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Clarification of Confidentiality Laws as They Apply to RI Early Intervention

This information is being provided to all Early Intervention Programs. Please share this document with agency personnel(s) responsible for the development of agency specific confidentiality policies.

The purpose of this document is to clarify misunderstanding of the laws governing confidentiality practices for Early Intervention. Policy developers should be aware that there are two federal laws that govern confidentiality practices and the privacy of Early Intervention records. The first is the Individuals with Disabilities Education Act (IDEA) Part C regulations (34 CFR §§303.401 through 303.417). These regulations incorporate the provisions of the second law- the Family Education Records Privacy Act (FERPA).

In our most recent record review, we found a wide variety of confidentiality policies regarding privacy practices based on the Health Insurance Portability and Accountability Act (HIPAA) being provided to Early Intervention families. While these documents may be applicable for mental health/social services agencies, they are not relevant to the practice of Early Intervention. Early Intervention services are overseen by the US Department of Education, and all the information gathered and recorded in the child's file is considered an education record. Documents related to confidentiality and the child's records that are based on HIPAA contain practices not relevant to Early Intervention and not allowed in Early Intervention.

**Part C of the Individuals with Disabilities Education Act (IDEA) § 303.402
Confidentiality**

“The Secretary takes appropriate action, in accordance with section 444 of GEPA [FERPA], to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by lead agencies and EIS providers pursuant to part C of the Act, and consistent with §§ 303.401 through 303.417. The regulations in §§ 303.401 through 303.417 ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained pursuant to this part by the Secretary and by participating agencies, including the State lead agency and EIS providers, in accordance with [FERPA].”

Within IDEA Part C regulations the term “early intervention records” was added to the September 28, 2011 final IDEA Part C regulations (34 CFR §303.403(b)) and is defined as operationally the same as the term “education records” when considering confidentiality provisions under Family Education Records Privacy Act (FERPA) (34 CFR Part 99) that refer to “education records.”¹

Therefore the Early Intervention record is an “educational record” not a “medical record”.

The Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule (45 CFR §160.103) exempts from the definition of “Protected Health Information” (PHI), those “education records” that are covered by FERPA. Records that are subject to FERPA are not subject to the HIPAA Privacy Rule (see page 82483, Federal Register, Vol. 65, No. 250, December 28, 2000).

Agencies cannot distribute HIPAA privacy practices related to confidentiality to Early Intervention parents/caregivers. HIPAA regulations are not applicable to EI and are in direct

¹ United States Department Of Education Office Of Special Education and Rehabilitative Services. Melody Musgrove letter dated May 8, 2013 Chelsie Flynn. ECI Program Director North Texas Rehabilitation Center. Wichita Falls, Texas

conflict with FERPA regulations. Parents/guardians of children in EI are required to receive and acknowledge policies compliant with FERPA and IDEA at Intake and whenever applicable. The *RI Early Intervention Procedural Safeguards and Funding* booklet was designed to provide parents/caregivers with the required information.

Although HIPAA does not apply to confidentiality and privacy of the Early Intervention record other aspects of HIPAA may apply such as the security rule regarding security standards for electronic transmittal of health information. Agencies may distribute policies related to the security rule to EI families if they desire.

Agencies should also be aware that FERPA and IDEA do not distinguish between sources of information in the record. Under FERPA, all information in the child's file is considered the "record". With written parental consent, information can be released to another source.

Questions have come up regarding releasing information in the file that has been obtained from a third party (e.g. audiological report). With a specific written parental consent, this information may be released. For example, during the child's enrollment a parent has signed a release for Early Intervention to obtain an audiological report, or developmental behavioral pediatrician's evaluation. At transition, if the parent would like the audiological or DBP report in the EI file to be sent to the LEA, the parent can sign consent to release this information. This is allowed under FERPA and IDEA.

A written consent completed for the release of information must meet IDEA, FERPA and RI Certification Standards requirements which must:

- list, in detail, the information that will be released
- state the purpose/reason for the disclosure
- specifically identify the party to whom the disclosure will be made
- be signed by the parent

While RI's Early Intervention agencies may re-disclose information with proper written consent, they retain the right to have written policies that limit disclosure. While this is within the individual rights of the agency, it is important to consider that EI's role is to assist families in the transition/ evaluation process. Allowing EI to release specific reports for the purpose of care coordination, transition, etc supports families in that process.

Agencies must follow existing state and federal laws governing confidentiality of records containing mental health, substance abuse (CFR Title 42) or HIV related information (HIPPA).

Attached please find Part C IDEA regulations and the presentation IDEA and FERPA Privacy Provisions — Understanding the Basics. If you have questions regarding FERPA, Part C regulations or any other question about this document please contact RI's Part C Coordinator at the Executive Office of Health and Human Services .