



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Honorable Darlene A. Carty
Commissioner
Virgin Islands Department of Health
Sugar Estate #48
St. Thomas, USVI 00802

NOV 16 2005

Dear Commissioner Carty:

The purpose of this letter is to respond to the Virgin Islands' Department of Health (VIDH) May 31, 2005 submission of its Federal Fiscal Year (FFY) 2003 Annual Performance Report (APR) under the Individuals with Disabilities Education Act (IDEA) Part C for the grant period July 1, 2003 through June 30, 2004. The APR reflects actual accomplishments that the State made during the reporting period, compared to established objectives. The Office of Special Education Programs (OSEP) has designed the APR under the IDEA to provide uniform reporting from States and result in high-quality information across States. The APR is a significant data source for OSEP in the Continuous Improvement and Focused Monitoring System (CIFMS).

VIDH's APR should reflect the collection, analysis, and reporting of relevant data, and include specific data-based determinations regarding performance and compliance in each of the cluster areas. This letter responds to the Territory's FFY 2003 APR. OSEP has set out its comments, analysis and determinations by cluster area.

Background

OSEP's March 2, 2005 FFY 2002 APR response letter required the Territory to submit data and information in the FFY 2003 APR regarding: (1) general supervision, analysis regarding the determination of compliance of its two Health Districts, as required by 34 CFR §303.501; (2) dispute resolution, analysis of compliance with the Part C requirements at 34 CFR §303.403; (3) conducting family assessments as required by 34 CFR §303.322(d); (4) providing service coordination as required by 34 CFR §§303.23 and 303.344(g); (5) ensuring that an appropriate justification was written on the individualized family service plan (IFSP) when services were not provided in the natural environment as required by 34 CFR §303.344(d)(1)(ii); (6) providing responsive data regarding the percentage of children participating in the Part C program that demonstrated improved and sustained functional abilities; and (7) Part C transition requirements: (a) timely transition conferences as required by 34 CFR §303.148(b)(2)(i); (b) IFSP transition planning requirements as required by 34 CFR §§303.148(b)(4) and 303.344(h); and (c) notification to local educational agencies (LEAs) as required by 34 CFR §330.148(b)(1).

OSEP's September 2005 Grant Award letter to VIDH containing the Virgin Islands Part C FFYs 2004 and 2005 grants contained special conditions regarding fiscal accountability and programmatic special conditions that require VIDH to ensure: (1) evaluations and assessments

and initial IFSP meetings being conducted within 45 days of referral as required by 34 CFR §§303.321(e)(2), 303.322(e)(1) and 303.342(a); (2) timely provision of early intervention services in accordance with a child's IFSP as required by 34 CFR §§303.340(c) and 303.342(e); and (3) sufficient personnel to ensure timely evaluations and assessments and provision of early intervention services ("Special Conditions"). Reports on these three special conditions are due December 2, 2005 and April 14, 2006. OSEP will respond to these issues after receipt of VIDH's reports due under the Special Conditions.

General Supervision

Identification and timely correction of noncompliance

OSEP's March 3, 2005 FFY 2002 APR response letter required the Territory to include data and its analysis, along with a determination of compliance or noncompliance from its monitoring during the 2002-2003 reporting period. On pages 3 and 4 of the FFY 2003 APR, VIDH reported that, with assistance from the National Early Childhood Technical Assistance Center (NECTAC), it instituted a comprehensive record review of 30% of all children enrolled in the Part C program as of March and April 2005 for the purpose of identifying any compliance issues found during this record review. On pages 4 and 5, VIDH provided an analysis of the baseline data and findings from this record review. OSEP will address the results of VIDH's compliance review in the remainder of this letter under the cluster areas most closely related to VIDH's findings.

On page 6, VIDH reported that it planned to continue to implement a comprehensive record review with the goal of implementing the record review for all children each year (or a substantial sample of all children) and to analyze the results of these record reviews quarterly to determine if noncompliance issues were corrected or continued to persist. During OSEP's February 2005 verification visit to the Virgin Islands, VIDH Staff told OSEP that corrective action plans would be in place for addressing noncompliance issues, including timelines for correction no later than one year from the date of identification of the noncompliance, and would provide training and technical assistance as needed. Follow-up mechanisms, such as targeted record reviews, onsite observations, and communication with staff and families, were also to be established.

In its verification letter, issued separately, OSEP reported that VIDH's system for general supervision and monitoring constituted a reasonable approach to ensure the identification of noncompliance. OSEP further concluded in that letter that OSEP could not yet determine whether VIDH's system for general supervision ensured the timely *correction* of noncompliance because VIDH had only recently in its FFY 2003 APR began providing monitoring data that demonstrated that it was identifying noncompliance.

In the State Performance Plan (SPP), due December 2, 2005 or within 60 days of the date of this letter, VIDH must include data in response to indicator 9 that demonstrates VIDH's ability to correct noncompliance identified in its FFY 2003 APR. If VIDH cannot provide such data, it must include in the SPP its plan to ensure compliance with the correction requirement in 34 CFR §303.501(b).

Dispute resolution

OSEP's March 2005 letter requested that VIDH clarify the source of data regarding providing parents with notice of procedural safeguards and confirm whether this data indicated compliance with the Part C provisions at 34 CFR §303.403. If the data indicated noncompliance, VIDH was to include, in its FFY 2003 APR, its plan, including strategies, proposed evidence of change, targets and timelines to ensure correction of noncompliance within a reasonable period of time not to exceed one year from the date OSEP accepts the plan.

On page 2 and Attachment 1 of the FFY 2003 APR, VIDH reported that no complaints or requests for mediation or due process were filed during the reporting period. In OSEP's verification letter, OSEP noted that during its interviews in the two Health Districts, parents told OSEP that they had been informed about their rights under Part C and that they knew whom to call if they had questions or concerns. OSEP reviewed VIDH's prior written notice document to determine whether VIDH informs parents of the required information pursuant to 34 CFR §§303.420 and 303.510- 303.512. OSEP recommended revisions to the notice and VIDH revised the prior written notice. OSEP's verification letter requests that VIDH submit with the SPP, due December 2, 2005, VIDH's revised prior written notice that meets the content requirements of 34 CFR §§303.420 and 303.510-303.512.

VIDH reported that it planned to disseminate the revised prior written notice document that OSEP reviewed during its February 2005 site visit. With the SPP, VIDH must confirm in writing that it has disseminated the revised prior written notice. OSEP looks forward to the Territory providing OSEP with the information on signed written complaints, due process hearing requests, and mediations in accordance with indicators 10, 11, and 13 in the SPP, due December 2, 2005.

Personnel

On pages 15-17 of the FFY 2003 APR, VIDH reported that recruitment and retention of an adequate number of personnel was, and will continue to be, a challenge due to the physical location of and economic conditions (high cost of living) in the Virgin Islands. OSEP's September 2005 Part C FFYs 2004 and 2005 Grant Award letter to VIDH included special conditions due to continued waiting lists for evaluations and assessments and early intervention services for eligible children with disabilities and their families due to lack of sufficient early intervention personnel. VIDH reported that, over the past 18 months, VIDH recruited 10 new part-time early intervention personnel, representing 4.2 full time equivalents (FTEs). However, VIDH reported that, at the time the FFY 2003 APR was submitted (May 31, 2005), VIDH needed the following personnel: (1) 5.5 FTE direct early intervention service providers; (2) 1.5 FTE service coordinators; (3) 1 FTE office manager; and (4) 1 FTE data manager. On pages 15-17, VIDH reported its strategies for recruitment of needed personnel. However, despite these additional personnel, VIDH had not, at the time of issuance of its FFY 2005 grant award, provided OSEP with documentation that indicated that waiting lists for evaluations and assessments and provision of early intervention services had been eliminated. OSEP will respond separately to VIDH's reports due under the Special Conditions.

Collection and timely reporting of accurate data

OSEP's verification letter concluded that VIDH's system for collecting and reporting data was a reasonable (although labor intensive) approach to ensuring the accuracy of the data that VIDH reports to OSEP under section 618 of the IDEA. As cited above in this letter, VIDH undertook a comprehensive child record data collection that was to be systematized in 2005. OSEP appreciates the Territory's efforts in this area and looks forward to the Territory providing OSEP with the information regarding Territory-reported data (618 and State Performance Plan and Annual Performance Plan) that are timely and accurate in accordance with indicator 14 in the SPP, due December 2, 2005.

Comprehensive Public Awareness and Child Find System

On pages 22-24 of the FFY 2003 APR, VIDH included data and analysis regarding the performance of the State's public awareness and child find system. VIDH reported that the percentage of enrolled children increased from 3.1% (160) to 3.5% (178) of the birth to three population (5,087). OSEP appreciates the Territory's efforts to improve performance in this area and looks forward to the Territory providing the information regarding child find in accordance with indicators 5 and 6 in the SPP, due December 2, 2005.

Family Centered Services

OSEP's March 2005 letter requested that VIDH clarify its data regarding conducting family assessments and indicate whether it reflects compliance with the Part C provisions at 34 CFR §303.322(d). If the data indicated noncompliance, VIDH was to include its plan, with strategies, proposed evidence of change, targets and timelines to ensure correction of noncompliance within a reasonable period of time not to exceed one year from the date OSEP accepted the plan.

On pages 25-28 of the FFY 2003 APR, VIDH included data and analysis of its IFSP record reviews indicating that 97% of the records reviewed (30% of the enrollment in the two Health Districts) contained a family-directed assessment of the family's needs and 97% of these IFSPs contained information regarding the family's concerns, priorities and resources. OSEP appreciates the State's efforts in this area. However, on page 5 of the FFY 2003 APR, VIDH reported that family outcomes may not always have been documented in child records and included strategies on pages 6, 7 and 28 of the FFY 2003 APR to ensure documentation. OSEP appreciates the State's efforts to ensure compliance and improve performance in this area. OSEP looks forward to reviewing the Territory's plan to collect data regarding family outcomes in response to indicator 4 in the SPP, due December 2, 2005.

Early Intervention Services in Natural Environments

Service coordination

OSEP's March 2005 letter requested that VIDH provide data in its FFY 2003 APR demonstrating compliance with the service coordinator responsibility requirements of 34 CFR

§§303.23 and 303.344(g) and that each child and family has an assigned service coordinator. On page 30 of the FFY 2003 APR, VIDH reported that 100% of the records reviewed (30% sample) demonstrated that a service coordinator was assigned as soon as possible after the initial referral of the child in accordance with 34 CFR §303.521. OSEP appreciates the State's efforts to ensure compliance in this area.

Evaluation and identification of needs

On pages 34-36 of the FFY 2003 APR, VIDH included baseline data and information, required by the FFY 2002 and FFY 2003 Part C Grant Awards' Special Conditions, that evaluations and assessments were conducted in all five developmental areas as required by 34 CFR §303.322(c)(3)(ii). The data regarding provision of evaluations and assessments in five developmental areas indicated that most children (37 of 39) did not receive vision and hearing evaluations and assessments due to lack of personnel.

OSEP will require VIDH to submit its data and analysis regarding compliance with the Part C provision (the evaluation and assessment in all developmental areas) as a part of the Special Conditions for the FFY 2004 and FFY 2005 Part C Grant Awards. OSEP looks forward to the State providing the information regarding evaluations and assessments in accordance with indicator 7 in the SPP, due December 2, 2005.

Individualized family service plans (IFSPs)

45-day timeline. On pages 34 and 36 of the FFY 2003 APR, VIDH included data and information regarding compliance with the requirement that evaluations and assessments and the initial IFSP meetings are conducted within 45 days of the referral to Part C as required by 34 CFR §§303.321(e)(2), 303.322(e)(1), and 303.342 (a). As part of its limited child record review, VIDH reported monitoring data that 35 of 38 (or 92%) of records reviewed met the standard for compliance with the Part C requirement to hold the initial IFSP meeting within 45 days of referral, based on its record review described above. However, as part of its special conditions report for FFYs 2003, VIDH also provided other data for all children referred to VIDH between January 1 and March 31, 2005 that demonstrated 62% compliance with the Part C provisions to hold an initial IFSP meeting within 45 days of referral. The 45-day timeline is the subject of one of the three areas of programmatic special conditions that are part of VIDH's FFYs 2004 and 2005 Part C Grant Award. OSEP will respond separately to this issue after receipt of VIDH's progress reports due under the Special Conditions.

IFSP content and IFSP process. On pages 5 and 30, VIDH included data and information indicating the following three areas of noncompliance not previously identified by OSEP: (1) IFSPs include statements of present levels of functioning in accordance with 34 CFR §303.344(a); (2) a periodic IFSP review is conducted every six months in accordance with 34 CFR §303.342(b); and (3) an IFSP meeting is held annually to review the IFSP in accordance with 34 CFR §303.342(c). On pages 6-7 and 31-32 of the FFY 2003 APR, the Territory also included strategies, proposed evidence of change, targets and timelines designed to ensure compliance within a reasonable period of time, not to exceed one year from the date of this letter. OSEP accepts this plan. With the SPP or within 60 days of the date of this letter, the Territory

must also include data and analysis demonstrating progress toward compliance and provide a report to OSEP, with data and analysis demonstrating compliance as soon as possible, but not later than 30 days following one year from the date of this letter.

Provision of early intervention services. On pages 37 and 38 of the FFY 2003 APR, VIDH included data and information indicating the following area of noncompliance that is the subject of VIDH's FFYs 2004 and 2005 Special Conditions: that early intervention services were not provided in accordance with IFSPs as required by 34 CFR §§303.340(c) and 303.342(e). Based on the sample record review conducted in March and April 2005, VIDH reported that 28 of 34 (or 82%) infants and toddlers received all services in accordance with their IFSPs and 30 of 36 (84%) infants and toddlers received all services on the projected dates in their respective IFSPs. This is the first time VIDH provided data. OSEP will respond separately to this issue after receipt of VIDH's progress reports due under the Special Conditions. OSEP also looks forward to the Territory providing the information regarding early intervention services in accordance with indicator 1 in the SPP, due December 2, 2005.

Natural environments

OSEP's March 2005 letter requested that VIDH provide, in its FFY 2003 APR, both performance data (on the percentages of children receiving early intervention services primarily in the home, programs for typically developing children or other natural environments) as well as compliance data on whether, under 34 CFR §303.344(d)(1)(ii), all IFSPs reflect that, to the maximum extent appropriate to the needs of the child, early intervention services were provided in natural environments or a justification of the extent, if any, to which any early intervention service would not be provided in a natural environment.

The Territory included data and analysis indicating noncompliance in this area, not previously identified by OSEP, with the provision to ensure that services were provided in the natural environments and an appropriate justification was written on the IFSP when early intervention services were not provided in the natural environment as required by 34 CFR §303.342(d)(1)(ii). On pages 40-42 of the FFY 2003 APR, VIDH included trend data and information indicating that on December 1, 2003, 193 (70.5%) children were served in natural environments, including the home and settings for typically developing children. Monitoring data on page 5 of the FFY 2003 APR indicated that justifications were not included on the IFSP when Part C services were provided in a setting other than the natural environment in 8 of 27 records reviewed and a justification was appropriate in 94.5% of the records reviewed where services were not provided in a natural environment as required by 34 CFR §303.344(d)(1)(ii). Eight files in one Health District did not contain the appropriate justification and VIDH reported that training would be provided to staff in that Health District so that appropriate justifications for services not provided in a natural environment would be recorded in the future, if appropriate. VIDH also intended to continue to ensure that Part C provisions were followed.

On pages 6-7 and 41-42 of the FFY 2003 APR, the Territory also included strategies, proposed evidence of change, targets and timelines designed to ensure compliance within a reasonable period of time, not to exceed one year from the date of this letter. OSEP accepts this plan. With the SPP, the Territory must also include data and analysis demonstrating progress toward

compliance and provide a report to OSEP, with data and analysis demonstrating compliance as soon as possible, but not later than 30 days following one year from the date of this letter.

OSEP also looks forward to the State providing the information regarding early intervention services in natural environments in accordance with indicator 2 in the SPP, due December 2, 2005.

Early childhood outcomes

Under the Government Performance and Results Act of 1993, 31 U.S.C. 1116, the effectiveness of the IDEA Part C program is measured based on the extent to which children receiving Part C services demonstrate improved and sustained functional abilities in the cognitive, physical, communication, social or emotional and adaptive developmental areas. The Part C FFY 2001, 2002 and 2003 APRs requested data on the percentage of children participating in the Part C program that demonstrate improved and sustained functional abilities in the developmental areas listed in 34 CFR §303.322(c)(3)(ii). On page 43 of the FFY 2003 APR, VIDH reported that it would report its planning “with regard to demonstrating improved functional abilities” in its SPP.

The SPP instructions establish a new indicator in this area, for which States must provide entry data in the FFY 2005 APR due February 1, 2007. Absence of this information at that time will be considered in OSEP’s annual determination on the status of the Territory’s performance and compliance required under section 616(d) of the IDEA. VIDH should carefully review the instructions to the SPP in developing its plans for this collection. OSEP looks forward to reviewing VIDH’s plans in the SPP.

Early Childhood Transition

OSEP’s March 3, 2005 FFY 2002 APR response letter required VIDH to revise its target provided in the FFY 2002 APR to demonstrate compliance with the Part C transition requirements and to provide data in the FFY 2003 APR demonstrating compliance and performance with the early childhood transition conference requirements at 34 CFR §303.148(b)(2)(i) [transition meeting timelines], 34 CFR §§303.148(b)(4) and 303.344(h) [content of IFSP to include steps to support the transition of all eligible children], and 34 CFR §303.148(b)(1) [local education agency (LEA) notification for children potentially eligible under Part B of IDEA].

On pages 44-47 of the FFY 2003 APR, VIDH included data and information indicating noncompliance with the following requirements, not previously identified by OSEP: (1) transition meeting timeline requirements as required by 34 CFR §303.148(b)(2)(i); (2) content of IFSP to include steps to support the transition of all eligible children as required by 34 CFR §§303.148(b)(4) and 303.344(h); and (3) local education agency (LEA) notification for children potentially eligible under Part B of IDEA as required by 34 CFR §303.148(b)(1).

On pages 44 and 45, VIDH revised its targets as requested by OSEP to demonstrate compliance with the Part C transition requirements. Further, VIDH provided record review data from a small sample of children that had transitioned to preschool special education under Part B of the

IDEA. On page 45, VIDH reported that: (1) 15 of 20 (75% compliance) children had a transition plan in each IFSP; (2) a transition planning conference was documented in 12 of 15 records (80% compliance at least 90 days prior to the child's third birthday for children potentially eligible under Part B; and (3) 6 of 15 records showed that the LEA was notified (with parental consent)¹.

On pages 6-7 and 46-47 of the FFY 2003 APR, the Territory also included strategies, proposed evidence of change, targets and timelines designed to ensure compliance within a reasonable period of time, not to exceed one year from the date of this letter. OSEP accepts this plan. With the State Performance Plan (SPP), the Territory must also include data and analysis demonstrating progress toward compliance and provide a report to OSEP, with data and analysis demonstrating compliance as soon as possible, but not later than 30 days following one year from the date of this letter.

OSEP also looks forward to the Territory providing the information regarding effective transition in accordance with indicator 8 in the SPP, due December 2, 2005.

Conclusion

With the State Performance Plan (SPP), due December 2, 2005, or within 60 days of the date of this letter, VIDH must report to OSEP:

1. Data in response to indicator 9 that demonstrates VIDH's ability to correct noncompliance identified in its FFY 2003 APR. If VIDH cannot provide such data, it must include in the SPP its plan to ensure compliance with the correction requirement in 34 CFR §303.501(b); and
2. Its revised prior written notice under 34 CFR §303.403.

With the SPP, due December 2, 2005, or within 60 days from the date of this letter, VIDH must also submit updated data demonstrating progress toward compliance with the following requirements (and a final progress report not later than 30 days following one year from the date of this letter demonstrating compliance with the following seven Part C requirements):

1. IFSPs include statements of present levels of functioning in accordance with 34 CFR §303.344(a);
2. A periodic IFSP review is conducted every six months in accordance with 34 CFR §303.342(b);
3. An IFSP meeting is held annually to review the IFSP in accordance with 34 CFR §303.342(c);

¹ The limited circumstances when parental notification may be required by a State is addressed in OSEP's February 2004 *Letter to Elder* (copy enclosed). OSEP is available to provide further technical assistance regarding this letter should it be needed.

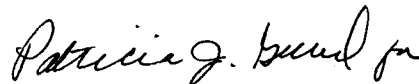
4. Appropriate justifications are included on the IFSP when an early intervention service is not provided in the natural environment as required by 34 CFR § 303.344(d)(1)(ii);
5. IFSPs meet the transition planning requirements of 34 CFR §§303.148(b)(4) and 303.344(h);
6. Transition conferences are held, with the approval of the family, at least 90 days before the child's third birthday as required by 34 CFR §303.148(b)(2)(i); and
7. The local education agency for the area is notified that a child will shortly reach the age of eligibility for preschool services under Part B as required by 34 CFR §303.148(b)(1).

Under separate cover, OSEP will address the reports required to be submitted on December 2, 2005 and April 14, 2006 under the Special Conditions for VIDH's FFYs 2004 and 2005 Part C Grant Awards that require VIDH to ensure: (1) evaluations and assessments and initial IFSP meetings being conducted within 45 days of referral as required by 34 CFR §§303.321(e)(2), 303.322(e)(1) and 303.342(a); (2) timely provision of early intervention services in accordance with a child's IFSP as required by 34 CFR §303.340(c) and 303.342(e); and (3) sufficient personnel to ensure timely evaluations and assessments and provision of early intervention services.

IDEA 2004, §616, requires each State to submit a SPP that measures performance on monitoring priorities and indicators established by the Department. These priorities and indicators are, for the most part, similar to clusters and probes in the APR. OSEP encourages the State to carefully consider the comments in this letter as it prepares its SPP, due December 2, 2005.

OSEP recognizes that the APR and its related activities represent only a portion of the work in your State and looks forward to collaborating with you as you continue to improve results for infants and toddlers with disabilities and their families. If you have questions, please contact Sheryl Parkhurst at (202) 245-7472.

Sincerely,



Troy R. Justesen
Acting Director
Office of Special Education Programs

Attachment

cc: Renee Joseph Rhymer
Part C Coordinator



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
FEB 11 2004

Mary Elder
Executive Director
Texas Interagency Council on
Early Childhood Intervention
4900 N. Lamar Boulevard
Austin, Texas 78751-2399

Dear Ms. Elder:

This is in response to your letter to the Office of Special Education Programs (OSEP) and the Family Policy Compliance Office (FPCO) requesting guidance concerning the disclosure of referral information from a lead agency under Part C of the Individuals with Disabilities Education Act (IDEA) to the State education agency (SEA) or the local education agency (LEA) under Part B. The information being disclosed is about children who will shortly turn three and transition from receiving early intervention services under Part C to potentially receiving special education and related services under Part B. You specifically requested on behalf of Texas Interagency Council on Early Childhood Intervention (TXECI), the lead agency in Texas under Part C, clarification regarding the circumstances in which parental consent is required for disclosure of this information by the lead agency. OSEP has consulted with the FPCO in responding to your letter.

The IDEA requires each State to have policies and procedures to ensure a smooth transition for toddlers receiving early intervention services under Part C to preschool or other appropriate services, including a description of how the lead agency will notify the LEA for the area in which such a child resides that the child will shortly reach the age of eligibility for preschool services under Part B. 20 U.S.C. §1437(a)(8)(A); 34 CFR §303.148. Section 637(a)(8)(A)(ii)(II) of the IDEA also requires the lead agency to convene a conference, with the approval of the parents of the child, among the lead agency, the family, and the LEA at least 90 days (and at the discretion of all such parties, up to 6 months) before the child is eligible for preschool services under Part B, to discuss any such services that the child may be eligible to receive.

To help ensure a smooth transition, Congress also included specific requirements under Part B of the IDEA for LEAs regarding transition of children from Part C to Part B. Section 612(a)(9) of the IDEA and 34 CFR §300.132 require the SEA to ensure: that children served under Part C who will participate in Part B preschool programs experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(8) of the IDEA; that by the third birthday of a child eligible under Part B, an individualized education program (IEP) or an individualized family service plan (IFSP) with appropriate content has been developed and is being implemented for the child; and that each LEA will participate in transition planning conferences arranged by the Part C lead agency.

Additionally, the SEA is responsible for ensuring that the child find responsibilities under its program are met, even if the SEA, through an interagency agreement or other mechanism, delegates to the lead agency or another agency the primary role in child find for the birth through two population. 34 C.F.R. §300.125. Since the eligibility criteria under Parts B and C are different, the child find and evaluation procedures under Part C must be followed when the purpose is to locate, identify and evaluate infants and toddlers with disabilities who may be eligible for early intervention services under Part C; and the child find and evaluation procedures under Part B must be followed when the purpose is to locate, identify and evaluate children with disabilities who are in need of special education and related services under Part B. See 20 U.S.C. §§1412(a)(3)(A) and 1435(a)(5); 34 CFR §§ 300.125 and 303.321.

If an infant or toddler is determined eligible under Part C, that infant and toddler with a disability and the family receive the early intervention services identified in the child's IFSP under Part C. At least 90 days (or up to six months depending on the State) prior to a toddler reaching the age of three (the age of initial eligibility for services under Part B), the Part C lead agency must notify the LEA for the area where the child resides that the child will shortly reach the age of eligibility for preschool services under Part B. 20 U.S.C. §1437(a)(8)(A)(ii)(I). Both the SEA under Part B and the lead agency under Part C are subject to their respective child find statutory obligations under the IDEA. See 34 CFR §§300.125 (Part B) and 34 CFR §303.148(b)(1) (Part C).

The IDEA specifically provides that the protections of the Family Educational Rights and Privacy Act (FERPA) at 20 U.S.C. §1232g (FERPA) apply to both Part B and Part C. 20 U.S.C. §§1417(c) and 1442. Specifically, IDEA sections 617 and 642 define "a State's lead agency" as a "state educational agency," and an "early intervention service provider" as an "LEA" for purposes of FERPA. In addition, FERPA defines "educational agency or institution" to include "any public or private agency or institution which is the recipient of funds under any applicable program." 20 U.S.C. §1232g(a)(3); 34 CFR §99.1. "Applicable programs" means any program for which the U.S. Department of Education has administrative responsibility, including Parts B and C of the IDEA. 20 U.S.C. §1221(c)(1). Thus records maintained for purposes of Parts B and/or C by the lead agency, the SEA or the LEA on those children referred for, or receiving, services under the IDEA are covered as "education records" under FERPA, and must be disclosed only in accordance with FERPA's requirements.

Under the IDEA, in States where the SEA, through an interagency agreement or other mechanism, has included the lead agency's participation in the SEA's child find activities, the SEA, with the lead agency, can establish procedures that allow the lead agency to refer a child to the SEA without prior parent consent in order to meet the SEA's child find responsibilities under 34 CFR §300.125. The specific information that can be included in the referral without prior parental consent by the lead agency for these limited child find purposes are the child's name, date of birth, and sufficient parent contact information (as determined by the SEA) to the SEA and/or LEA so that the SEA and LEA can meet their respective child find responsibilities.

However, the SEA may meet its child find obligations in other ways. The SEA may require instead that the lead agency or any other agency that makes referrals under the State's child find system notify the parent that the child is being referred to the SEA for child find purposes and

allow the parent an opportunity to object; if the parent objects during the period provided for objection, then the IDEA does not require that the referral be made and, consequently in this situation, parental consent is required before the referral can be made. In a State that allows parents an opportunity to object to the child find referral, the lead agency may meet its child find referral obligations in other ways. For example, the lead agency may elect, but is not required, to convene an IFSP meeting to explain to the parent the child find purposes of the referral. If the parent continues to object to the referral, the lead agency may also require the parent to confirm in writing at the IFSP meeting that the parent objects to the referral. If the parent objects to the referral, the SEA and LEA may meet their respective child find obligations through other procedures, such as general public awareness campaigns and, under these circumstances, the IDEA does not require the referral to be made and the lead agency is no longer obligated to refer the child to Part B.

In general under FERPA, personally identifiable information about a child cannot be disclosed by a public agency without first obtaining parental consent unless there is a specific exception. Specifically, you ask whether the “directory information” exception, under FERPA at 20 U.S.C. §§1232g(a)(5) and (b)(1) might permit TXECI to disclose, without parental consent, certain personally identifiable information to the SEA or LEA to meet the statutory child find duties. While the directory information exception does not apply to this situation, we have concluded that another FERPA exception does apply.

The “directory information” exception under FERPA at 20 U.S.C. §§1232g(a)(5) and (b)(1) allows a public agency to disclose information designated as “directory information” to the public without first obtaining parental consent. FERPA does not allow “directory information” to be used to link to other categories of personally identifiable information, such as disability. The disclosure of the child find referral information under the IDEA by the Part C lead agency to the LEA or SEA is not disclosure of directory information because disclosing this information on only Part C children would identify these children as infants and toddlers with disabilities, which information is personally identifiable information not permitted to be released under FERPA. Thus, the child find referral information under the IDEA by the lead agency to the Part B agency does not fall under FERPA’s directory information exception.

However, we have concluded that FERPA and its implementing regulations do not require the lead agency to obtain parental consent when the IDEA requires the lead agency to make the disclosure. As more fully explained above, the IDEA requires the lead agency to disclose some limited personally identifiable information to the LEA and/or the SEA when the SEA, through an interagency agreement or other mechanism, has included the lead agency’s participation in the SEA’s child find activities under 34 CFR §300.125. The specific FERPA exception that allows referral for child find purposes without prior parent consent is the exception to disclosure of personally identifiable information to authorized representatives of state and local educational authorities in connection with the enforcement of Federal legal requirements which relate to any Federally-supported education programs. 20 U.S.C. §§1232g(b)(3) and (b)(5); 34 CFR §99.31(a)(3)(iv) and 34 CFR §99.35(a). In this case, the disclosure of child find referral information by the lead agency to the SEA and/or LEA is required to meet the statutory child find duties under Parts B and C of the IDEA. See 20 U.S.C. §§1232g(b)(3) and (b)(5); 34 CFR §§99.31(a)(3)(iv) and 99.35(a); 20 U.S.C §§1412(a)(3) and 1437(a)(8); 34 CFR §§300.125 and

303.148(b)(1). Under this FERPA exception, the education records disclosed by the lead agency to the SEA or LEA must be protected in a manner which will not permit the personal identification of Part C children and their parents to anyone other than the SEA or LEA and must be destroyed when no longer needed to enforce or to comply with the Federal legal requirements. Further, the lead agency must maintain, with the child's Part C records, a record that there has been a disclosure of personally identifiable information to the SEA and/or LEA from the child's education records. See, 34 CFR §99.32.

As noted earlier, under the IDEA, a State may adopt a policy of allowing parents an opportunity to object to the referral for child find purposes. Under such a policy, a parent may object during the period provided for objection. If the parent objects under this circumstance, the IDEA does not require referral of the child and, consequently in this situation, FERPA would require prior written parental consent before the referral can be made for child find purposes.

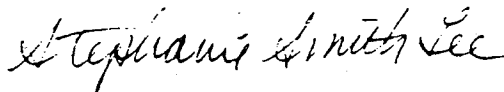
Disclosure of the same information by TXECI to the SEA or LEA, without consent, for a different purpose, however, is not permissible under either FERPA or Part C. Separate parental consent is required prior to each of the following stages under the IDEA for the: (1) transmission of other information about the child from the lead agency to the LEA; (2) evaluation of the child to determine eligibility under Part B; and (3) if the child is determined eligible under Part B, for the initial provision of special education and related services under Part B. 20 U.S.C. §§ 1414(a)(1)(C)(i) and 1436(e); 34 CFR §§ 303.342(e), 303.344(h)(2)(iii) and 300.505.

You also ask if a State may allow parents to refuse the transmission of information by the Part C agency if the parents do not want the SEA or LEA to contact them regarding a referral. The lead agency under Part C and the SEA and LEA under Part B have a statutory responsibility under the IDEA to ensure a smooth transition for each child and family and, under the IDEA's child find provisions, to ensure the identification, location and evaluation of each child eligible for services under Parts B and C of the IDEA. As discussed above, unless the SEA has adopted a procedure allowing parents an opportunity to object, the Part C lead agency must provide the name of the child, date of birth, and sufficient contact information, as determined by the SEA, to allow the SEA and LEA to fulfill their child find responsibilities; parental consent is not required for this disclosure. However, as noted above, the parent has the right under the IDEA to refuse to consent: (1) to having the child evaluated under Part B and (2) to the transfer of additional information from the child's Part C records.

Finally, you ask whether notice must be provided to a Part C family that identifying information will be sent to the LEA for child find purposes; while there is no such specific notice requirement under the IDEA or FERPA that applies to that situation, States may choose to do so. Under Part C, parents are notified of the transition conference by the lead agency at least 90 days prior to their child turning three and should be made aware of the referral by the lead agency to the LEA at that conference (or earlier if the State chooses to do so). Even if parents do not attend the transition conference, they have the right to inspect and review under the IDEA and FERPA their child's education records, which, as discussed above, contain a record that the SEA and/or LEA received personally identifiable information from their child's education records without parental consent.

I hope this information provides the clarification needed. If you need further assistance, please contact Terese Lilly, the OSEP Part C contact for Texas, at (202) 205-0151.

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Smith Lee".

Stephanie Smith Lee
Director
Office of Special Education Programs

cc: Gene Lenz
Division of Special Education, TEA

LeRoy Rooker
Director, Family Policy Compliance Office