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

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Dear Mr. Hutton and Dr. East:

This is in response to your joint letter to me, dated December 3, 2010, in which you discuss the Office of Special Education Programs' (OSEP's) "Early Childhood Transition FAQ" and subsequent technical assistance documents released through the OSEP-funded Technical Assistance (TA) Network. I am pleased to have the opportunity to respond to your concerns.

The 2004 Amendments to the Individuals with Disabilities Education Act (IDEA or Act) strengthened the longstanding requirement that children participating in early intervention service programs under Part C of the Act experience a smooth and effective transition to preschool programs under Part B of the Act when the children are eligible for Part B services. The IDEA requires a series of steps and activities for the smooth transition from Part C to Part B services to ensure that eligible children receive a free appropriate public education (FAPE) by their third birthdays. The importance of early childhood transition is reflected in the monitoring priorities in IDEA section 616(a)(3)(B), which references the early childhood transition requirements in IDEA section 637(a)(9). The statutory focus on early childhood transition in the monitoring priorities in IDEA section 616(a)(3) formed the foundation for the inclusion of specific indicators regarding early childhood transition in the State Performance Plan (SPP)/Annual Performance Reports (APRs) for both Parts C and B.

The Early Childhood Transition Frequently Asked Questions (ECT-FAQ) document was developed in response to requests from the field for clarification on issues related to transitioning children with disabilities from Part C to Part B. Many of these questions were raised by State Part C and Part B staff as they sought to report valid and reliable data related to the early childhood transition Indicators C-8 and B-12 in the SPP/APRs. The responses presented in the ECT-FAQ represent longstanding IDEA requirements, OSEP policy, or explanations of instructions and data elements in the SPPs/APRs.

Your letter questioned why the ECT-FAQ was not issued as a formal OSEP memo. Since the ECT-FAQ guidance was intended primarily to assist States in their reporting of early childhood transition data under Indicators C-8 and B-12 in the SPP/APR, it was issued as an FAQ document and provided to State educational agency and lead agency staff through the SPP/APR

Calendar, presentations at conferences, and on national conference calls. This is a common practice used by OSEP when guidance or clarification is needed related to the SPP/APR.

We have carefully reviewed the ECT-FAQ in light of the five questions you raised in your letter. Based on our review, we do not believe it is appropriate or necessary to withdraw the ECT-FAQ from circulation. Below we respond to the five specific questions raised in your letter. Please note that if you have other questions or issues with the ECT-FAQ, we would be happy to meet with you at your convenience to discuss each of your issues.

Question #1: Your letter questioned the statutory and regulatory authority in the ECT-FAQs for requiring the IDEA Part C program to implement two distinct "notifications" and why the second required "notification" is considered a referral to Part B. Your letter also questioned the statutory and regulatory authority under Part B for defining referral as presented in the ECT-FAQ.

OSEP Response: We address both IDEA Part C notifications and referral under Part B in this response. While not labeled as such in the statute, there are, in fact, two IDEA Part C notification provisions in IDEA section 637(a)(9). Under IDEA section 637(a)(9)(A)(ii)(I)-(II), "the lead agency…will—(I) notify the local educational agency 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; (II) 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 conference among the lead agency, the family, and the local educational agency not less than 90 days (and at the discretion of all such parties, not more than 9 months) before the child is eligible for the preschool services, to discuss any such services that the child may receive."

Although the word "notify" is only expressly mentioned in section 637(a)(9)(A)(ii)(I), there are, in fact, two notification provisions in section 637(a)(9)(A)(ii) and both notifications are obligations of the Part C lead agency to notify the LEA. IDEA section 637(a)(9)(A)(ii)(I) is notification of children who will shortly reach the age of three. IDEA section 637(a)(9)(A)(ii)(II) reflects the requirement to conduct a timely transition conference for children who are potentially eligible for Part B services and this cannot be conducted without notifying and inviting the LEA representative to the transition conference. For the purposes of IDEA section 637(a)(9)(A)(ii)(II), the lead agency may use the invitation to the transition conference as notification to the LEA that the child is potentially eligible for Part B services. Alternatively, when the lead agency notifies the LEA of children who will shortly reach the age of eligibility for preschool services, the lead agency could note those children that are potentially eligible for Part B services. While not required to do so, the lead agency may combine the information required in both notifications in a single process, which should prove more efficient for both the lead agency and the LEA, and which would fulfill the lead agency's responsibility under IDEA section 637(a)(9)(A) to alert the LEA to children for whom transition conferences will be scheduled, thus allowing the LEA to better plan for attendance at those conferences.

Regarding the second issue in this question, while the term "referral" is not defined in Part B, it is used in Part B and its implementing regulations. When the public agency under Part B is notified that a child is potentially eligible under the Part B requirements at 34 CFR §300.8, whether such notification is from Part C, from a child's teacher, from a parent or from any other source, the Part B public agency has an obligation under 34 CFR §300.111 to evaluate the child if the Part B public agency suspects the child may have a disability. "Referral" is a term

commonly used in the education community for such notification and distinguishes it, for Part B purposes, from the receipt of written, informed parental consent for evaluation which triggers the 60-day evaluation timeline under 34 CFR §300.301(c)(1)(i). States may have different policies and procedures they require LEAs to carry out once they are notified that a child may be potentially eligible for Part B services. The responses to FAQs #5 and #26 clarify that a referral to Part B occurs for the purpose of SPP/APR Indicator measurement B-12a when an LEA has been notified that a child who is served in Part C is potentially eligible for Part B services and those children must be included in measurement B-12a (the number of children who have been served in Part C and referred to Part B for eligibility determination). Because notification that a child who is served in Part C is potentially eligible for Part B services is considered an initial referral for children transitioning from Part B to Part C, the LEA must give the parents a copy of the notice of procedural safeguards in accordance with 34 CFR §300.504(a)(1).

Question #2: Your letter indicated that ECT-FAQ #36 states that the State is now required, in SPP/APR Indicator B-12e, to provide the number of children who are referred to Part B and who were referred to Part C less than 90 days before their 3rd birthday. The letter commented that LEAs do not have these data and therefore must obtain it from Part C personnel.

OSEP Response: ECT- FAQ #36 asks: "What children must be included in SPP/APR Indicator measurement B-12e (the number of children who were referred to Part C less than 90 days before their third birthdays)?" The response states: "The State must include in measurement B-12e all children served in Part C and referred to Part B who were referred to Part C less than 90 days before their third birthdays." This component of the measurement for B-12 was added at the suggestion of several State Part B staff who noted that Part B should not be held accountable for children referred to Part C less than 90 days before their third birthdays because in that circumstance it would be impossible for Part C to inform Part B that the child is potentially eligible for Part B more than 90 days before the child's third birthday and consequently, for Part B to have more than 90 days to complete the evaluation, determine eligibility, and have an IEP developed and implemented by the child's third birthday. It also would be impossible, if a child was referred to Part C within 90 days of the third birthday, for the Part C lead agency to convene a transition conference at least 90 days before the child's third birthday in a manner consistent with IDEA section 637(a)(9)(ii)(II).

Ideally States should collaborate to develop a mechanism to gather these data. Measurement B-12e allows a State to present a more accurate picture in Indicator B-12 regarding the State's compliance with the early childhood transition requirement. Many States have reported these data for several years to clarify performance under Indicator B-12. If a State Part B program is unable to obtain these data, the State should explain the circumstances in the APR and the State will not be penalized for not reporting data for B-12e. States should recognize however, that it works to their benefit to provide data on the number of children referred to Part C less than 90 days before their third birthday in B-12e as these children are deducted from B-12a, and therefore are not included when determining the percent of children referred by Part C prior to age three, who are found eligible for Part B, and who have an IEP developed and implemented by their third birthdays.

Question # 3: Your letter questioned the statutory authority for Part C systems to determine whether a child is potentially eligible for Part B services.

OSEP Response: Under IDEA section 637(a)(9)(A)(ii)(II), the lead agency is required to convene a transition conference among the lead agency, the family, and the LEA not less than 90 days (and at the discretion of the parties, not more than 9 months) before the child is eligible for the preschool services for any child who may be eligible for Part B services. Therefore, the lead agency is required to make a determination if a child is potentially eligible for Part B services in order to determine for which children the lead agency needs to hold those transition conferences that must be conducted not later than 90 days prior to the child's third birthday. It is vital that Part C and Part B staff work collaboratively to develop such criteria for determining which children are potentially eligible for Part B services in order to ensure that all eligible children who transition from Part C to Part B receive FAPE by their third birthdays as required under IDEA section 612(a)(9).

Question #4: Your letter questioned the statutory authority for the statement: "Part C staff should be responsible for providing parents with information related to the LEA's special education policies and procedures." The letter states that "[t]his information should be provided by LEA representatives, either at the transition conference or at another opportunity at the LEA's discretion."

OSEP Response: ECT-FAQ #18 asks: "What are the lead agency responsibilities if the LEA representative does not participate in the transition conference that is conducted under IDEA section 637(a)(9)(A)(ii)(II)?" The response states, in full, that: "The lead agency must conduct the transition conference under IDEA section 637(a)(9)(A)(ii)(II) and (III) and use that meeting to develop or revise the transition plan in the IFSP (including identifying appropriate transition steps and services). 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."

IDEA section 635(a)(6) was amended in 2004 to add, in relevant part, that the Part C system must include "A public awareness program…including preparation and dissemination by the lead agency….to all primary referral sources…on the availability of early intervention services under this part and of services under section 619, and procedures for assisting such sources in disseminating such information to parents of infants and toddlers with disabilities." [Emphasis added.] In addition, under IDEA sections 612(a)(9) and 637(a)(9)(A), the lead agency is jointly responsible with the LEA to ensure "a smooth transition." The basic information listed in the ECT-FAQ response, such as eligibility definitions, and State timelines and the general process for consenting to an evaluation, is information that should be readily available in the child find materials that lead agencies have prepared under IDEA section 635(a)(6) and other documents already available to the Part C program.

OSEP agrees that it is primarily a Part B LEA responsibility to attend the transition conference and provide information to parents of children potentially eligible for services under Part B; however, the absence of Part B staff at a transition conference does not negate the responsibility of the Part C lead agency under IDEA sections 635(a)(6) and 637(a)(9) to ensure that parents have the information they need to support a smooth transition for their children with disabilities from Part C to Part B services. Under the public awareness requirements at IDEA section 635(a)(6), the lead agency must provide Part B information (services under IDEA section 619) to primary referral sources (in this case parents). Part C and Part B programs should take joint

responsibility for ensuring that parents are provided complete and accurate information regarding the services available to children transitioning from Part C to Part B services. This is another opportunity for Part C and Part B staff to collaborate in the development of materials to explain the services available under Part B.

Question #5: Your letter questioned the statutory authority for the response to ECT-FAQ #22, which asks: "Must the service coordinator attend the initial IEP meeting if invited by the LEA at the request of the parent?" The ECT-FAQ response states, in full, "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." The letter noted that this requirement is stated under the Part B requirements and that, "the Part C statute is completely silent on any role the service coordinator is expected to play at the initial IEP meeting."

OSEP Response: Neither the IDEA Part C statute nor our response to ECT-FAQ #22 states that the service coordinator is required to attend the initial IEP meeting in these circumstances. Rather, the response appropriately states that the service coordinator must make every effort to attend the initial IEP meeting if invited by the LEA at the request of the parent. As we have emphasized throughout this letter, it is critical for Part C and Part B staff to work together to ensure a smooth and effective transition from the early intervention program under Part C to the preschool program under Part B for eligible children with disabilities. If the transition process is not both cooperative and collaborative, children with disabilities and their families may not effectively transition from Part C to Part B. Participation of the Part C service coordinator at the initial IEP meeting helps the LEA to obtain additional information about the Part C services the child received just prior to entering the IDEA Part B program. In addition, parents typically have a trusting and positive relationship with their service coordinator, the presence of whom at the initial IEP meeting could help ease the parents' transition from Part C early intervention to Part B preschool services.

I hope this response addresses your stated concerns. For the reasons discussed above, it is important for the Part C and Part B preschool programs in each State to collaboratively implement these longstanding statutory and regulatory requirements regarding early childhood transition. We value our working relationship with each of your groups and hope that you will feel free to contact us with any further questions on these issues, or any others which you would like to discuss.

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 in the context of the specific facts presented.

If you have additional questions, please do not hesitate to contact this office.

Sincerely,

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