



July 23, 2007

Ms. Patty Guard  
Acting Director  
Office of Special Education Programs  
U.S. Department of Education  
400 Maryland Avenue, SW  
Potomac Center Plaza, Room 4109  
Washington, DC 20202-2600

Dear Ms. Guard:

This document is in response to the May 9, 2007 *Federal Register* announcement requesting public comment on the proposed regulations for the Part C Early Intervention program as amended by the Individuals With Disabilities Improvement Act of 2004. These comments are on behalf of the Council for Exceptional Children (CEC), in collaboration with its Division on Early Childhood (DEC), the largest professional organization committed to improving educational outcomes for individuals with exceptionalities.

CEC is committed to the achievement of successful outcomes for infants and toddlers with disabilities, through the provision of high quality professional supports and quality conditions for assisting infants and toddlers with disabilities and their families. CEC has worked closely in conjunction with its Division on Early Childhood (DEC) to develop its final recommendations for the Part C proposed regulations, and the recommendations presented here reflect the result of that work. These recommendations also supersede previous comments made by CEC at the public meeting conducted by OSERS on June 14, 2007, in Washington, D.C.

We are pleased that the Office of Special Education and Rehabilitation Services (OSERS) and CEC share the basic belief that a strong IDEA represents an important and necessary component of the early intervention system in this country. It is fundamental to the success of infants and toddlers with disabilities. We appreciate the opportunity to provide these comments on the proposed regulations for IDEA Part C, and we trust that our recommendations will be beneficial to OSERS as it develops the final regulations for Part C.

Initially, CEC would like to note that the language in IDEA 2004 states that "the Secretary shall issue regulations under this title only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this title." This is in Section 607(a) of the law. However, CEC would also like to make note that the proposed regulations for Part C impose many additional requirements on state Part C systems while the President's budget request for fiscal year 2008 recommends a \$13 million cut in federal funding for Part C. CEC believes that this is irresponsible and that the imposition of new requirements should only be made if federal funding is to follow.

CEC appreciates and supports the incorporation of relevant Part B provisions (e.g. monitoring, confidentiality, etc) into the Part C regulations instead of having these incorporated by reference as we requested in our letter to the Department in February 2005. This creates a comprehensive set of federal IDEA requirements for Part C. CEC also appreciates the use of terminology consistent with early intervention in these newly incorporated provisions under Part C.

CEC encourages the Department to develop final Part C regulations as soon as possible, disseminate them to the field, and provide training and technical assistance to special education professionals and families because it has been over 2 years since the law took effect on July 1, 2005.

The following are CEC's comments organized by topical areas:

### **General and Definitions**

- CEC appreciates and supports the incorporation of relevant Part B provisions (e.g. monitoring, confidentiality, etc) into the Part C regulations instead of having these incorporated by reference as we requested in our letter to the Department in February 2005. This creates a comprehensive set of federal IDEA requirements for Part C. CEC also appreciates the use of terminology consistent with early intervention in these newly incorporated provisions under Part C.
- CEC requests regulatory language be included for the term "scientifically-based" and the guidance should be aligned with NCLB language as long as the guidance ensures that single-subject, correlational, and qualitative research are included in the definition along with random assignment experiments.

CEC notes that the *DEC's Recommended Practices* initiative is one which identifies, promotes and supports the use of scientifically valid practices based on a synthesis of best available research evidence integrated with professional and family wisdom and values.

- In addition, CEC recommends regulatory language on "peer-reviewed research" be consistent with the work of the National Research Council (2005).
- CEC has significant concern regarding the proposed change in 303.24 regarding the definition of "multidisciplinary." Permitting one individual to represent a multidisciplinary perspective is not consistent with recommended practice.
- CEC supports the proposed change in 303.33 (c) to allow the use of the term "case management."

### **Evaluation, Assessment and Eligibility**

- ❑ CEC supports changing the 2 working day referral timeline to “as soon as possible but no longer than 5 working days from identification to referral.” (303.302(a)(2)(i))
- ❑ CEC supports retaining the language at current §303.321(b) (2) as included in the proposed language at §303.301(b) (2) that reads, “An effective method is developed and implemented to determine which children are in need of early intervention services.” However, CEC strongly disagrees with the addition of the new requirement to have an effective method to determine which “children are not in need of those services.” This language is not included in the statute and would add significant and unnecessary burden to lead agencies.
- ❑ CEC supports the NPRM language related to the 45-day timeline that defines Day 1 as the day the parent consents to evaluation. However, CEC recommends that the regulation also require that consent for evaluation be obtained as soon as possible but in no case longer than 15 calendar days after referral. (303.320(e))
- ❑ CEC recommends that a specific provision be added to §303.320 (e) to allow the lead agency to document family requested delays (e.g. child or family illness, work or family vacation scheduling needs or other family requested considerations) that would interfere with the ability of the lead agency to meet the 45-day timeline.
- ❑ CEC supports the addition of language in §303.303 permitting states to establish policies and procedures to screen children as part of procedures to determine if the child needs to be evaluated. This is consistent with our letter submitted in February 2005, in which we requested the addition of a state option to establish and implement screening policies and procedures.
- ❑ CEC recommends the language at §303.420(a) (1) (ii) below be deleted. The proposed language states “The lead agency must ensure parental consent is obtained before administering screening procedures that are used either to determine:
  - (i) Whether a child is suspected of having a disability; or
  - (ii) A child's eligibility under this part;”

Screening appropriately can be used as described in (a)(1)(i) to determine the need for evaluation, but screening, by definition, is not appropriate nor are screening instruments valid for use to determine eligibility as stated in (a)(1)(ii).

- ❑ CEC requests that the language in proposed §303.303(a) (2) be modified to read “the parent must be offered an evaluation” instead of the proposed language “the child must be evaluated.”
- ❑ CEC requests modification to the proposed §303.303(a) (3) and (4). CEC notes that the written prior notice in (3) would inform the parent, as it would be required to do so under §303.421, that the parent must initiate a dispute resolution process to overturn the agency’s decision to not evaluate. This prior notice statement would be inconsistent with the proposed language in (4) stating an evaluation must be conducted at parent request

even if the child is not suspected of being a child with a disability as per the written prior notice. CEC suggests instead that if the agency decides the child does not need an evaluation, the agency be required to present this decision and the reasons for it to a parent in writing (but not through written prior notice at 303.421). At that point, if the parent requests an evaluation, the agency would be required to offer the evaluation.

- ❑ CEC supports the revised definitions of evaluation and assessment with several reservations. To address these, CEC strongly recommends the following changes:
  - CEC has significant concern about the new language at §303.320(a) (1) (iv)) and (d) establishing a new component to the evaluation and assessment process. This new process expands the concept contained in the current regulations regarding identification of “service needs” and seems inconsistent with the statutory intent that services be identified at the IFSP meeting to address the child’s needs in the context of the child and families outcomes. This new requirement to perform “an assessment of service needs” prior to the IFSP is not consistent with the statute or with 25 years of practice in Part C across the country;
  - CEC recommends that §303.320(b) (2) be revised to read “... but informed clinical opinion may not negate the results of assessment instruments that did establish a child’s eligibility.” The NPRM language is not clear; and
  - CEC requests the language at 303.320(a)(2)(iii) be clarified that in instances in which medical records and other information are adequate to determine eligibility without assessment, a child must still receive assessment in accordance with 303.320(b) prior to the IFSP meeting.
  
- ❑ CEC requests that clarification related to whether parents are required to consent to outcome assessment required under the SPP/ APR process be included in §§303.420. The FAQ from OSEP (Sept. 2006 VI.) states families cannot refuse to provide data needed for federal accountability. However, the SPP/ APR process is dependent on pre and post child assessment information that in some states is also used for initial eligibility for Part C and for Part B preschool services.
  
- ❑ CEC suggests that the final regulations provide additional clarification on the new language on “rigorous” in the definition of developmental delay.

### **Services and Providers**

- ❑ CEC supports the inclusion in §303.13(c) (11) of teachers of children with hearing impairments (including deafness) and teachers of children with visual impairments (including blindness) to the term special educator.
  
- ❑ CEC recommends that nutrition and nursing services be retained in §303.13. We note the preamble language that these services still would be required if determined necessary by the IFSP team and are being eliminated because they were never included in the statute. CEC is concerned that if the services are eliminated from the list in federal regulations after being there for over 15 years, the field will misinterpret that deletion.

- CEC supports the proposed change of language in §303.16(a) from “during the time the child is receiving the other early intervention services” to “during the time that the child is eligible to receive other early intervention services.”
- CEC does not support the addition of subsection (a)(2) in the proposed revision to the definition of “native language” in 303.25. This language is not contained in section 602(20) of the statutory definition nor is it in the current Part C regulations at 303.401(b). This additional requirement to provide all services to eligible infants and toddlers and their families in the language used by the child in the home or learning environment would place a significant new responsibility on Part C systems resulting in major financial and human resource implications. While CEC certainly supports this as a goal and encourages it as practice whenever possible, it would be virtually impossible to implement this proposed requirement, particularly in communities in which there are often up to 100 different languages spoken by families.

### **IFSPs**

- CEC recommends that current language at §303.343(a)(iv) be retained to allow states the continued flexibility to have the service coordinator be either the person who has been working with the family since the initial referral for the person who will be designated to be the service coordinator responsible for implementing the IFSP.
- CEC requests clarification on IFSP language related to preschoolers with IFSPs. We note that the language at §303.344(d) (4) seems to apply to any preschooler that has an IFSP. However, this does not seem consistent with Part B §300.323 (b) that allows the use of IFSPs for preschoolers under certain circumstances. Further, this is not consistent with language included in the IEP content language under §300.320 that does not require educational components for preschool IEPs.
- CEC disagrees with the addition of “length” and “duration” into the content of the IFSP at §303.344(d)(1)(i) as these terms are not included in the statute.

### **Natural Environment**

- CEC does not support the term “if applicable” in §303.344(d)(1)(ii) as it implies that a justification may not always be required. The statute is clear that a justification is required if a service is to be provided in a setting other than a natural environment.
- The language at 303.344(d)(1)(ii)(B)(2) appears to be a typo and probably should be 303.26 not 303.25.
- CEC supports the following definition of “natural environment.” - “Natural environments means settings in which an infant or toddler without a disability typically spends time, including the home and inclusive community settings in which children without disabilities participate; and must be consistent with the provisions of 303.126.”

- CEC recommends that language in §303.126 (b) that states "... only when early intervention services cannot be *provided* satisfactorily in a natural environment" be replaced with the statutory language in Sec 635(a) (16) (b) "... only when early intervention cannot be achieved satisfactorily for the infant or toddler in a natural environment." CEC also recommends that the clarification contained in the congressional report regarding "the decision would be made by the parents and other members of the IFSP team" be incorporated into the final regulations.

## **Transition**

- CEC supports the proposed transition language requiring a referral to the LEA 9 months before the child's third birthday.
- CEC does not support the language in proposed §303.209(a) (3) (i) (B) that would require an intra-agency agreement if the Lead Agency is the SEA. It is unnecessary and is a burden for education lead agencies to have to agree with themselves. This new requirement would present an unnecessary paperwork burden.
- CEC opposes the deletion of 303.4. This provision allows states to follow Part B and not Part C regulations with children who transition to preschool special education before their third birthday. This regulation is consistent with IDEA section 619(a)(2) and(h), long-standing provisions in the statute. This provision is necessary as an important component of many state transition systems as part of ensuring a seamless transition for children and families from Part C to preschool special education.
- CEC does not support the change in language throughout §303.209 related to transition from "age of eligibility for preschool" to "the child's third birthday." Many states have transition policies and procedures that are consistent with the statute and regulations and that allow flexibility to meet community, child and family needs. Changing to "third birthday" will disrupt many existing options for seamless transitions that have been carefully crafted by states and local communities.
- CEC supports the inclusion of the state lead agency option to provide written prior notice to parents allowing them to decline referral to the local school system as their child approaches age three. This is consistent with the long standing OSEP position as contained in policy letters on this matter.
- CEC recommends that a construction clause be added at 303.209(e) stating that nothing will hold Part C responsible for ensuring required timeline for the transition conference is met if referral to Part C occurs less than 45 days prior to the date the transition conference is due.

## **Birth to Kindergarten Option**

- CEC has significant concerns regarding the lack of funding to support the new state option to serve children under Part C up to kindergarten age with parent consent. It is

unlikely that any state will allow this option for parents of preschoolers without federal funding to support its implementation.

- CEC supports the clarification that 15 percent of the excess of funds over \$460 million would be available for the new three to kindergarten option as included in 303.734.
- CEC generally supports the provision in 303.211 (a)(2) and 303.501 (d) that allows states to serve a subset of children under the birth-to-kindergarten option but there are major issues that remain to be clarified. However, state allocations for this should be consistent with the age range a state includes in the option.

### **Procedural Safeguards**

- CEC supports the consent requirement for screening §303.420 (a)(1); evaluation (a)(2); provision of services (a)(3); use of private insurance at (a)(4); and exchange of personally identifiable information at (a)(5);
- CEC recommends that language consistent with Part B at §300.515(c) be included in Part C to allow extensions in a due process hearing to be granted at the request of either party. There are legitimate circumstances under which an extension may be necessary on the part of both parties. Having the hearing officer grant the extension or not is a protection against any potential abuse of this provision.
- CEC supports the inclusion of the state lead agency option to provide written prior notice to parents allowing them to decline referral to the local school system as their child approaches age three. This option is included in a number of places in the NPRM including §303.401(e), and §303.209(b) (3). This option is consistent with policy in many states and is long standing OSEP policy as contained in OSEP letters on this matter.
- CEC disagrees with the pendency language at §303.430(e) (3) (i). The language at (i) is based on §303.211(b) (4) that is based on statutory language. This statutory language is not related to dispute situations or pendency but is related to the provision of services in the birth to kindergarten option.

In addition, CEC recommends that (ii) be reworded as follows "Once a child turns three and has been determined ineligible for services under Part B or eligible for services under Part B, the provisions of paragraph (e) (1) of this section do not apply and the lead agency is not required to provide Part C services to that child during the pendency of any due process complaint under Part B."

- CEC does not support the proposed language at §303.434(d). This requirement may serve as a disincentive to parents to file a state complaint and is an additional burden to a parent that is not necessary. State lead agencies have a variety of ways that the substance of a state complaint is made available to the entity against whom the complaint is filed. This should remain a state matter.

### **State ICC**

- CEC supports the addition of §303.601(a) (1) (iii) excluding parents who are employees of agencies providing early intervention services from serving as parents on the state ICC.

## **Finance**

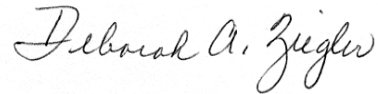
- CEC does not support the proposed requirement in 303.420 (a) (4) requiring parent consent in order to access public insurance and the requirement in 303.520 (a) (i) requiring parent consent to disclose personally identifiable information in order to access Medicaid reimbursement. Part C, as designed by Congress, is an interagency system that must utilize all available resources to support the needs of the eligible child and family. Federal Part C funds were designed to be the “glue money” to be used in the event federal, state and local funds are not available to pay for a service. Statutory and regulatory language related to “payor of last resort” requires that all resources, including public insurance, be utilized prior to the use of Part C funds. CEC does not consider this change to be consistent with statutory language.
- CEC does not support the proposed language in §303.520 (b) (2) to exempt the parental consent requirement in cases where there is state legislation. CEC is concerned that this exemption will lead to potential litigation and misuse of the family’s insurance. Not all insurance policies are subject to state statute. The percentage of policies that are exempt varies from state to state with some states reporting the percentage as high as 80%. It is unrealistic to expect that local programs or service coordinators will have the knowledge to differentiate ERISA vs. Non-ERISA on a case by case basis.
- In order to prevent potential litigation, CEC encourages the Department to add language in §303.520 (b) (ii) and (iii) that would require that the state’s system of payment policies to include information on the family’s procedural safeguards.
- CEC does not support the language in §303.520(a)(1)(i) that requires families to give consent to disclose personally identifiable information to utilize the family’s public benefits. CEC believes that by virtue of the family’s voluntary enrollment in the public benefit, their personally identifiable information is already known.
- CEC supports the language in §303.520 (b)(1) (i) that requires a family to provide consent before the release of personally identifiable information to private insurance for billing purposes

## **Accountability**

- CEC supports the language in §303.120(a) (2) (iv) that requires the correction of non-compliance as soon as possible but no later than one year after identification.

Thank you for allowing the public to provide comment on the IDEA Part C proposed regulations and for considering CEC's recommendations. If you need additional information please contact Deborah Ziegler, Associate Executive Director for Policy and Advocacy Services at [debz@cec.sped.org](mailto:debz@cec.sped.org) or 703-264-9406, Dan Blair, Senior Director for Policy and Advocacy Services at [danb@cec.sped.org](mailto:danb@cec.sped.org) or 703-264-9403, or Kim Hymes, Policy Specialist, at [kimk@cec.sped.org](mailto:kimk@cec.sped.org) or 703-264-9441.

Sincerely,

A handwritten signature in cursive script that reads "Deborah A. Ziegler".

Deborah A. Ziegler, Ed.D  
Associate Executive Director  
Policy and Advocacy Services