



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