



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

July 10, 2014

Kim Wedel
Part C Coordinator
Texas Department of Assistive and Rehabilitative Services
4800 North Lamar Boulevard
Austin, Texas 78756

Dear Ms. Wedel:

This letter is in response to your February 28, 2014 letter to me requesting clarification on provisions in the regulations implementing Part C of the Individuals with Disabilities Education Act (IDEA) regarding 34 CFR §§303.520 and 303.521, State systems of payments (SOP), and 34 CFR §303.510, payor of last resort. You believe that the SOP regulatory requirements may create barriers to using public or private insurance as funding sources for IDEA Part C, and that those barriers are inconsistent with the statutory payor of last resort requirement in IDEA section 640. 20 U.S.C. § 1440. Additionally, you raise concerns that some parents may arbitrarily decline to provide written consent for the State to use their insurance to pay for IDEA Part C services, thereby creating a conflict with the payor of last resort requirement. We are pleased to clarify the IDEA Part C SOP requirements and to address your concerns regarding these provisions.

The IDEA Part C SOP regulations allow States to use public benefits or insurance, private insurance, and family fees as three potential funding sources for IDEA early intervention services for infants and toddlers with disabilities and their families. The SOP requirements that became effective on July 1, 2012 (Federal fiscal year (FFY) 2012), balance important protections for parents with options for States on how to finance Part C services. As explained further below, a State may choose to either obtain parent consent to use insurance, or adopt cost protections for the use of public benefits or insurance and for the use of private insurance so that the State does not have to obtain parent consent. 34 CFR §303.520(a) and (b). A State may choose to include in its SOP a family fee for specific early intervention services for which a fee can be charged (no fees may be charged for the services identified in 34 CFR §303.521(b)), and charge parents who have an ability to pay the family fee (which fee cannot exceed the actual cost of the service). 34 CFR §303.521(a)(3), and (4)(ii) and (iii). However, under 34 CFR §303.520(c), if a parent or family of an infant or toddler with a disability is determined unable to pay under the State's definition of inability to pay as prescribed in 34 C.F.R. § 303.521(a)(3) and does not provide consent under 34 CFR §303.520(b)(1), the lack of consent may not be used to delay or deny any services.

The IDEA Part C SOP use-of-insurance provisions were promulgated with the payor of last resort requirements specifically in mind. The Analysis of Comments and Changes to Final Regulations Implementing Part C of the IDEA clarified that the "nonsubstitution of funds" requirement in 34 CFR §303.510(a) directly incorporates the long-standing payor of last resort

requirements in section 640(A) of the IDEA. 76 Fed. Reg. 60140, 60220 (Sep. 28, 2011). The reference to 34 CFR §303.520 in 34 CFR §303.510(a) was added to ensure that States do not interpret the Part C payor of last resort provisions to override the requirements in 34 CFR §§303.520 and 303.521, concerning consent and the use of public and private insurance and an SOP to pay for IDEA Part C services. As noted in the 2011 final regulations, the United States Department of Education (Department) determined that funds from public health insurance or benefits (*e.g.*, Medicaid or CHIP) or private insurance, are not considered “available” funding sources under the Part C payor of last resort provisions, unless a parent has provided the consent required under 34 CFR §§303.520(a)(1) and (b)(1)(i) (concerning parental consent for use of public benefits or insurance or private insurance), or unless one of the exceptions under 34 CFR §§303.520(a)(2) or (b)(2) applies. Further, when other public funds are available to pay for the Part C services, such as funds from the Department of Defense’s TRICARE medical assistance program or Temporary Assistance for Needy Families, IDEA Part C funds are the payor of last resort.

Regarding the requirement in 34 CFR §303.520(b)(1) to obtain parental consent before using a parent’s private insurance, parental consent must be obtained: (1) when the lead agency or early intervention service provider seeks to use private insurance to pay for the initial provision of any early intervention service in the individualized family service plan (IFSP); and (2) each time consent for services is required due to an increase in the provision of services in the child’s IFSP because of the potential costs that can be incurred by a family as a direct result of using such insurance. In promulgating the requirement to obtain parental consent to use private insurance, the Department noted that it believes that the potential costs to parents outweigh the need to make private insurance funds available to lead agencies unless the cost protections in 34 CFR §303.520(b)(2) are adopted by the State. 76 Fed. Reg. at 60224-60225. Therefore, if a State is concerned about parents providing consent, a State may adopt the protections set forth under 34 CFR §303.520(b)(2) in order to not have to obtain parental consent. The private insurance protections are as follows:

- i. The use of private health insurance to pay for Part C services cannot count towards or result in a loss of benefits due to the annual or lifetime health insurance coverage caps for the infant or toddler with a disability, the parent, or the child’s family members who are covered under that health insurance policy;
- ii. The use of private health insurance to pay for Part C services cannot negatively affect the availability of health insurance to the infant or toddler with a disability, the parent, or the child’s family members who are covered under that health insurance policy, and health insurance coverage may not be discontinued for these individuals due to the use of the health insurance to pay for services under Part C of the act; and
- iii. The use of private health insurance to pay for Part C services cannot be the basis for increasing the health insurance premiums of the infant or toddler with a disability, the parent, or child’s family members covered under the health insurance policy.

Your letter also asks about how the payor of last resort requirements are applied when serving children whose public or private insurance would cover [Early Childhood Intervention] (ECI)

services.¹ You raise concerns that the statutory and regulatory provisions may prevent an infant or toddler with the disability from being eligible for IDEA Part C services in Texas. Neither the IDEA nor the implementing regulations for Part C prohibit a child with a disability from receiving Part C services because of the availability or lack of insurance coverage. “Eligibility” to receive early intervention services is determined by a comprehensive, multidisciplinary evaluation of the child, as described in 34 CFR §303.321. Therefore, a parent’s refusal to consent to the use of public or private insurance does not impact the infant or toddler’s eligibility for early intervention services. Furthermore, if a parent does not consent to use public or private insurance, Federal IDEA Part C funds could be used to pay for IDEA Part C services in such a case, because the public or private insurance funds are not “available” under the payor of last resort provisions in IDEA section 640. See, 34 CFR §303.510 and 76 Fed. Reg. 60140, 60220 (Sep. 28, 2011).

We note that although your letter raises concerns about the Department’s SOP regulations, Texas has submitted its revised SOP policies on April 8, 2014 that comply with the Department’s IDEA Part C SOP regulations, and address each of the applicable requirements in Section II.A.3.a of the IDEA Part C FFY 2014 Grant Application and the specific assurance Texas provided in its FFY 2013 IDEA Part C grant letter. The Department’s Office of Special Education Programs approved those revised SOP policies in a memorandum dated, April 18, 2014.

If you have any further questions, please do not hesitate to contact Susan Kauffman, of my staff, at 202-245-6432 or by email at Susan.Kauffman@ed.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Melody Musgrove". The signature is fluid and cursive, with a long horizontal line extending to the right.

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

¹ ECI is the name of the Statewide IDEA Part C early intervention program in Texas.