



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE
SERVICES

July 19, 2013

Maureen Greer
Executive Director
IDEA Infant and Toddler Coordinators Association
6545 North Olney Street
Indianapolis, Indiana 46220

Dear Ms. Greer:

This is in response to your September 8, 2012 and June 28, 2013 correspondence that included State questions about implementing the system of payments (SOP) provisions of the 2011 Part C regulations of the Individuals with Disabilities Education Act (IDEA). I apologize for the delayed response. Specifically, the IDEA Infants and Toddler Coordinators Association (ITCA) asked on behalf of its State members about: (1) parental consent requirements; (2) parental consent for the use of private insurance to pay for Part C services; and (3) the SOP and fees provisions under the 2011 Part C regulations. Staff from the Office of Special Education Programs (OSEP) clarified ITCA's questions during conference calls on October 18, 2012 and January 23, 2013. We have grouped ITCA's questions, and provide responses, in the topic areas referenced above.

I. Parental Consent

Question 1: In lieu of written consent, may a State lead agency under Part C (lead agency) or early intervention services (EIS) provider obtain consent over the phone or electronically, consistent with 34 CFR §§303.7 and 303.420(a)(4), to use a child's or parent's public benefits or insurance when such consent is required under 34 CFR §303.520(a)?

Answer 1: A lead agency or EIS provider may not obtain parental consent over the phone or orally. *Consent*, as defined in the Part C regulations in 34 CFR §303.7(b), means that the parent understands and agrees in writing to the carrying out of the activity for which the parent's consent is sought. However, if a State lead agency chooses to do so, written consent may be provided by the parent in electronic form under Part C provided that the State lead agency or participating agency ensures that there are appropriate safeguards, consistent with the requirements in IDEA Part B,¹ and the Family Educational Rights and Privacy Act (FERPA).²

¹ Under the 2006 IDEA Part B regulations, written consent may be provided under IDEA Part B through an electronic signature provided that there are appropriate safeguard in place. "States that permit the use of electronic or digital signatures for parental consent would need to take the necessary steps to ensure that there are appropriate safeguards to protect the integrity of the process." 71 Fed. Reg. 46540, 46629 (August 14, 2006) (Preamble to 2006 final IDEA Part B regulations). In the preamble to the 2013 final IDEA Part B regulation regarding the use of public insurance or benefits to pay for IDEA Part B services in 34 CFR §300.154(d)(2)(iv)(B), the Department noted that written consent to use public benefits or insurance may be obtained through electronic signature by meeting the FERPA requirement in 34 CFR §99.30(d) and the consent must be accompanied by "a statement that the parent

These safeguards include that the electronic signature: (1) is dated; (2) identifies and authenticates a particular person as the source of the electronic consent; (3) indicates such person's approval of the information contained in the electronic consent; and (4) is accompanied by a statement that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for Part C services.

Question 2: May a lead agency create and use one document to obtain the parental consent required under separate regulatory provisions? As an example, may the lead agency create and use one document that meets the requirements of both 34 CFR §303.520(a)(2), regarding parental consent to use a child's or parent's public benefits or insurance to pay for Part C services and 34 CFR §303.520(a)(3), regarding written notification provided to the child's parents prior to using a child's or parent's public benefits or insurance to pay for Part C services?

Answer 2: There is nothing in the statute or regulations that prohibits a lead agency from creating and using one document to obtain parental consent that meets the requirements of 34 CFR §§303.520(a)(2)(ii) and 303.520(a)(3), provided that the State meets all of the applicable requirements for the consent being sought.

Related to the example above, under certain circumstances, the lead agency must obtain parental consent to use a child's or parent's public benefits or insurance to pay for Part C services, consistent with 34 CFR §§303.7, 303.420(a)(4), and 303.520(a)(2). Pursuant to 34 CFR §303.520(a)(2), the lead agency must obtain parental consent to use a child's or parent's public benefits or insurance to pay for Part C services if –

- (1) the child or parent is not already enrolled in the public benefits or public insurance program or
- (2) the parent or child is already enrolled in the public benefits or public insurance program and using those benefits or insurance would—
 - (A) Decrease available lifetime coverage or any other insured benefit for that child or parent under that program;
 - (B) Result in the child's parents paying for services that would otherwise be covered by the public benefits or insurance program;
 - (C) Result in any increase in premiums or discontinuation of public benefits or insurance for that child or that child's parents; or
 - (D) Risk loss of eligibility for the child or that child's parents for home and community-based waivers based on aggregate health-related expenditures.

understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services under part 300.” 78 Fed. Reg. 10525, 10529 (February 14, 2013).

² Under FERPA, electronic consent may serve as written consent provided that the “Signed and dated written consent” includes a record and signature in electronic form that--“(1) Identifies and authenticates a particular person as the source of the electronic consent; and (2) Indicates such person's approval of the information contained in the electronic consent.” 34 CFR §99.30(d).

Additionally, under 34 CFR §303.520(a)(1) and (3), prior to using a child's or parent's public benefits or insurance to pay for Part C services, the lead agency must provide written notification to the child's parents that must include –

- (i) A statement that parental consent must be obtained under §303.414, regarding consent prior to disclosure or use of personally identifiable information, if that provision applies, before the lead agency or EIS provider discloses, for billing purposes, a child's personally identifiable information to the State public agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid);
- (ii) A statement of the no-cost protection provisions in §303.520(a)(2) and that if the parent does not provide the consent under §303.520(a)(2), the State lead agency must still make available those Part C services on the IFSP for which the parent has provided consent;
- (iii) A statement that the parents have the right under §303.414, if that provision applies, to withdraw their consent to disclosure of personally identifiable information to the State public agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) at any time; and
- (iv) A statement of the general categories of costs that the parent would incur as a result of participating in a public benefits or insurance program (such as co-payments or deductibles, or the required use of private insurance as the primary insurance).

Therefore, nothing in the IDEA statute or regulations would prohibit a lead agency from creating one document that is used to obtain parental consent under 34 CFR §303.520(a)(2) and that also provides the parent with the written notification required in 34 CFR §303.520(a)(3). However, the lead agency must ensure that the parent receives a copy of the document that is structured in a way to fulfill the requirements as stated above, *i.e.*, for the parents to remain in possession of the written notification that meets the requirements in 34 CFR §303.520(a)(3) even after the parent returns the portion of the document through which the parent has provided the required parental consent.

Question 3: In cases where there will be no cost to the parent to use the child's or the parent's public benefits or insurance, must the lead agency or EIS provider obtain consent for release of personally identifiable information (PII) when the lead agency is not the agency that administers the State Medicaid or public benefits or public insurance program? Is this answer different when the lead agency is the agency that administers the State Medicaid or public benefits or public insurance program?

Answer 3: The requirement to obtain parental consent prior to the disclosure of PII to a third party in 34 CFR §§303.414 and 303.420(a)(5) is different and a separate requirement from the other parental consent requirements under Part C (such as the requirement in 34 CFR §§303.420(a)(4) and 303.520 to obtain parental consent for the use of insurance and the requirement in 34 CFR §303.420(a)(3) to obtain parental consent before providing early intervention services to a child). The specific exceptions to the parental consent requirements for

the disclosure of PII under Part C are provided in 34 CFR §303.414(b). A lead agency or other participating agency may not disclose PII (as defined in §303.29), to any party except participating agencies (as defined at §303.403(c)) that are part of the State’s Part C system without parental consent unless authorized to do so under the exceptions listed at 34 CFR §303.414(b), which incorporate FERPA provisions. The definition of a “participating agency” includes the State lead agency and EIS providers, and any individual or entity that provides any Part C service, but does not include primary referral sources, or public agencies or private entities that act solely as funding sources for Part C services. 34 CFR §303.403(c).

Therefore, even in cases where there will be no cost to the parent to use the child’s or the parent’s public benefits or insurance such that consent to use the public benefits or public insurance is not required under 34 CFR §§303.420(a)(4) and 303.520(a)(2), the lead agency or EIS provider must still obtain consent, consistent with 34 CFR §§303.414 and 303.420(a)(5), for the release of personally identifiable information when the lead agency is not the State agency that administers Medicaid or the public benefits or public insurance program, unless there is a specific exception applicable under 34 CFR §303.414(b) or the provisions of FERPA, as amended. 76 Fed. Reg. 60140, 60223 (September 28, 2011). In cases where the lead agency is the State agency that administers Medicaid or the public benefits or insurance program from which funds are being used to pay for Part C services, the State is not required to obtain consent but may choose to adopt a consent provision that meets the requirements of 34 CFR §§303.414 and 303.420(a)(5).

II. Parental Consent – Use of Private Insurance to Pay for Part C Services

Question 4: Must a lead agency or EIS provider obtain parental consent to use a parent’s private insurance in States where the State has enacted a State statute, consistent with 34 CFR §303.520(b)(2), regarding insurance coverage for early intervention services under Part C, but the parent’s insurance policy does not fall under the protections of that statute?

Answer 4: Yes. Under 34 CFR §303.520(b)(1)(i), the lead agency or EIS provider must obtain parental consent to use private insurance in cases where a parent’s private insurance policy does not fall under the protections of the State statute that meets the requirements of 34 CFR §303.520(b)(2). As noted in 34 CFR §303.520(b)(2), parental consent is not required for the use of benefits under those insurance policies that are subject to the State statutory protections identified in 34 CFR §303.520(b)(2).

III. System of Payments and Fees³

Question 5: Must the State’s SOP policy under 34 CFR §303.521 explicitly state that the parent is responsible to pay his or her private insurance premiums for the private insurance policy if such private insurance will be used to pay for Part C early intervention services?

Answer 5: Yes. A State’s SOP policy is a written policy that must specify which functions or services are subject to the State’ system of payments, including any sliding fees or cost participation fees or other costs charged to the family as a result of using the family private insurance policy (*i.e.*, co-payments, premiums, or deductibles) to pay for receipt of Part C services. 34 CFR §303.500. If a State requires a parent to pay any costs that the parent would incur as a result of the State’s use of private insurance to pay for early intervention services (such as co-payments, premiums, or deductibles), those costs must be identified in the State’s SOP policy under 34 CFR §303.521; otherwise the State may not charge those costs to the parent. Premiums are typically costs a parent would pay as a cost of having a particular insurance policy and not an additional cost that the parent would incur as a result of the use of his or her insurance to pay for Part C services. However, if a parent is expected to continue to be responsible for paying premiums, the State’s SOP policy must expressly include a reference to that responsibility.

Question 6: In States where the State will not pay a parent’s insurance co-payments or deductibles, must the State’s SOP policy under 34 CFR §303.521 include specific language informing the parent that he or she will be responsible for insurance co-payments and deductibles?

Answer 6: Yes. Consistent with 34 CFR §303.520(b)(1)(ii), general types of costs (such as co-payments, premiums, deductibles) must be identified in the State’s SOP policy if a State requires a parent to pay any cost that the parent would incur as a result of the State’s use of public or private insurance to pay for Part C services. A State may not charge those costs to a parent if the costs are not identified in the State’s SOP policy.

Question 7: Is it permissible for a State to bill a parent’s commercial (*i.e.*, private) health insurance policy that is exempt from any State insurance mandates and that will affect a parent’s annual and lifetime caps, as long as the parent has provided consent to bill such insurance?

Answer 7: Yes. A State may bill a parent’s commercial (*i.e.*, private) health insurance that is exempt from the State’s insurance mandates that include the State’s statutory protections under 34 CFR §303.520(b)(2) and that will affect a parent’s annual and lifetime caps if: (1) the parent provides consent to use such private insurance, consistent with 34 CFR §§303.420(a)(4) and 303.520(b)(1); (2) the State SOP policy specifies the general costs to the parent for the use of private insurance to pay for the receipt of Part C services when the

³ OSEP notes that a number of questions in Section III have been asked by specific States and OSEP has provided responses in the context of each State’s unique SOP policy. Given that each State uses different funding sources and has different administrative billing structures, we want to clarify in advance that the general responses in Section III may vary slightly based on a State’s unique circumstances.

parent’s private insurance is exempt from State insurance mandates, consistent with 34 CFR §303.520(b)(1)(ii); and (3) the State provides the parent a written copy of the State’s SOP policy that includes which functions or services, if any, are subject to the SOP, consistent with 34 CFR §303.520(b)(1)(iii).

The State’s SOP policy must identify the potential costs that the parent may incur when their private insurance is used to pay for early intervention services under Part C (such as co-payments, premiums, or deductibles or other long-term costs such as the loss of benefits because of annual or lifetime health insurance coverage caps under the insurance policy consistent with 34 CFR §303.520(b)(1)(iii)). Even if a parent does not have the right to consent to bill private insurance in 34 CFR §303.520(b)(1) because the parent’s insurance policy is subject to the State’s statutory protections identified in 34 CFR §303.520(b)(2), a parent retains the right to decline or revoke consent for any particular Part C service in the IFSP under 34 CFR §303.420(a)(3) if that parent does not wish to have his or her private insurance used for a particular service. 76 Fed. Reg. 60140, 60226 (September 28, 2011).

Question 8: Must a State’s SOP policy include a State definition of “ability to pay” even if the State does not charge parents any out-of-pocket expenses, such as co-payments or deductibles?

Answer 8: No. If the State’s SOP policy makes clear that the parent is not charged any out-of-pocket costs such as family fees or co-payments or deductibles and that all Part C services are provided at no charge to the parent, then the State does not need to include a State definition of “ability to pay” or “inability to pay.”⁴ These definitions are only needed in a SOP policy if the State is establishing criteria for when a parent is required to pay a sliding scale or other fee or some other out-of-pocket expense such as a co-payment or deductible.

If a State is using public benefits or insurance, private insurance, or a schedule of family or sliding fees to pay for Part C services, the State’s system of payment policy must include a definition of “ability to pay” as required at 34 CFR §303.521(a)(3).

Question 9: How does OSEP define the term “actual cost” as used in 34 CFR §303.521(a)(4)(iii)? In the absence of a “fee for service” system, how would a provider determine “actual cost?” Would “actual cost” include all expenditures related to delivering early intervention services, *e.g.*, travel for service delivery and other related administrative costs?

Answer 9: Under 34 CFR §303.521(a)(4)(iii), a State is required to provide in its SOP policy an assurance that families will not be charged any more than the actual cost of the Part C service (factoring in any amount received from other sources for payment for that service). As clarified in the *Analysis of Comments and Changes* to the 2011 final Part C regulations, the “actual cost for a part C early intervention service may vary by State....” 76 Fed. Reg. 60140, 60227

⁴ “Premiums” are specifically not included as an out-of-pocket expense in this scenario because Part C does not permit a State to require a parent to enroll in a particular insurance program. A premium is a cost a parent is already responsible for paying if he or she has an insurance policy. Therefore, a State would not be required to develop a definition of “ability to pay” or “inability to pay” if the only expense the parent must continue to pay is the cost of the premium for the parent’s insurance policy.

(September 28, 2011). When determining the “actual cost” of providing a particular early intervention service, the State must use a method that ensures a reasonable calculation and may consider all verifiable costs, *e.g.*, travel to provide Part C services and those limited administrative costs directly related to service provision.

Question 10: May a State bill commercial (*i.e.*, private) insurance and parents for a single service as long as the combination of two payments does not exceed the “actual cost” of the service (excluding the State’s cost for those services that must be offered at no cost to families)?

Answer 10: Yes. As clarified in the *Analysis of Comments and Changes* to the 2011 final Part C regulations --

Subject to any consent requirements in 34 CFR §§303.420 and 303.520, the lead agency may use, as part of its SOP, funds from multiple sources (*e.g.*, public insurance or benefits, private insurance, and family fees) to pay for each part C service in an IFSP. However, the lead agency may not receive funds (whether from one or a variety of sources, such as family fees or insurance, to pay for a particular service) that exceed the actual cost of providing the service. Therefore, the State may not charge a family an amount that exceeds the actual cost of providing a particular part C service. Nor may the State charge a family for amounts received by the State from other funding sources for that service. 76 Fed. Reg. 60140, 60227 (September 28, 2011).

Question 11: May a State have an SOP policy that charges a fee to a parent who declines to consent to access the family’s public insurance or benefits or private insurance to pay for Part C services when such consent is required under 34 CFR §303.520?

Answer 11: Yes, a State may have an SOP policy that charges a fee to a parent who declines to consent to access the parent’s public insurance or benefits or private insurance to pay for Part C services when such consent is required, if that parent is determined able to pay and the fee is charged based on a parent’s ability to pay (which is based on the parent’s income and expenses). As noted in the Preamble to the IDEA Part C Notice of Proposed Rulemaking, “a Part C lead agency would continue to be able to require parents either to pay the costs of providing early intervention services or to provide their consent for use of their public insurance or benefits or private insurance or to pay the fees established by the State....” 72 Fed. Reg. 26456, 26482 (May 9, 2007).

Prior to charging the parent a fee, the State must determine that the parent has the ability to pay as defined in 34 CFR §303.521(a)(3), and if the parent is determined unable to pay, the child must receive all Part C services at no out-of-pocket cost to the parent. Additionally, even if the parent is determined able to pay, the lead agency may not charge families for the core Part C functions and services specified in 34 CFR §303.521(b), including service coordination, child find, evaluations and assessments, Individualized Family Service Plan (IFSP) development, and implementation of the Part C procedural safeguards.

Question 12: May a State have an SOP policy that charges higher fees to parents with commercial (*i.e.* private) insurance who decline to consent to access their private insurance to pay for Part C services?

Answer 12: As a part of a State’s SOP policy, a State may charge a parent a fee for specific Part C services, but the same fee must apply to all parents, whether the parents have insurance or do not have insurance, or have insurance but decline to consent to use their insurance. In addition, in its Part C SOP policy, a State must include the assurance required in 34 CFR §303.521(a)(4)(iv) that the State will not charge families with insurance disproportionately more than families who do not have insurance. The Department has determined that a State would not be charging disproportionately more to a parent with insurance if the State charges that parent specific insurance-related costs such as premiums, co-payments and/or deductibles, in addition to any fees that apply to all parents.⁵ The added specific insurance-related costs would result in parents with insurance having to pay more, but not disproportionately more, than a parent without insurance. The State is not required to charge parents with insurance these additional costs and the State may not charge parents who have insurance, but meet the State’s “inability to pay” definition these additional costs.

Question 13: If a State has a SOP policy but does not charge any fees or other out-of-pocket costs to a family, must its SOP policy include provisions to inform parents of their procedural safeguard rights if the parent wishes to contest the imposition of a fee or the State’s determination of the parent’s ability to pay as required by 34 CFR §303.521(e)?

Answer 13: If the State has a SOP policy under 34 CFR §303.500(b) (which means that the State uses public benefits or insurance, private insurance, and/or family fees to pay for Part C services), but does not charge any fees or out-of-pocket costs to parents in the SOP policy, the State’s SOP policy must include the procedural safeguards identified in 34 CFR §303.521(e). The regulation in 34 CFR §303.521(e) requires that each State’s SOP policy include written policies explaining that a parent who wishes to contest the imposition of a fee or the State’s determination of the parent’s ability to pay, may use the Part C procedural safeguards such as mediation, State complaints, and due process hearings. OSEP believes that each State’s SOP policy must ensure that parents be informed about their procedural safeguards under 34 CFR §303.521(e) regardless of whether actual fees or out-of-pocket costs are charged to parents. This is true because, even if a State chooses not to impose costs or fees for Part C services, there may be instances when a parent is either incorrectly charged a fee or out-of-pocket cost such as a co-payment or deductible or the State incorrectly determined that certain cost protections applied when they did not (*e.g.*, for the use of public insurance that are required in 34 CFR §303.520(a)(2)(ii)). Therefore, the State’s SOP policy must include provisions to inform parents of the Part C procedural safeguards in 34 CFR §303.521(e).

⁵ We note that a premium is a cost a parent is already responsible for paying if he or she has an insurance policy. Thus, depending on a State's SOP policy, it may not be an appropriate additional cost that could be charged in this context because it might not be a cost incurred by the State if the State were to use such insurance to pay for Part C services. See further explanations regarding premiums under the responses to Questions 5 and 8 above.

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 Part C requirements in the context of the specific facts presented.

We hope this is helpful in clarifying parental consent requirements and the implementation of the system of payments provisions of the 2011 Part C regulations. This letter does not address your questions regarding maintenance of effort (Part C's Prohibition against supplanting; indirect cost provisions). OSEP will address this area in future guidance.

We appreciate the efforts of the Infant and Toddler Coordinators Association on behalf of infants and toddlers with disabilities and their families. We look forward to a continued partnership with you, and your member States in making quality early intervention services available to infants and toddlers with disabilities and their families.

Sincerely,

A handwritten signature in black ink that reads "Melody Musgrove Ed.D." with a stylized flourish at the end.

Melody Musgrove, Ed.D
Director
Office of Special Education Programs