



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

May 9, 2016

Martha Goodman
Coordinator
Maryland Special Needs Advocacy Project
The Louise D. and Morton J. Macks Center
for Jewish Education
5708 Park Heights Avenue
Baltimore, Maryland 21215-3930

Dear Ms. Goodman:

This letter responds to your August 3, 2015 correspondence to Dr. Melody Musgrove, former Director, Office of Special Education Programs (OSEP), within the Office of Special Education and Rehabilitative Services, at the U.S. Department of Education. In your letter you ask if there is a “Federal barrier” to the development of an individualized education program (IEP) for an eligible child whose parent is contemplating whether to choose special education and related services under Part B of the Individuals with Disabilities Education Act (IDEA or Act) or continue to receive IDEA Part C services when a State has opted to make Part C early intervention services available to children aged three and older consistent with 34 CFR §303.211. We regret the delay in responding.

The IDEA Part C regulation at 34 CFR §303.211 allows each State to develop and implement a policy under which parents of children who are receiving early intervention services and who are eligible to receive services under section 619 of Part B of the Act can choose for these children to continue receiving early intervention services under Part C of the Act. If a State chooses to adopt such a policy, it must specify how long early intervention services will be available to these children, which could be until the beginning of the school year following the child’s third, fourth, or fifth birthdays, but no later than the age at which the child enters, or is eligible under State law to enter, kindergarten or elementary school in the State. 34 CFR §§303.211(a)(2) and (a)(3).

If a State offers Part C services beyond the age of three it must provide certain information to assist parents in understanding the differences between those services and services provided under Part B. This notice must initially be provided at the transition conference held at least 90 days before the child’s third birthday, and include an explanation of: (1) the rights of the parents to elect to receive services under Part C or under Part B; and (2) the differences between the types of services and the locations at which the services are provided under Part C and Part B, the procedural safeguards that apply, and possible costs (including costs or fees charged to families), if any, to parents of children eligible under Part C. 34 CFR §§303.209(f)(2), 303.211(b)(1). After providing the parents with that notice, the lead agency must obtain informed consent from the parent of any child with a disability for the continuation of early intervention

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services for that child. 34 CFR §§303.7 and 303.211(b)(5). Consent must be obtained before the child reaches three years of age, where practicable. 34 CFR §303.211(b)(5). OSEP has noted that the “annual notice will help to ensure that parents of a child eligible for services under 303.211 understand that they have the right to choose between early intervention services under part C of the Act and preschool services under part B of the Act and that they are fully informed of the differences between these two options.” See Early Intervention Program for Infants and Toddlers with Disabilities, Final Regulations, Analysis of Comments and Changes, 76 FR 60140, 60179 (September 28, 2011).

Children whose parents elect to continue to receive Part C services beyond age three must have an individualized family service plan developed that includes an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills consistent with the requirements in 34 CFR §303.344(d)(4). 34 CFR 303.211(b)(2). For those children, the parents must be provided the notice described above each year, and retain the right, at any time, to opt-out of early intervention services and, instead, to obtain a free appropriate public education under Part B of the Act for their child. 34 CFR 303.211(b)(1), 303.211(b)(3).

There is nothing in the IDEA or its implementing regulations that addresses whether an IEP must be developed before a parent chooses Part C early intervention services or chooses Part B services for their child beyond the age of three. Therefore, a public agency is neither required to develop, nor prohibited from developing, an IEP in this situation. If the public agency chooses to develop an IEP for the parent’s consideration, it must ensure that it complies with the IDEA requirements in 34 CFR §§300.320-300.324, including the requirements related to IEP content, IEP team participants, and parent participation.

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 Department of the IDEA in the context of the specific facts presented.

If you have any further questions, please do not hesitate to contact Lisa Pagano at 202-245-7413 or by email at Lisa.Pagano@ed.gov.

Sincerely,

/s/

Ruth E. Ryder
Acting Director
Office of Special Education Programs