



December 3, 2010

Melody Musgrove  
Director  
Office of Special Education Programs  
U.S. Department of Education  
550 12<sup>th</sup> Street, S.W.  
Washington D.C. 20202

Dear Dr. Musgrove:

This letter is being sent to you on behalf of the IDEA Infant & Toddler Coordinators Association (ITCA) that represents state lead agencies that are responsible for implementing Part C of IDEA, and the National Association of State Directors of Special Education (NASDSE), which represents the directors of special education in the states, federal territories and the Freely Associated States.

Over the last ten months, there have been increasing concerns expressed related to the “OSEP Early Childhood Transition FAQ” and subsequent technical assistance documents released by OSEP. The purpose of this letter is to provide you with notice of these concerns and to *respectfully request that these documents be withdrawn at this time*. Simply stated, we are concerned that the “OSEP Early Childhood Transition FAQ” document and accompanying materials:

- 1) represent an expansion of Part C and Part B requirements without rulemaking; and
- 2) were issued in a manner inconsistent with prescribed formal processes for issuance of policy and data collection directives.

Both NASDSE and ITCA are concerned that implementation of this FAQ requires changes to longstanding state policy and regulations. Guidance of this nature has historically been transmitted from OSEP to state special education and Part C leadership through the dated, numbered memorandum series. The Transition FAQ has not been sent to Chief State School Officers, Special Education Directors, Lead Agency Directors or Part C Coordinators. Dissemination has only been through posting on the SPP/APR calendar and presentations at workshops and on conference calls.

Both NASDSE and ITCA appreciate the willingness of OSEP to provide technical assistance to states to help them in their responsibilities to ensure the smooth transition of young children from Part C to Part B. However, based on careful review of these OSEP-released documents and ongoing consultation with our state members, we believe these documents contain new federal policies that can only be made through the regulatory process consistent with IDEA Section 607 (d) and (e) including the opportunity for public comment. Furthermore, these documents contain additional data requirements not included in the current OMB-approved data collections.

The following are a few examples of policies that appear to go beyond current federal regulations or approved data collections:

- **FAQ #8 and #26: The FAQ requires Part C to implement two distinct “notifications.” The FAQ states that the second required “notification” is considered a referral to Part B and is worded as follows:** “The importance of providing early LEA Notification for a toddler with a disability served in Part C who is potentially eligible under Part B is that once the LEA receives LEA Notification for such a child, the LEA must treat this as an initial referral to Part B and provide notice of procedural safeguards to the child’s parent under 34 CFR §300.504(a)(1).”

**Comment:** We are unaware of any citations to existing provisions under Part B or Part C regulations that define referral as presented in the FAQ. Further, there are no references to two distinct notifications in the Part C statute or existing regulations. Section 637(a) under the Part C statute only mentions one “notification” as follows, “...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, as determined in accordance with state law.” The Part C statute does not address referral to Part B at all. This has significant implications for states’ current special education policies and procedures concerning what activity constitutes a referral to Part B.

- **FAQ #36 states that the LEA is now required to provide data in SPP/APR B-12e, the number of children who are referred to Part B and who were also referred to Part C less than 90 days before their 3<sup>rd</sup> birthday.**

**Comment:** LEAs do not have these data and therefore must obtain it from Part C personnel. This is not a required data collection for Part C, has not been subject to OMB approval and public comment and has significant resource implications for Part C and Part B systems.

- **The FAQ contains a number of responsibilities of the Part C system without reference to applicable citations in the statute or in existing Part C regulations.** In our review of the Part C statute and regulations, we were not able to locate applicable references. Several examples are listed below:

- **FAQ #5** states that “...the Part C lead agency is responsible for establishing State policy in defining “potentially eligible for Part B...” The FAQ further states that “The importance of providing early LEA Notification for a toddler with a disability served in Part C who is potentially eligible under Part B is that once the LEA receives LEA Notification for such a child, the LEA must treat this as an initial referral to Part B...”

**Comment:** The only statutory language that could be applicable to this topic is at Section 637(a)(9)(ii)(II) that states “in the case of a child who may be eligible for such preschool services, with the approval of the family of the child, convene a transition conference...” We do not see how this statutory language can be interpreted as requiring a referral without parent consent for children potentially eligible.

Determining “potentially eligible” as a state policy for the Part C system, even with consultation with the SEA, is not within the authority of the Part C program. Part C personnel should not be making such decisions about a child’s potential eligibility under another program. This raises possible liability issues for the Part C program if a

child is not referred and later is found to be eligible and could have benefited from earlier identification for Part B.

- **FAQ #18** states that “In addition, the lead agency must provide parents at the conference with information about Part B preschool services, consistent with IDEA section 635(a)(6). This information includes a description of the Part B eligibility definitions, State timelines and process for consenting to an evaluation and conducting eligibility determinations under Part B, and the availability of special education and related services.”

**Comment:** This regulatory citation relates to public awareness requirements for informing primary referral sources of necessary information. This statutory provision does not address the transition conference or procedures to be followed by the Part C representative when the LEA does not attend the conference. Part C staff should not be providing parents with information related to the LEA’s special education policies and procedures. This information should be provided by LEA representatives, either at the transition conference or at another opportunity at the LEA’s discretion. Further, and perhaps most significantly, this policy places families at risk to receive incomplete or inaccurate information regarding their program options under Part B.

- **FAQ #22** states that “The service coordinator must make every effort to participate in the initial IEP meeting if invited by the LEA at the request of the parent.”

**Comment:** The Part C statute is completely silent on any role the service coordinator is expected to play at the initial IEP meeting. The statutory reference is only in Part B and is only related to the invitation of a representative of the Part C system to the IEP at the request of the parent. The requirement in the FAQ that the service coordinator “must make every effort” is not consistent with existing statutory language.

In closing, we appreciate your willingness to review our concerns and consider our recommendation to withdraw these documents at this time. ITCA and NASDSE are available and willing to provide any additional information that may be needed or to assist as you review these important policy matters. Feel free to contact either Nancy Reder, NASDSE at [nancy.reder@nasdse.org](mailto:nancy.reder@nasdse.org) and Sharon Walsh, ITCA at [ideaitca@aol.com](mailto:ideaitca@aol.com) to discuss this further.

Sincerely,



Brad Hutton,  
ITCA President



Bill East, Ed.D.,  
NASDSE Executive Director

cc: Ruth Ryder