. This Court has reasoned that parents "are not left to challenge the government without a realistic opportunity to access the necessary evidence. *Schaffer* at 61. Even though a subpoena *duces tecum* was issued to Mr. K. to bring the data to the hearing, R.F.'s parents, and their experts, were denied the evidence they needed. Raw data is not unlike test protocols and the U.S. Department of Education has stated that parents are entitled to access to test protocols. See *Letter To Price*, 57 IDELR 50 (OSEP, October 13, 2010, App. 1 at 2.). A summary of the raw data is an individual's interpretation of the data, in this case Mr. K.'s, in the same way a report of an evaluation is the writer's interpretation of the test protocol. As Mr. K. testified, "raw data can be perceived in many ways." Pet. App F at 247. The Fourth Circuit's holding that Mr. K.'s summaries provided R.F.'s parents access to her educational records misses the importance of the parents having access to the "necessary evidence" to challenge the school system. In *Schaffer,* this Court recognized that

> [s]chool districts have a 'natural advantage' in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and share information with them.

Id. at 60. Thus, the Fourth Circuit erred in holding that it was not a violation of the IDEA to destroy R.F.'s raw data and that so doing significantly impeded R.F.'s parents' opportunity to participate in the decisionmaking process as well as submit evidence in support of her case.

CONCLUSION

The intent of Congress was to provide that some procedural violations, by and of themselves, rise to the level of a denial of FAPE. "The procedural mandates of the Act are so significant that, in some circumstances, failure to comply with the mandates 'can itself constitute the denial of a free appropriate education.'" *J.R. v. Sylvan Union Sch. Dist.,* 2008 WL 682595 (E.D. Cal. March 10, 2008) citing *Blackman v. Dist. of Columbia*, 277 F. Supp. 2d 71, 79 (D.D.C. 2003).

The Fourth Circuit's interpretation of 20 U.S.C. § 1415(E)(ii) ignores important policies Congress sought to advance with enactment of the IDEA, including "strengthening the role and responsibility of parents and ensuring [they have] meaningful opportunities to participate in the education of their children." 20 U.S.C. § 1400(c)(5)(B). Specified purposes of the Act include ensuring that the rights of parents of children with disabilities are protected. § 1400(d)(1)(B). The Fourth Circuit's opinion effectively eviscerates parents' rights and opportunity to participate meaningfully in decisions impacting their children's education.

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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57 IDELR 50
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Letter to Price
Office of Special Education Programs

N/A

October 13, 2010

Related Index Numbers
390.025 Opportunity to Examine Records
Judge / Administrative Officer
Melody Musgrove, Director

Ruling

Test protocols with personally identifiable information may be both education records and copyright protected. However, the IDEA's inspection and review requirements do not implicate copyright law unless the district distributes a copy of the record to the parent.

Meaning

Test protocols constitute education records under the IDEA and FERPA when they are intermingled with personally identifiable information. While parents have the right to request copies of education records, such as when they reside too far away to make inspection in person a reasonable option, districts risk violating copyright law if they send the parents copies of test protocols. In such a situation, the options are to find

some alternative way for the parent to inspect the records or discuss with the copyright holder whether a summary of the assessment results can be provided instead of a copy.

Case Summary

Responding to an inquiry from a state's Part C coordinator, OSEP indicated that where copyright law conflicts with the IDEA's requirement to provide copies of education records, districts should seek other ways to facilitate inspection or contact the copyright holder. OSEP observed that test protocols that include personally identifiable information are education records within the meaning of the IDEA and FERPA, and therefore parents have the right to inspect and review them. Parents also have the right to request copies of education records if the failure to provide copies would effectively prevent them from exercising the right to inspect and review records. 34 CFR 300.613(b)(1). However, test protocols also can be protected by copyright law. For that reason, when there is a need to provide a copy of the protocol to the parent, OSEP stated that the state lead agency may wish to contact the copyright holder and determine whether a summary or report of the assessment can be provided in lieu of the protocol. "Such a summary or report would provide parents with the necessary and pertinent information regarding their child's developmental functioning and areas of strengths and need," OSEP Director Melody Musgrove wrote. Otherwise, the district may need to find some alternative means for the parent to inspect the documents.

Full Text

Dear Ms. Price:

This is in response to the December 7, 2009, letter from the Florida Department of Health (FDOH) to the Office of Special Education Programs (OSEP) requesting clarification about whether FDOH must provide parents with a copy of a test protocol that contains personally identifiable information about their child as part of their child's education records[1] under Part C of the Individuals with Disabilities Education Act (IDEA). The letter also asked whether: (1) Federal copyright laws prohibit the copying and distribution of copies of the test protocol that contains personally identifiable information, if the protocol is copyrighted; (2) FDOH and its early intervention service (EIS)

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[1] The child records referenced in the IDEA Part C regulations in 34 CFR § 303.402, which refer to "records ... dealing with the child" and "records about the child" has the same meaning as "education records" in 34 CFR §§ 300.560-300.576 (of the IDEA Part B regulations in effect prior to October 13, 2006). The IDEA Part C regulations in 34 CFR. §§ 303.402 and 303.460(b) incorporate the confidentiality procedures in 34 CFR §§ 300.560-300.576 of the previous IDEA Part B regulations in effect prior to October 13, 2006. These provisions are now found in the revised IDEA Part B regulations currently in effect at 34 CFR §§ 300.610-300.627. (Where applicable, we will refer to the current regulations in the text of this response and reference the previous regulations in a footnote). Under IDEA, sections 617(c) and 639(a)(2), codified in 20 U.S.C. §§ 1417(c) and 1439(a)(2), and applicable IDEA Part C regulations in 34 CFR §§ 303.402 and 303.460, each State must include in its statewide Part C system procedural safeguards that the State will follow to ensure the protection and confidentiality of personally identifiable information collected, used, or maintained under IDEA Part C.

providers may provide parents with a copy of the test protocol that contains personally identifiable information if it is protected under copyright law; and (3) FDOH may provide an original or a copy of the test protocol that contains personally identifiable information to the local educational agency (LEA), with parental consent, upon a child's transition at age three from the IDEA Part C program to the IDEA Part B preschool program.

Copyright Law

Test protocols commonly refer to written instructions on how a test must be administered and the questions posed. Generally, these test protocols are original creations of independent authors and/or organizations. Therefore, they may be protected by the U.S. Copyright Act of 1976, the Digital Millennium. Copyright Act of 1988, as well as other State, Federal, and international acts and conventions. If a given test protocol is copyrighted, it may not be reproduced, transmitted, distributed, publicly displayed, nor may a derivative work be created therefrom, without express permission from the copyright owner, unless such use is allowed under the Fair Use Doctrine.

The Office of Special Education and Rehabilitative Services (OSERS) has noted that if a document is copyrighted, the IDEA's inspection and review rights generally do not implicate copyright law. Specifically, the Analysis of Comments and Changes to the 1999 IDEA Part B regulations states:

[P]ublic agencies are required to comply with the provisions of IDEA and FERPA [Family Educational

Rights and Privacy Act of 1974], and must ensure that State law and other contractual obligations do not interfere with compliance with IDEA and FERPA. Federal copyright law protects against the distribution of copies of a copyrighted document, such as a test protocol. Since IDEA and FERPA generally do not require the distribution of copies of an education record, but rather parental access to inspect and review, Federal copyright law generally should not be implicated under these regulations.

There is nothing in the legislative history of section 615(b)(1) of the [IDEA] to suggest that it expanded the scope of information available to parent examination beyond those records that they would have access to under FERPA.

64 Fed. Reg. 12606, 12641 (March 12, 1999) (Analysis). However, because the question here is not about a test protocol document, but rather a test protocol that contains personally identifiable information about a child and is part of a child's education records, we address this question further below and note that our discussion below is consistent with OSERS's Analysis in 1999.

Conditions Under Which a Test Protocol Is Considered Part of a Child's Education Record

The term "education records" under IDEA is defined as "the type of records covered under the definition of 'education records' in the regulations implementing the

[FERPA]."[2] Under the FERPA regulations, the term "education records" means those records that are ... directly related to the student ... 34 CFR § 99.3 ("Education records").

A document such as the test protocol by itself is not part of a child's education record unless it includes personally identifiable information about a child. "A test protocol or question booklet which is separate from the sheet on which a student records answers and which is not personally identifiable to the student would not be part of his or her 'education records'." Analysis, 64 Fed. Reg. at 12641. FDOH's letter indicates that the child's information is integrated throughout the test protocol that is the subject of FDOH's inquiry. This child-specific information is factual, personally identifiable information and reflects the child's level of functioning in the five major developmental areas reflected in IDEA sections 632(5)(A)(i) and 636(d)(1), and 34 CFR §§ 303.322 and 303.344(a). This child-specific information is used to determine a child's eligibility and need for services under Part C of the IDEA. Thus, we conclude that as described by FDOH, the test protocol that contains

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[2] Both 34 CFR § 300.560(b) of the previous IDEA Part B regulations (which applies to IDEA Part C through 34 CFR § 303.402) and 34 CFR § 300.611(b) in the current regulations refer to the definition of "education records" in FERPA. FERPA is codified in 20 U.S.C. § 1232g and the FERPA regulations are in 34 CFR Part 99. The provisions in 34 CFR § 303.402 and the note following 34 CFR § 303.460 confirm that, under IDEA Part C, these FERPA definitions and regulations apply to Part C of the IDEA.

personally identifiable information in this case is an "education record" under IDEA Part C.

Right to Inspect and Review Child's Records

Under the IDEA Part C regulations, which incorporate relevant confidentiality provisions under the Part B regulations, parents must be

> afforded the opportunity to *inspect and review their child's records relating to evaluations and assessments, eligibility determinations,* development and implementation of IFSPs, individual complaints dealing with the child, and any other area under ... [Part C] involving records about the child and the child's family.

34 CFR § 303.402 (emphasis added). The right to inspect and review a child's records includes the right to request that the State provide copies of the child's records "if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records." 34 CFR § 300.613(b)(2).[3] The right to inspect and review the child's education records also includes the "right to a response from the participating agency to reasonable requests for explanations and interpretations of the records." 34 CFR § 300.613(b)(1).[4]

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[3] The language in the current Part B regulation at 34 CFR § 300.613(b)(2) was previously in 34 CFR § 300.562(b)(2) of the Part B regulations in effect prior to October 13, 2005, which is incorporated by reference by 34 CFR § 303.402.

[4] The language in the current Part B regulation at 34 CFR § 300.613(b)(1) was previously in 34 CFR § 300.562(b)(1) and (3) of

In a situation where a copyrighted document has been made part of a child's education record because it includes child-specific information, the State lead agency may wish to contact the copyright holder to discuss whether a summary or report of the child's evaluation and assessment results can be prepared that can be provided to the parents as part of the child's education record, in lieu of providing a copy of the copyrighted document. Such a summary or report would provide parents with the necessary and pertinent information regarding their child's developmental functioning and areas of strengths and need. The State lead agency may identify other alternatives to provide parents with the rights under IDEA Part C to inspect and review their child's test protocol that contains personally identifiable information, if such records are copyrighted documents.

Separately, we note that the State lead agency must provide parents with an explanation of the results of their child's evaluation and assessment as part of the notice that must be provided to parents under 34 CFR § 303.403(b) before the agency proposes or refuses to initiate or change the identification, evaluation, or placement their child, or the provision of appropriate early intervention services to the child and the child's family. This notice pursuant to 34 CFR § 303.403(b) must provide an explanation of the child's evaluation and assessment results in a manner that would adequately inform the parent about how and in what areas the child was evaluated and assessed, and

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the Part B regulations in effect prior to October 13, 2006, which is incorporated by reference by 34 CFR § 303.402.

include the child's data or performance against such measures in order to explain the basis of the child's eligibility determination. A summary or report would both meet this requirement and not require the State lead agency to provide a copy of the test protocol that includes both questions and child-specific personally identifiable information.

Originals vs. Copies

FDOH also asked whether it could provide an original or a copy to the LEA when a child receiving services under IDEA Part C transitions at age three from the IDEA Part C program to the IDEA Part B program and the State lead agency is not the SEA. As part of this transition period, if the parent consents, the State lead agency must provide the LEA the specific education records (including the test protocol that contains personally identifiable information) that the parent has requested be sent to the LEA. The LEA, upon receipt of the child's education records, must protect the records under the applicable confidentiality requirements in Part B of the IDEA and FERPA. However, the IDEA is silent regarding whether the State lead agency must provide the original or a copy of a child's education records when the child transitions from IDEA Part C to Part B. In addition, the document retention provisions in the General Education Provisions Act (GEPA) and the Education Department General Administrative Regulations (EDGAR) do not require that original documents be maintained. See, 20 U.S.C. § 1232f(a); 34 CFR § 80.42(b). Thus, although the State lead agency must maintain certain records under the IDEA, GEPA, EDGAR (and possibly other

applicable statute of limitations and records retention laws), IDEA, GEPA and EDGAR do not require the State lead agency to maintain originals of documents.

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 appreciate FDOH's commitment to ensure the provision of early intervention services to infants and toddlers with disabilities and their families. If you have further questions, please contact Hillary Tabor at (202) 245-7813, the OSEP Part C State Contact for Florida.